

Nos. 99-2443, et al.

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

**PATRICIA BRAGG, et al.,
Plaintiffs-Appellees,**

v.

**WEST VIRGINIA MINING ASSOCIATION, et al.,
Intervenors-Defendants-Appellants,**

On Appeal from the United States District Court
for the Southern District of West Virginia

**BRIEF OF PLAINTIFFS-APPELLEES PATRICIA BRAGG, JAMES W.
WEEKLEY, SIBBY R. WEEKLEY, WEST VIRGINIA HIGHLANDS
CONSERVANCY, CARLOS GORE, LINDA GORE, CHERYL PRICE,
AND JERRY METHENA**

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER
ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

Pursuant to FRAP 26.1 and Local Rule 26.1, Patricia Bragg, James W. Weekley, Sibby R. Weekley, West Virginia Highlands Conservancy, Carlos Gore, Linda Gore, Cheryl Price, and Jerry Methena, who are appellees, make the following disclosures:

1. Is party/amicus a publicly held corporation or other publicly held entity?
 YES NO

2. Does party/amicus have any parent corporations?
 YES NO

If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?
 YES NO

If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?
 YES NO

If yes, identify entity and nature of interest:

5. Is party a trade association?
 YES NO

If yes, identify all members of the association, their parent corporations, and any publicly held companies that own 10% or more of a member's stock:

(signature)

(date)

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Jurisdictional Statement

Plaintiffs-appellees Patricia Bragg, et al. (Bragg) claim that the Director of the West Virginia Division of Environmental Protection (DEP) has violated his non-discretionary duties under the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. § 1201, et seq., in approving surface mining permits in West Virginia. These claims arise under the citizen suit provision of SMCRA, which authorizes citizens to sue State regulatory authorities that fail “to perform any act or duty under this Act which is not discretionary.” 30 U.S.C. § 1270(a)(2).

Statement of the Case

1. Introduction. These appeals focus primarily on two of Bragg’s seventeen claims in her Second Amended Complaint. DEP, Industry Intervenors, Coal Owner Intervenors, and the Union Intervenor challenge the district court’s decision to grant a permanent injunction and summary judgment in favor of Bragg on Counts 2 and 3 of that Complaint. Those Counts seek to enforce DEP’s nondiscretionary duties under SMCRA’s buffer zone rule.

These Counts are part of Bragg’s broader challenge to permitting of “mountaintop removal” (hereafter “MTR”) coal strip mining in West Virginia. In MTR mining operations, strip mine operators blast apart and remove hundreds of feet of soil and rock to expose and remove multiple coal seams. JA 275. The waste

rock, or “spoil,” not replaced on the mountaintop is dumped into nearby valleys and streams, creating huge “valley fill” waste disposal areas. Id. A partially-constructed valley fill is pictured on the next page of this brief and at JA 143. DEP has authorized the burial of at least 786 miles of West Virginia streams with mine waste from valley fills. JA 1930, 2112-14. Tens of thousands of acres of hardwood forest have been leveled. JA 275. The U.S. Fish and Wildlife Service found that “the loss of these streams and their associated forests may have ecosystem-wide implications.” JA 281. Since the 1980's, the size and number of MTR mines and their associated valley fills has increased, especially in southern West Virginia. JA 275.

At Intervenors’ request (JA 443-48), Judge Haden visited and flew over southern West Virginia MTR sites and described “the extent and permanence of environmental degradation this type of mining produces” (JA 1602):

[M]ined sites were visible from miles away. The sites stood out among the natural wooded ridges as huge white [snow-covered] plateaus, and the valley fills appeared as massive, artificially landscaped stair steps. Some mine sites were twenty years old, yet tree growth was stunted or non-existent. Compared to the thick hardwoods of surrounding undisturbed hills, the mine sites appeared stark and barren and enormously different from the original topography.

The residents who live close to these huge mines experience noise, dust, and blasting vibrations that crack the walls and foundations of their homes.

Generations-old communities near the mines are decimated by the exodus of neighbors and friends who move away to escape these conditions. JA 117-27, 452-55, 503.

2. Statutory Background. Valley fills are regulated primarily under two federal statutory programs: SMCRA and the Clean Water Act (CWA). See Federal Appellants' Brief (hereafter "U.S. Br.") 8-17 for a detailed description of these programs.

SMCRA "establish[es] 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 "fundamental concept" of SMCRA is "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." H. Rep. No. 218, 95th Cong., 1st Sess. 57 (1977).¹ SMCRA's goals are "that land affected by surface mining be returned to a form and productivity at least equal to that of its premining condition, and that such condition will not contribute to environmental deterioration and is consistent with the surrounding landscape."

¹West Virginia has a federally-approved state program under SMCRA. 30 C.F.R. Part 948.

Id.

SMCRA's provisions "are fully intended to protect the hydrological integrity of any area to be surface coal mined or impacted by such mining." S. Rep. No. 128, 95th Cong., 1st Sess. 54 (1977). This statute and West Virginia's federally-approved State program require mine operators to "minimize the disturbances to the prevailing hydrologic balance at the mine-site," and to "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)(10), (b)(24); W.Va. Code § 22-3-13(b)(10), (b)(24).²

The buffer zone regulation was promulgated to protect these resources by limiting mining activities that disturb land within 100 feet of intermittent and perennial streams. The federal version of this regulation provides that:

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

²West Virginia's federally-approved state program is contained in the West Virginia Surface Coal Mining and Reclamation Act, W.Va. Code § 22-3-1, et seq. and in regulations implementing that law, 38 C.S.R. § 2-1, et seq.

- (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. West Virginia's federally-approved program similarly establishes stream buffer zones, but requires additional findings before a variance may be granted:

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

38 C.S.R. § 2-5.2.

The Office of Surface Mining (OSM) promulgated the federal buffer zone rule in 1979, emphasizing that the rule “protects stream channels,” and that “[b]ecause of the significance of streams as features on the mine landscape, the Office believes that rules on how streams are to be treated and protected should be spelled out.” 44 Fed. Reg. 15176-77 (Mar. 13, 1979); JA 1932-33. An Environmental Impact Statement

(EIS) prepared in 1979 examined the impacts of SMCRA's federal implementing regulations, including the buffer zone rule. JA 1951. The EIS stated that the regulations were designed to protect aquatic life in all stream segments, both within and outside the mined area:

The program should directly protect the quality and quantity of waters within and downstream of areas mined and habitat characteristics, including streambeds and velocities, on which aquatic species are dependent.

JA 1956 (emphases added). The EIS also recognized that “[r]equirements for unmined buffer zones along streams may have an indirect adverse impact of loss of recovery of coal resources.” JA 1954.

When it modified the rule in 1983, OSM explained that “[b]uffer zones are used to protect streams from sedimentation and from gross disturbance of stream channels caused by surface coal mining and reclamation operations.” 48 Fed. Reg. 30312 (June 30, 1983)(emphasis added). OSM stated that “intermittent and perennial streams generally have environmental resource values worthy of protection under Section 515(b)(24) of the [Surface Mining] Act.” Id. “The 100-foot limit is used to protect streams from sedimentation and help preserve riparian vegetation and aquatic habitats.” Id. at 30314. The variance procedure in the rule was designed to allow disturbances in the buffer zone for activities such as road crossings and culverts. Id. at 30315.

OSM considered the impact of the buffer zone rule on mining operations. In 1979, OSM stated:

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

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

44 Fed. Reg. at 15177; JA 1933. In 1983, in response to a commenter's assertion that the buffer zone rule is "an onerous and unnecessary burden that could have serious adverse effects on many operations and preclude the mining of significant reserves," OSM stated that "[s]treams are crucial conduits of sediment pollution from the mine areas and are often valuable fish and biological habitats. Because of the significance of streams, OSM will specify how streams are to be treated and protected." 48 Fed. Reg. at 30312.

Both federal and State buffer zone rules are nondiscretionary. Stream buffer zones "shall not be disturbed" unless the Director finds that each requirement for a variance is met. OSM has approved the West Virginia buffer zone rule as a part of its State program, and therefore it is the federally enforceable buffer zone rule in

West Virginia. 55 Fed. Reg. 21304 (May 23, 1990); 61 Fed. Reg. 6511, 6522 (Feb. 21, 1996). For the purposes of this appeal, however, both the federal and State rules lead to the same outcome.

Under a federally-approved state program, the state regulatory authority (here, DEP) decides whether to issue surface mining permits. 30 U.S.C. § 1260. However, that authority is limited by § 1260(b), which provides:

No permit or revision application shall be approved unless the application affirmatively demonstrates and the regulatory authority finds in writing on the basis of the information set forth in the application or from information otherwise available which will be documented in the approval, and made available to the applicant, that—

(1) the permit application is accurate and complete and that all the requirements of this Act and the State or Federal program have been complied with.

West Virginia's federally-approved state program contains a similar provision. 38 C.S.R. § 2-3.32.d. Thus, in addition to its non-discretionary duties under the buffer zone rule, DEP has a non-discretionary statutory duty to reject incomplete permit applications that do not demonstrate compliance with the approved state program, including compliance with the buffer zone rule.³

³Congress enacted this requirement because it was especially concerned that state agencies would slight environmental requirements in their permit reviews (H. Rep. No. 218, supra, p. 91):

Experience has shown that without a thorough and comprehensive data base presented with the permit application, and absent analysis and review both by

the agencies and by other affected parties based on adequate data, [this] judgment has often traditionally reflected the economic interest in expanding a State's mining industry. Valid environmental factors tend to receive short shrift. To meet this problem, the bill delineates in detail the type of information required in permit applications in section 507 and 508 and the criteria for assessing the merits of the application in section 510. [emphasis added]

“These minimum informational specifications are the ‘minimum uniform requirements’ that all states must demand of permit applicants.” In Re Permanent Surface Mining Regulation Litigation, 653 F.2d 514, 532-33 (D.C. Cir. 1981).

2. Citizen Suits. SMCRA authorizes citizens to bring suit against the appropriate State regulatory authority “where there is alleged a failure of the . . . appropriate State regulatory authority to perform any act or duty under this Act which is not discretionary with the . . . State regulatory authority.” 30 U.S.C. § 1270(a)(2). The legislative history of the citizen suit provision indicates that Congress “believe[d] that citizen suits can play an important role in assuring that regulatory agencies and surface operators comply with the requirements of the Act and federally-approved regulatory programs.” S. Rep. No. 128, p. 88.

3. Proceedings Below. After complying with SMCRA’s 60-day pre-suit notice requirement, Bragg filed her complaint in federal district court on July 21, 1998. JA 66. Bragg asserted that the Director of DEP had violated several of his nondiscretionary duties under SMCRA in issuing mining permits, including his duties under the state buffer zone rule. *Id.* She also alleged that three officials of the U.S. Army Corps of Engineers (the Corps) had violated the National Environmental Policy Act (NEPA) by approving permits without preparing an EIS, were violating § 404(e) of the CWA, 33 U.S.C. § 1344(e), by using Nationwide rather than individual permits for mines that cause more than minimal adverse environmental effects, and lacked jurisdiction under § 404 of the CWA, 33 U.S.C. § 1344, to permit valley fills for surface mines because the waste they contained was excluded from the Corps’

definition of “fill material” in 33 C.F.R. § 323.2(e). Id.

a. The Federal Settlement. In December 1998, the Corps reached an agreement with Bragg to prepare, for the first time, an EIS on the effects of valley fills on streams and the environment. JA 181, 287. Until this EIS is completed, the Corps agreed to require applications for individual permits under § 404 for mines with valley fills impacting more than 250 acres of a watershed, because those fills could be expected to have more than minimal adverse effects. JA 289. This agreement resolved Bragg’s NEPA and CWA claims. However, the Agreement provided that it “shall not be construed to prejudice Plaintiffs’ right to challenge actions, including the legality of valley fills . . . , under [SMCRA] and the approved state program.” J.A. 286. In June 1999, Judge Haden approved the settlement agreement. 54 F. Supp.2d 653; JA 1733.

b. The Spruce Mine. At the time it agreed to the settlement agreement, the Corps refused to require preparation of an EIS, or submission of an application for an individual § 404 permit, before authorizing a mountaintop removal mine proposed by Intervenor Hobet Mining, Inc. near Blair, West Virginia (the Spruce mine). JA 292. This mine would cover 3113 acres (nearly five square miles). JA 718. Hobet proposed to remove 400 vertical feet of mountain ridges, generating 826 million cubic yards of waste material. Approximately 150 million cubic yards of that

material would be dumped in four large valley fills covering 7.8 miles of streams. JA 624-25, 838-39, 2157; JA 29, #138, Ex. 2, p. 3.

Because of their disagreement about this mine, Bragg and the Corps specifically excluded it from their settlement agreement. JA 292. After DEP approved Hobet's SMCRA permit (including its request for a buffer zone variance) and the Corps announced its intent to issue a Nationwide § 404 permit, Bragg sought a temporary restraining order and preliminary injunction. After 35 hours of hearings (JA 1575), Judge Haden granted a preliminary injunction enjoining the Corps from issuing a Nationwide § 404 permit for the Spruce mine, staying the SMCRA permit issued by DEP, and enjoining Hobet from beginning preconstruction or mining activities until the case was resolved on the merits. 54 F. Supp.2d 635; JA 1622. Shortly before trial, the Corps withdrew its proposed issuance of a Nationwide § 404 permit for the Spruce mine, and Hobet agreed to submit a new application for an individual § 404 permit. JA 49, #341. Hobet also agreed to revise its state mining permit to attempt to meet Bragg's objections. *Id.*; JA 1829.

c. The State Consent Decree. In addition to her claims against the Corps, Bragg challenged DEP's permitting practices under SMCRA, including its failure to ensure that mined areas are restored to their approximate original contour (AOC) and achieve proper post-mining land uses. In July 1999, Bragg and DEP signed a

proposed Consent Decree to resolve these issues. JA 2899. Under that Decree, DEP agreed to propose new statutes, regulations and policies on AOC and post-mining land uses. DEP conceded in the Decree and to Judge Haden that the district court had jurisdiction to enter the Decree. JA 1826, 1852. DEP's counsel told Judge Haden that "[i]t is the case that with respect to the items in the Consent Decree, the state of West Virginia has waived the sovereign immunity argument." JA 1826. All parties in the litigation supported entry of this Decree, and did not question its overall fairness and reasonableness. JA 61, #433, p. 2; JA 2924.

Before DEP signed the Decree, it provided a public comment period, as state law required. JA 1836, 1843, 1848; see W.Va. Code § 5-3-2a. At a hearing after submission of the proposed Decree, Judge Haden explained why he encouraged public comment on this agreement (JA 1835-36):

I think the public ought to be brought up to speed on this and that the public ought to be given the opportunity to meaningfully comment as to whether the public views this as something that ought to be approved or something that ought to be rejected or something that ought to be sent back to the bargaining table.

Judge Haden extended the duration of the state-mandated public comment period and made efforts to make copies of the Consent Decree and the commenting process accessible to the public. JA 1836, 1909, 1912-17. In February 2000, Judge Haden approved the Decree. 83 F.Supp.2d 713; JA 2912. Subsequently, the West Virginia

Legislature passed, and the Governor approved, DEP's proposed statutory and regulatory changes to implement this Decree. House Bill 4223, § 64-3-1(u)(passed March 11, 2000; approved April 3, 2000).

d. The Buffer Zone Claims. Bragg and DEP could not agree on Bragg's two buffer zone claims under SMCRA. In Count 2, Bragg alleged that DEP had engaged in a pattern and practice of approving buffer zone variances based on permit applications that did not include findings required before such variances may be approved. JA 1794-96. In Count 3, Bragg alleged that DEP's authority under this rule does not (or cannot) extend to permitting activities such as valley fills that bury intermittent and perennial streams. JA 1796-97. Those two claims were excluded from the Consent Decree and submitted to the district court on cross-motions for summary judgment. JA 1845, 1853, 1910. In October 1999, the district court granted Bragg's motion for summary judgment on those two claims and enjoined DEP from violating its nondiscretionary duties under the buffer zone rule. 72 F. Supp.2d 642; JA 2845. Judge Haden enjoined DEP "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." 72 F. Supp. 2d at 663; JA 2845. As Judge Haden explained, this injunction is purely prospective and applies only to future permit approvals. JA 56,

#391, p. 3.

DEP and Intervenors moved to stay this order pending appeal. JA 55-56, #381, 384, 389. Judge Haden directed Bragg to respond to the motion on October 28, 1999. JA 56, #391, p. 2. Without waiting for Bragg's response and, according to Judge Haden, acting in a manner that was "uninvited and in disregard of the briefing order" (JA 2892), DEP and Intervenors supplemented their stay motion on October 28 with 42 pages of affidavits. These conclusory affidavits claimed, without any supporting evidence or analysis, that the Judge's October 20 order would have dire consequences to West Virginia's mining industry and economy. JA 57, 2848-90. Bragg filed her timely opposition to the stay on October 28, and had less than 24 hours to prepare and file a short supplemental response to the 42 pages of new affidavits on October 29. JA 57, 2892. A stay was granted on October 29, even though the district court found that Appellants failed to meet the conditions for granting a stay. 190 F.R.D. 194; JA 2891. Judge Haden stated that he was "in no position to examine adequately the factual basis" of the "firestorm of reaction" to his ruling, or "to take an informed measure of the harms predicted." JA 2894. He believed that a stay would "defuse invective and diminish irrational fears so that reasoned decisions can be made with all deliberate speed." JA 2895.

Statement of Facts

Appellee Patricia Bragg lives in a home in West Virginia on Neighway Branch, downstream from a MTR mine that she can see from her yard. JA 2749, 2753-55. The mine will place a valley fill and sediment pond in Neighway Branch, which Bragg uses to water her garden. JA 2755-56, 2772. The blasting at this mine has cracked the plaster in her home and shaken her home so much that she has to catch vases to keep them from falling on the floor. JA 2758-59. Appellee Cheryl Mathena also lives along a West Virginia stream, downstream from a MTR mine and its associated valley fills. JA 2777, 2782, 2785, 2789-91.

Appellees James and Sibbey Weekley own a home and about one acre of property along Pigeonroost Branch in Blair, West Virginia. JA 449, 462. Mr. Weekley, a retired coal miner, has lived in Pigeonroost Hollow for 57 years, and his wife has lived there for 39 years. JA 449, 500. His ancestors have lived there for about 200 years. Id.

A stream, Pigeonroost Branch, is at the bottom of the hollow and runs through the Weekleys' property. JA 450. It runs all year round and is 14 feet wide in places. Id. Mr. Weekley has hunted in the hollow and fished and swum in the stream his whole life. JA 451. The Weekleys place a high value on the fish, wildlife, and natural environment in the hollow. JA 451-52, 501-2.

The Weekleys have already suffered cracked walls from blasting at Hobet's

existing operations at its seven-square-mile Dal-Tex MTR mine, which is three-quarters of a mile from their home. JA 452-54, 1435. The dust generated by this mining operation makes them cough, coats the furniture in their house, and prevents them from sitting outside on their porch. JA 454. The noise and dust interrupt the Weekleys' lives 24 hours a day. JA 503. Thus, the mine would significantly interfere with the Weekleys' use and enjoyment of their property.

Hobet's proposed Spruce mine would be much closer to their home and would place a valley fill in Pigeonroost Branch within only a few hundred yards of their home. JA 455-56, 492, 504, 1283. The valley fill would fill Pigeonroost Hollow with several hundred feet of rock, bury and destroy the stream, cut down most of the surrounding trees, and completely and permanently change its appearance. JA 456, 597-98, 648-50, 1414.

Members of Appellee West Virginia Highlands Conservancy have visited mined lands and valley fills in southern West Virginia and are deeply upset by the permanent alteration of some of the richest natural areas in the state. JA 510-16. One of their members is a kayaker who could no longer access a stream because it was buried by a valley fill. JA 545.

DEP has exhibited a pattern and practice of failing to make the required findings for buffer zone variances when it has authorized valley fills. Larry Alt is

DEP's permit supervisor in its Logan Regional Office and reviews permit applications for compliance with state program regulations. JA 550-53. This region contains the highest concentration of MTR valley fills in the state. JA 278, 280-81. He testified that he did not apply the buffer zone rule to the filled stream segment. JA 572. Instead, he stated that:

If the company has shown that the fill is necessary during the review of the application with the spoil balance and stuff and they show that the fill will be stable, then . . . in the area of the fill, we do not require them to make those [buffer zone variance] findings.

JA 572. Thus, to obtain a buffer zone variance for valley fills, Mr. Alt only requires applicants to state that the fill will meet stability requirements and is needed to dispose of excess spoil. JA 572-73, 1978-80, 2008, 2011-13, 2021-23, 2027-29, 2031-32. These two criteria are not included in the rule and therefore are irrelevant to buffer zone variance decisions. Mr. Alt stated that he had a ten-year policy and practice of not making the required buffer zone findings before granting buffer zone variances for valley fills. JA 577, 2032. He had reviewed 8,000 permit applications, and could not remember ever recommending that such a variance be denied. JA 558, 1987.

For example, three DEP officials, Mr. Alt, Mr. Stollings (another permit reviewer), and Mr. Ailes (the Chief of DEP's Office of Mining and Reclamation),

admitted that DEP granted Hobet's request for a variance from the stream buffer zone requirement for its Spruce mine without making the required findings. JA 590-94, 1077, 1079, 1918-21, 2109-11, 2147-51. Instead, Mr. Alt granted the variance because he uncritically accepted Hobet's assertion that the only method of disposing of mining spoil was to dump it into streams. JA 572. However, the Assistant Chief of DEP's Office of Mining and Reclamation, Mr. Halstead, admitted that DEP, contrary to its practice, can not legally grant a buffer zone variance simply because the permittee says there is no other place to put the spoil. JA 852. Mr. Alt testified that his decision to exempt valley fills at Hobet's Spruce mine from compliance with the buffer zone rule were representative of, and consistent with, his practice for all permit applications for MTR operations with valley fills. JA 577, 593-94. Mr. Ailes also testified that the buffer zone requirements should have been considered for these applications. JA 2099-2100.

DEP has granted buffer zone variances even though numerous applicants stated in their permit applications that the valley fills would adversely affect fish migration, and would adversely affect the flow and gradient of the portion of the stream in which the fill is placed. JA 573, 2001-07, 2018-23, 2162-72, 2179-92. For example, DEP granted a buffer zone variance for Pen Coal's Parker Branch No. 2 Surface Mine, even though the application stated that:

The normal flow and gradient of the stream will be adversely affected in the areas of the proposed durable rock [valley] fills and the required sediment control for each. Surface mining activities as proposed in this application make disturbance in these areas necessary.

. . .
Fish migration and related environmental values will be adversely affected in the areas of the proposed durable rock [valley] fills and the required sediment control for each. Surface mining activities as proposed in this application make disturbance in these areas necessary. [emphasis added]

JA 2183-85. Thus, DEP used economic factors to override the environmental factors specified in the rule.

DEP also summarily granted buffer zone variance for valley fills in numerous high-quality streams. One finding DEP must make before granting a buffer zone variance is that state water quality standards will not be violated. 38 C.S.R. § 2-5.2. According to the DEP official responsible for implementing West Virginia's water quality standards, valley fills must comply with those standards. JA 807, 1179-80, 1186-88. Under those standards, the existing uses of a designated high-quality stream cannot be degraded by an MTR mine unless the specified intergovernmental coordination and public participation procedures are followed. 46 C.S.R. § 1-4.1(b). DEP approved valley fills in Lilly Fork, Pigeonroost Branch, and other high-quality streams without following these procedures. JA 804, 807-08, 822-23, 827-28, 2050-52, 2058, 2066-68, 2177. Indeed, DEP has not even promulgated regulations to implement the required intergovernmental coordination planning process. JA 2454.

The existing use of all streams in the state is, at a minimum, “the propagation and maintenance of fish and other aquatic life.” 46 C.S.R. §§ 1-2.5, 1-2.6, 1-6.1. The Chief of DEP’s Office of Water Resources admitted that, when valley fills are placed in high-quality streams, they eliminate the existing use of that stream in the portion of the filled stream segment. JA 2074-79. DEP has allowed existing uses of high-quality streams to be eliminated by valley fills. JA 2047, 2050-52.

Appellants have not disputed Bragg’s evidence on the adverse effects on valley fills on aquatic life. DEP’s employees and Intervenors’ biological expert admitted that valley fills bury and destroy aquatic life in the stream segment filled. JA 597-98, 1414, 1970, 1986, 1989-90, 1993, 2037-38. A stream segment filled by a valley fill ceases to exist. JA 597-98, 1990-91. Fish cannot migrate through a valley fill because it buries the stream with rock. JA 598, 1978. The U.S. Fish and Wildlife Service has found that valley fills eliminate streams “which support healthy aquatic communities and provide fresh water, nutrients and food organisms to downstream aquatic ecosystems.” JA 1926. Aquatic life in higher order streams (the downstream segments in a watershed) is dependent on the health of the aquatic communities in the lower order streams (the upstream segments in the watershed) that feed the higher order streams and rivers. JA 739-41. The construction of a valley fill therefore adversely alters the integrity of the stream segment filled, and

causes an adverse impact to the physical, hydrological and biological components of aquatic ecosystems in that segment and in downstream segments. A 1997 OSM briefing paper stated (JA 2194):

“[r]ecent discussions with WVDEP, EPA, USF&W, WVDNR and others indicate that large valley fills which completely cover a significant portion of the headwaters of intermittent or perennial streams cannot comply with the [buffer zone rule]. According to discussions with EPA, they will in all cases cause violations of State and Federal water quality standards and adversely affect related environmental values.”

DEP’s Assistant Chief, Mr. Halsted, similarly testified that DEP could not possibly make the required buffer zone variance findings for valley fills in perennial and intermittent streams. JA 2487-88.

DEP has estimated that it has permitted valley fills that would bury approximately 786 miles of West Virginia’s streams, as measured from the ridge line to the toe of the valley fill. JA 1930, 2112-14. An earlier study by the U.S. Fish and Wildlife Service made a “highly conservative” estimate that 469.3 miles of streams had been buried by valley fills in just three West Virginia counties. JA 281. This study also found that, within the upper reaches of the Mud River watershed in southern West Virginia, 39 percent of streams had been filled or approved for filling.

Id.

Federal and state agencies have taken multiple conflicting positions on the application of the buffer zone rule to valley fills. The head of OSM's Knoxville Tennessee office, which administers the regulatory program under SMCRA for the state of Tennessee, testified that the buffer zone rule does apply to valley fills, and that he had applied it to two applications for valley fills in that state. JA 2121-22, 2125-26, 2131-34, 2145-46. In an April 1999 oversight report on two West Virginia permit applications, OSM permit reviewers stated, without any analysis, that "the footprint of valley fill areas [i.e., the stream segment filled] is excluded from the stream buffer zone requirements." JA 1639, 1641. In June 1999, the Director of OSM's Charleston Field Office disavowed that position and stated that OSM "has not formulated an agency determination of how the buffer zone requirements apply to streams that are filled with excess spoil during a mining operation." JA 2281.

Until June 23, 1999 (less than one month before the scheduled trial in this case), DEP had no written guidance or interpretation on the buffer zone rule. JA 612, 2094-95, 2105-06. Prior to that time, DEP accepted numerous permit applications in which applicants requested buffer zone variances for the footprint of the valley fill, thereby implicitly admitting that the buffer zone rule applies to that area. JA 2089, 2093-95. Nevertheless, DEP initially argued in February 1999 that the buffer zone

rule did not apply to the footprint of the valley fill. JA 28, #133, pp. 8-9; JA 1023.

DEP's counsel also stated at the preliminary injunction hearing that "the no material damage findings of the Surface Mining Act are made by DEP and are not necessarily the same as the adverse impact requirements which the Corps has to make under Section 404" of the CWA. JA 1552.

On June 23, 1999, DEP issued a guidance document stating that "[i]t is the interpretation of the agency that section 5.2 . . . is not applicable to the footprint of fills . . ." JA 48, #329, Ex. 1. This guidance document was issued in direct response to the Bragg lawsuit. JA 2103. In its July 26, 1999 Answer to Bragg's Second Amended Complaint, DEP "specifically denie[d] that the buffer zone rule . . . applies to the footprint of an approved fill," but "acknowledge[d] . . . that permit applicants and its permit review offices and teams of permit reviewers have operated with inconsistent understandings of how and where the regulations set forth in 30 [sic] C.S.R. § 2-5, et seq. should be construed and applied, and the required findings would be made." Id., p. 13.

Then, in August 1999, over a year after Bragg's complaint was filed, and one business day before the due date of DEP's summary judgment brief on the buffer zone issue, DEP entered into a "Memorandum of Understanding" with OSM, the Corps and EPA which purported to "clarify" the meaning of the stream buffer zone

rule (hereafter referred to as the “Buffer Zone MOU”). JA 2218. This MOU stated that the buffer zone rule does apply to the footprint of valley fills, by stating that the rule requires a “consideration of potential direct, indirect, and cumulative adverse environmental impacts associated with the placement of fill material in waters of the United States (e.g., the valley fill, sediment pond dam).” JA 2220. In its August 30, 1999 summary judgment reply brief, DEP abandoned its footprint-exemption argument and conceded that “the buffer zone rule does apply to the footprints of valley fills . . .” JA 54, # 373, p. 11.

The Buffer Zone MOU also stated that water quality findings made by the Corps under Section 404 of the Clean Water Act—the 404(b)(1) Guidelines at 40 C.F.R. Part 230—are “comparable” to the findings required for buffer zone variances under SMCRA. JA 2220. The MOU concluded that:

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

Id. Based on this MOU, DEP argued that it did not need to make any findings prior to granting variances under the buffer zone rule, and that the Corps’ findings under § 404 superseded the buffer zone rule. JA 2199-2200, 2481-85.

Significantly, the U.S. Fish and Wildlife Service refused to sign this MOU,

even though it had signed an earlier April 1999 MOU on valley fill issues. JA 1732, 2222. The head of its regional office in Pennsylvania, David Densmore, objected to the Buffer Zone MOU on the ground that the standard of environmental protection in the 404(b)(1) Guidelines was lower than the standard in the buffer zone rule:

The two regulations differ in both the degree of degradation allowed (*significant* under section 404 and *will not adversely affect* under SMCRA regulations) and in the types of degradation considered. While Section 404 limits its analysis to aquatic impacts, SMCRA allows an evaluation of *other environmental resources of the stream*, in addition to water quantity and quality issues. According to the *Federal Register* announcement adopting SMCRA's regulations at 30 C.F.R. 816.57, "the phrase 'and related environmental resources' has been added to the language of the final rule to indicate that regulatory authorities will be allowed to consider factors other than water quantity and quality in making buffer zone determinations" [48 Fed. Reg. at 30316, col. 1]. [citation added]

JA 2442, 2456. Densmore concluded that "[t]he 404 standard is, in effect, lower than the SMCRA standard, regardless of how the regulations have been applied on the ground." JA 2442.

In April 2000, the United States filed its brief in this action. In that brief, the federal government reversed the position that it took in the Buffer Zone MOU, stating that findings made under the guidelines can not substitute for the findings required by the buffer zone rule. U.S. Br. 42. OSM also sent a letter to DEP stating that the Buffer Zone MOU was an incorrect interpretation of SMCRA and its implementing regulations. *Id.*, Addendum 39-40.

The federal government has also taken multiple positions on whether § 404 of the Clean Water Act applies to valley fills. In its July 1990 brief in this Court in West Virginia Coal Ass'n v. Reilly, 728 F. Supp. 1276 (S.D.W.Va. 1989), aff'd, 932 F.2d 964, 1991 WL 75217 (4th Cir. 1991), EPA made ambiguous and inconclusive statements about whether valley fills are covered under § 402, 33 U.S.C. § 1342, or § 404 of the CWA. JA 133-34. Prior to the December 1998 settlement agreement in this case, Bragg deposed three Corps officials from its Huntington District, Cincinnati Division, and Washington, D.C. National offices concerning its § 404 authority over valley fills. The Division official testified that, prior to March 1998, it was unclear whether the Corps ever intended to regulate valley fills under § 404; instead, “they just sort of oozed into that.” JA 196-200. Up to that time, the Corps’ Huntington District had issued Nationwide 21 permits under § 404 for valley fills based on an understanding that mining overburden was fill material, but there was no written policy. JA 195, 248, 254, 265, 269. In March 1998, after the Corps’ § 404 authority over these fills was questioned, Corps officials and their legal counsel in the Cincinnati Division and Huntington District offices reviewed the 1986 Memorandum of Agreement with EPA and the decision of this Court in West Virginia Coal Ass'n v. Reilly. JA 249-50. Based on this review, the Corps issued informal guidance in the form of an E-mail message in March 1998 that valley fills were to be regulated

under § 402, not § 404. JA 172, 200, 203-07, 255-57. At the time of their depositions in November 1998, however, this policy was in flux and it was uncertain what the Corps' position was. JA 182, 207-08, 249. All three officials testified that they believed that valley fills are created to dispose of waste and therefore do not qualify as fill material under § 404. JA 173-174, 179-80, 211, 255, 260. Contrary to Intervenor's assertions (Int. Br. 20-21), these Corps officials also testified that they were not familiar with, had never approved, or did not follow, EPA's 1988 draft policy on valley fills. JA 183-84, 218-20, 265.

In the December 1998 Settlement Agreement between Bragg and the Corps, the Corps stated that it would require § 404 permits for valley fills, with individual permits required for fills greater than 250 acres. JA 289. In return, Bragg dismissed her claims against the Corps and agreed not to "challenge the Corps' authority under CWA section 404 to authorize discharges of surface mining spoil into waters of the United States based on the argument that such spoil is not fill material pursuant to 33 C.F.R. § 323.2(e)." JA 292. In April 2000, simultaneously with the filing of its brief in this Court, the Corps proposed to amend its definition of fill material to expressly cover valley fills. U.S. Brief, Att. 1, p. 18; 65 Fed. Reg. 21292, 21295 (April 20, 2000). The public comment period on this proposed rule closed on July 19, 2000. 65 Fed. Reg. 37738 (June 16, 2000). It is uncertain whether the proposed rule will

become final.

Judge Haden's decision prohibits placement of valley fills only in intermittent and perennial streams, not ephemeral streams. JA 2845. There is no credible evidence in the record showing that this decision will have a significant impact on coal production. JA 2894.

DEP's affidavit in support of a stay pending appeal claimed that 59 of 62 pending permit applications for surface mining permits proposed to place valley fills in intermittent or perennial streams. JA 2848. Surface mining produces only 32% of the coal mined in West Virginia. DEP Br., Addendum A-421. The remainder is produced from underground mines, which DEP's affidavit completely failed to address.

In addition, neither DEP's conclusory affidavit nor any other evidence in the record purports to analyze whether or to what extent the proposed mines can be re-engineered to avoid impacts to intermittent or perennial streams. Indeed, the evidence shows that DEP has never attempted to analyze this issue. According to DEP's own hydrologist, permit applications do not identify or analyze the ephemeral/intermittent boundary. JA 2438. The application form merely asks the applicant to state whether or not its proposed operations "will disturb land within 100 feet of an intermittent or perennial stream." JA 2165, 2170, 2177. DEP's John Ailes

testified that DEP has not determined how to utilize the definitions of ephemeral and intermittent streams in the permitting process. JA 57, #394, Ex. 3. DEP's Larry Alt testified that "there needs to be more documentation of where you have the transition between perennial[-] intermittent and perennial stream[s]" and that he is "not using any method" to make that determination. *Id.*, Ex. 4. Thus, DEP has never attempted to measure the difference between ephemeral stream segments that may be filled under the district court's ruling and intermittent and perennial stream segments that can not. JA 57, #394, Exs. 2-4; JA 2413, 2438.

Since DEP has never applied the buffer zone regulation to determine how far down a valley an ephemeral stream extends, DEP and Intervenors have no way to determine the extent to which the district court's injunction will affect MTR mining activities involving valley fills. DEP's and Intervenors' affidavits contain self-serving conclusions and present no factual or scientific analysis of the hydrology or engineering data for specific mine sites. See, *e.g.*, JA 2276, 2862. While Intervenors' mining expert, Mr. Kitts, opined that restricting valley fills to ephemeral streams would "end the practice of mountaintop mining" (JA 1273), he admitted on cross examination that this opinion was based on the biological definition of ephemeral streams under the Clean Water Act, not the hydrological definition of ephemeral streams which applies to MTR mines under SMCRA (JA 1324). OSM

has interpreted its buffer zone rule to allow disturbances to these ephemeral streams despite the existence of biological communities. JA 1318-19. Mr. Kitts admitted that he had no idea what the length of the ephemeral streams would be using OSM's hydrological definition, which must be used in SMCRA permitting. JA 1323-24. He also admitted that he had not analyzed the economic feasibility of mining Hobet's Spruce Fork mine using other mining methods. JA 1375. Judge Haden stated that he was "in no position . . . to take an informed measure of the harms predicted," and that Appellants' predictions were based on "invective" and "irrational fears." JA 2894-95.

However, Bragg's hydrological and engineering experts did perform a preliminary analysis of the impacts of the ruling on Hobet's Spruce mine. Bragg's hydrologist estimated that, for the watersheds proposed for valley filling by that mine, the total length of the ephemeral streams in those watersheds is 4.01 miles. JA 2287-88. Bragg's mining engineer estimated that sizeable valley fills containing a total of 30 million cubic yards of material could be placed in these ephemeral streams. JA 2297. In contrast, prior to the 1980's, valley fills were generally less than 250,000 cubic yards each. JA 275.

SUMMARY OF ARGUMENT

The district court correctly granted Bragg's motion for summary judgment on

her two buffer zone claims. OSM agrees with this conclusion, and its interpretation is the only agency interpretation entitled to deference under SMCRA. On Count 2, Judge Haden correctly found that DEP violated its nondiscretionary duty under the buffer zone rule by failing to make required findings that valley fills in perennial or intermittent streams will not adversely affect the environmental resources of the filled stream segment. DEP admits that it failed to make these findings for the filled stream segment. DEP's first defense—that the rule does not apply to the “footprint” of the fill—has been rejected by OSM. DEP's first defense is also inconsistent with the plain language of the buffer zone rule and the related stream definitions, which protect all portions of the stream. DEP's second defense is premised on the validity of the August 1999 MOU, which the federal appellants now admit was illegal. The MOU is invalid because the standards it uses are less stringent, and have a narrower jurisdictional and geographic scope, than those in the state buffer zone rule.

The district court's rejection of these defenses is consistent with a SMCRA provision that bars conflicts with the CWA. Both the state buffer zone rule and the CWA require compliance with state water quality standards. When OSM considered whether to approve West Virginia's buffer zone rule, OSM sought EPA's concurrence that the rule was consistent with water quality standards. EPA's concurrence decision raised concerns about placing valley fills in streams and

insisted that those fills must comply with water quality standards. The district court's decision maintains compliance with those standards and consistency with the CWA, while DEP's and Intervenors' interpretation would allow noncompliance with those standards and create a conflict with the CWA.

On Count 3, Judge Haden correctly found that the state buffer zone rule does not authorize DEP to permit valley fills to bury perennial or intermittent streams. He found that DEP cannot make six of the seven findings required to grant a buffer zone variance for valley fills, because those fills necessarily harm stream flow, stream gradient, fish migration, water quality, water quantity, and related environmental values. Since none of the Appellants dispute these facts, they provide a sufficient basis for affirming the district court's decision on Count 3.

The seventh required finding is that the activity will not cause or contribute to violations of state water quality standards. Judge Haden correctly ruled that valley fills violate the anti-degradation and waste assimilation provisions in West Virginia water quality standards. They degrade, and destroy, the existing use of the filled stream segment by filling it with millions of tons of industrial waste. The CWA 404(b)(1) Guidelines, and EPA's interpretation of those Guidelines, on which Appellants rely, do not authorize violations of water quality standards so long as there is no significant degradation of the aquatic ecosystem. The Guidelines prohibit

both a standards violation and significant degradation. In any event, Appellants have no basis for exempting high quality waters from the anti-degradation requirement. Those waters can only be degraded after specified procedures are followed, and cannot be degraded in a way that interferes with “fishable/swimmable” uses. DEP admits that it allowed valley fills to be placed in high quality waters without following the specified procedures, and that such fills destroy the ability of the filled stream segment to be fishable and swimmable. Valley fills also violate the waste assimilation prohibition in West Virginia water quality standards. This prohibition is independent of the anti-degradation requirement. Judge Haden correctly ruled that valley fills violate this prohibition because they bury the stream with waste.

Appellants’ and Amici’ other defenses to violations of the buffer zone rule are erroneous. The district court’s ruling is consistent with SMCRA’s regulatory program. Appellants never even attempted to prove their apocalyptic claim that enforcement of the buffer zone rule would end all mining. OSM rejected the same claim seventeen years ago when it promulgated the rule. Nothing in SMCRA or its implementing regulations contemplates the wholesale and permanent destruction of many hundreds of miles of streams.

The district court had statutory jurisdiction over Bragg’s buffer zone claims. SMCRA authorizes citizens to bring a citizen suit in federal district court against a

state regulatory authority to enforce its nondiscretionary duties under SMCRA. DEP has a federal, nondiscretionary, statutory mandate under SMCRA to withhold approval of permits that violate its federally-approved state program. DEP has a nondiscretionary duty under its federally-approved state program to prevent disturbances to the 100-foot buffer zone next to intermittent and perennial streams unless it makes specific findings and the standards for a variance are satisfied. The language and structure of SMCRA, its legislative history, and judicial decisions demonstrate that these duties arise under federal, not state, law. Bragg may enforce these mandatory duties because the factual determinations that trigger the duties are undisputed.

Bragg need not exhaust administrative remedies. SMCRA contains an express anti-exhaustion section which provides that the availability of administrative procedures “shall not be construed” to limit a citizen’s right to file a federal suit to enforce nondiscretionary duties. The district court also had jurisdiction under SMCRA to consider Bragg’s claim that DEP’s buffer zone decisions fail to comply with state water quality standards. The state buffer zone rule establishes an independent requirement under SMCRA that buffer zone variances will not lead to violations of those standards.

Bragg’s citizen suit is not barred by the Eleventh Amendment. Bragg’s claims

fall within the Ex Parte Young exception that allows suits against state officials seeking prospective relief to end continuing violations of federal law. Bragg's suit is consistent with, and expressly authorized by, SMCRA's legislative scheme, so there is no basis for applying the limitation on Ex Parte Young jurisdiction set forth in Seminole Tribe v. Florida. The existence or adequacy of state remedies for Bragg's claims is irrelevant to Eleventh Amendment analysis. Alternatively, even if Ex Parte Young were inapplicable, West Virginia waived its immunity by accepting the federal government's invitation to act as the deputized federal regulator of surface mining in that state.

The district court's issuance of a permanent injunction was proper. The parties below did not question the scope of that injunction, and instead pursued an all-or-nothing strategy. The federal appellants therefore waived their argument that the scope of the injunction was overbroad, and cannot raise it for the first time on appeal. In any event, the breadth of the injunction is supported by the plain language of the rule, which prohibits any disturbance unless the variance criteria are satisfied.

The district court had jurisdiction to enter the Consent Decree resolving Bragg's other SMCRA claims. DEP expressly waived its Eleventh Amendment immunity in the Decree and in open court, and also waived its right to appeal this issue. Intervenors cannot satisfy the redressability prong of standing analysis to

challenge the Decree on Eleventh Amendment grounds, because even if those arguments were sustained, the Decree is expressly enforceable as a contract in state court. The district court's statutory jurisdiction to enter a consent decree is analyzed on a more limited basis than is a disputed claim, and Bragg satisfies this limited standard. The district court's judgment concerning both the buffer zone claims and the Consent Decree should therefore be affirmed.

ARGUMENT

I. The District Court Correctly Granted Bragg's Motion for Summary Judgment Because DEP Violated Its Nondiscretionary Duties Under the Buffer Zone Rule

The plain language of West Virginia's buffer zone rule provides that "no land within one hundred feet (100') of an intermittent or perennial stream shall be disturbed by surface mining operations . . .," unless a variance is authorized. 38 C.S.R. § 2-5.2(emphasis added). West Virginia has defined surface mining operations as "activities conducted on the surface of lands for the removal of coal . . . including, but not limited to, . . . areas upon which . . . such activities disturb the natural land surface. Such areas shall also include any adjacent land, the use of which is incidental to any such activities . . . and storage areas." W.Va. Code § 22-3-3(u)(emphasis added). DEP admitted that this definition includes valley fills, since valley fills are incidental to coal removal, are used as storage areas, and disturb the

natural land surface adjacent to the area where coal is removed. JA 559-60, 899-901.

Consequently, under the plain language of the buffer zone rule, valley fills may not disturb any land within 100 feet of those streams, unless a variance is authorized.

In order to obtain a variance, DEP must make seven findings. It must find that the surface mining activities will (1) not adversely affect the normal flow or (2) gradient of the stream, (3) adversely affect fish migration or (4) related environmental values, (5) materially damage the water quantity or (6) quality of the stream and (7) will not cause or contribute to violations of applicable State or Federal water quality standards. 38 C.S.R. § 2-5.2.

In ruling on Count 2, Judge Haden correctly found that DEP violated its nondiscretionary duties under the buffer zone rule by failing to make required findings that valley fills in perennial or intermittent streams will not adversely affect the environmental resources of the filled stream segment. In ruling on Count 3, Judge Haden also correctly held that valley fills necessarily cause adverse environmental impacts on such streams and that DEP therefore had a nondiscretionary duty to withhold approval of variances from that rule for such fills.

A. DEP’s Interpretation Is Not Entitled to Any Deference

DEP argues that this Court should give “great deference” to its “long-established interpretation” of the buffer zone rule. DEP Br. 13-15, 32. Similarly,

Intervenors' central argument is that DEP's reasonable interpretation of the state buffer zone rule and its "consistent administrative practice" is controlling and is inconsistent with the district court's interpretation. Int. Br. 27, 36.

If any deference is due in this case, it is due only to OSM's interpretation in its brief in this case. Congress designated the Secretary of the Interior (through OSM) as the agency responsible for implementing SMCRA, including the approval of State programs and the promulgation of "rules and regulations as may be necessary to carry out the purposes and provisions of this Act." 30 U.S.C. §§ 1211(c)(1), (c)(2). In In Re Permanent Surface Mining Regulation Litigation, 653 F.2d at 523, the D.C. Circuit specifically 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." Instead, the court held that the Secretary's interpretation is the only interpretation entitled to deference because he has the "ultimate responsibility for guaranteeing effective state enforcement of uniform minimum standards . . ." Id.

OSM has flatly rejected DEP's interpretation of the buffer zone rule. OSM supports the district court's rulings that the buffer zone rule applies to the stream segment buried by valley fills, that DEP failed to make required buffer zone findings for that segment, and that valley fills in intermittent and perennial streams can not be

authorized under that rule because they adversely impact the filled stream segment.
U.S. Br. 38-51.

In any event, even if DEP's interpretation could warrant any deference, it would not qualify for such deference in this case. DEP's interpretation has been neither long-established nor consistent. Prior to this litigation, DEP had no written guidance on the buffer zone rule. Instead, it accepted numerous applications for buffer zone variances which assumed that the buffer zone rule does apply to the footprint. JA 2089, 2093-95. During this litigation, DEP issued a guidance document stating that it does not apply. Then, a month later, DEP signed the Buffer Zone MOU which said it does apply, and filed a reply brief in the district court admitting that it does apply. See pp. 23-24 above. Now, on appeal, DEP argues that it does not apply, but that the MOU (which says it does apply) is still valid.

DEP criticizes the federal agencies for repudiating the Buffer Zone MOU, praises it as "the best construction of the regulation at issue," and argues that DEP's application of the MOU is entitled to deference. DEP Br. 9, n.4, 32, 36. Yet DEP has also abandoned the MOU. Its argument that the buffer zone rule does not apply to the footprint of valley fills was rejected in the MOU. JA 2220. DEP admitted below that "DEP and OSM provide in the MOU that the buffer zone rule does apply to the footprint of fills . . ." JA 54, # 373, p. 11 (emphasis in original). DEP cannot

simultaneously attack the MOU, defend it, and claim that both of these inconsistent positions are entitled to deference. Furthermore, it makes no sense to “defer” to the Buffer Zone MOU, when three of the four government agencies that were parties to that MOU have repudiated it. A repudiated interpretation is not entitled to deference. Mayfair Const. Co. v. U.S., 841 F.2d 1576, 1580 (Fed. Cir. 1988).

Contrary to Intervenors’ argument (Int. Br. 22, 47), there is no evidence in the record that DEP considered the effects on the entire stream, including the filled segment, when it applied the state buffer zone rule. On the contrary, as shown above, DEP only looked at whether the valley fill met stability requirements and whether the operator stated in the application that it was needed to dispose of excess spoil. DEP did not analyze the impact of the fill on the stream. Indeed, DEP repeatedly approved fills even though applicants admitted that the fills would damage streams. DEP’s administrative practice, to the extent it was “consistent,” was that DEP would grant every requested variance without following the requirements of its own rule.

Thus, DEP’s interpretation is not entitled to any deference because (1) it is inconsistent with OSM’s interpretation, and (2) it has been erratic, conflicting and internally inconsistent. FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 37 (1981)(“the thoroughness, validity and consistency of an agency’s reasoning are factors that bear upon the amount of deference to be given an agency’s ruling”).

The only agency entitled to deference is OSM, which supports Bragg’s position.

B. The District Court Correctly Granted Summary Judgment on Count 2: DEP Admittedly Failed to Make Required Buffer Zone Findings Before Approving Valley Fills in Perennial and Intermittent Streams

DEP admits that it failed to make buffer zone findings for valley fills before granting buffer zone variances. DEP Br. 6, 8 (“buffer zone variance findings were not made for the area beneath fills”). This admission is sufficient, by itself, to affirm Judge Haden’s order. Nevertheless, DEP argues that, despite the plain language of the regulation, it is exempted from making buffer zone findings for valley fills, because (1) the buffer zone rule does not apply to the footprint of the valley fill; and (2) even if it does apply, DEP could properly substitute findings under CWA 404(b)(1) for buffer zone findings under SMCRA.

1. The Buffer Zone Rule Applies to All Portions of a Stream

Judge Haden correctly decided that the buffer zone rule does apply to the footprint of the fills. JA 2814-16. DEP’s interpretation “leads to the *reductio ad absurdum* that miles of stream could be filled and deeply covered with rock and dirt, but if some stretch of water downstream of the fill remains undiminished and unsullied, the stream has been protected.” JA 2814-15. As Judge Haden explained, state and federal regulations define intermittent and perennial streams to include “reaches,” “parts,” and “portions” of streams. JA 2812, n.15, 2815. See 38 C.S.R. §

2-2.69, 2.86; 30 C.F.R. § 701.5. Furthermore, the 1979 EIS on OSM’s mining regulations stated that those regulations were designed to protect “waters within and downstream of areas mined.” JA 1956. Nothing in the language or history of the regulations suggests that parts of streams may be destroyed so long as other parts are saved. The plain language of the buffer zone rule is unequivocal and provides that “no land” within the buffer zone may be disturbed unless the variance requirements are met. The district court therefore correctly found that “the buffer zone rule protects entire intermittent and perennial streams, not just portions thereof.” JA 2816.

2. Findings Made Under the CWA 404(b)(1) Guidelines Are No Substitute for Findings Required by the Buffer Zone Rule

Intervenors and DEP argue that the Buffer Zone MOU determined that CWA findings under §§ 404 and 401 function the same as SMCRA findings under the buffer zone rule. Int. Br. 48-50; DEP Br. 31-36. This argument is premised on DEP’s last-minute, changed interpretation of the buffer zone rule and the validity of the Buffer Zone MOU. However, the three federal agencies that signed that MOU (EPA, the Corps, and OSM) now admit that it was illegal. U.S. Br. 42.⁴ Those

⁴DEP also argues that the MOU is consistent with a 1988 EPA draft policy approved in West Virginia Coal Ass’n v. Reilly. DEP Br. 34, citing JA 2524-27. That argument is misplaced. The 1988 draft policy was never intended to replace or even affect the buffer zone rule. Moreover, EPA has now rescinded both it and

agencies have conducted a considered reappraisal of the MOU and frankly concluded that it is an indefensible and erroneous interpretation. They concede that the CWA and SMCRA “establish independent obligations” and that “the buffer zone language adopts a stricter standard than the 404(b)(1) guidelines.” *Id.* at 43-44.

The United States’ position, and the district court’s decision, on this issue are correct. The 404(b)(1) Guidelines prohibit “significantly adverse effects” on environmental resources, while the buffer zone rule prohibits mining activities that “adversely affect” environmental resources. 40 C.F.R. § 230.10(c); 38 C.S.R. § 2-5.2. “Adverse effects” are a broader set of effects than “significantly adverse effects.” By prohibiting only the latter, and not the former, the Guidelines use a weaker standard of protection than the standard in the buffer zone rule.

DEP does not argue that an “adverse effect” and a “significantly adverse effect” are the same. Instead, DEP combines an “adverse effect” with “material damage” from the buffer zone rule, and argues that the cumulative effect of both

the MOU. In any event, EPA intended the policy to be used to determine when it would object to State NPDES permits for fills under § 402. 728 F. Supp. at 1279. The Corps has never followed EPA’s policy in issuing § 404 permits for fills. See p. 27 above.

terms adds up to the same thing as “significant degradation” under CWA § 404. DEP Br. 35.

There are two defects with this argument. First, as a matter of construction, the rule prohibits activities that cause either an “adverse effect” or “material damage.” To grant a buffer zone variance, the Director of DEP must find that there are no adverse effects on stream flow, stream gradient, fish migration and related environmental values, and must also find there is no material damage to water quantity and quality. DEP’s interpretation—that the rule only prohibits adverse effects that cause material damage—is a distortion of the plain language of the rule. Second, as the United States has shown, courts have refused to read a “significance” threshold into statutes and regulations that do not contain one, and OSM specifically rejected such a threshold when it promulgated the buffer zone rule. U.S. Br. 44-45. The Guidelines therefore provide less protection than does the buffer zone rule.⁵

⁵DEP also argues that “the buffer zone rule was never meant to prohibit any de minimis adverse effect.” DEP Br. 35. Even if that were true, it would not mean that the rule only prohibits significant adverse effects. As the United States

recognizes, government agencies have some discretion to permit actions with only de minimis adverse effects, but can not permit actions with significant adverse effects unless there is some textual basis for that threshold in the statute or regulation. U.S. Br. 44, n.14. Thus, de minimis effects are less serious than significant effects.

Furthermore, the 404(b)(1) Guidelines have a narrower jurisdictional and geographic scope. The buffer zone rule protects the land within 100 feet on either side of the stream, including the “related environmental values” in that buffer strip. JA 570. OSM expressly added this language to allow the regulatory authority “to consider factors other than water quantity and quality in making buffer zone determinations.” 48 Fed. Reg. at 30316. As Interior’s 1979 EIS on its buffer zone rule explained, “[m]aintenance of buffer zones, particularly in the forested eastern area, will prevent increased water temperatures from incident solar radiation by maintaining vegetative cover and shade,” and “[t]his will protect fresh water fishes . . .” JA 1957. As Bragg’s biological expert explained, the forest canopy in the buffer strip not only shades the stream and buffers its temperature changes, but also provides leaf material that supports the biological productivity of its benthic community. JA 733-34, 738-40. He testified that “[t]he buffer zone helps to protect the ecological integrity of the stream,” and “[t]he function of shading is critical because these organisms live in a very limited temperature threshold.” JA 735. Congress expressly intended to protect these “related environmental values” when it enacted SMCRA. 30 U.S.C. § 1265(b)(24); see also W.Va. Code § 22-3-13(b)(24).

In contrast, the Guidelines only protect the aquatic resources in the stream

itself. EPA's and the Corps' jurisdiction under the Clean Water Act only extends to "waters of the United States," and not to adjoining dry land. 33 U.S.C. § 1362(7); U.S. v. Riverside Bayview Homes, 474 U.S. 121, 123, 126 (1985). The Corps has explained that:

The Corps regulations state that non-tidal waters of the United States, including perennial, intermittent and ephemeral streams, are waters of the United States up to the ordinary high water mark (see 33 CFR Part 328.4(c)). These three stream types typically have a bed and bank . . . If a landscape feature with a bed and bank does not have an ordinary high water mark, it is not a water of the United States unless it contains jurisdictional wetlands.

64 Fed. Reg. 39252, 39348 (July 21, 1999). Consequently, the area between the stream high water mark and the outer limit of the 100 foot buffer zone is protected by SMCRA, not by the CWA. Since the 404(b)(1) Guidelines do not apply to this area, they cannot substitute for findings under the state buffer zone rule for this area.

3. The District Court's Interpretation Is Not Barred By SMCRA § 1292(a)

DEP and Intervenors argue that SMCRA § 702(a), 30 U.S.C. § 1292(a), bars interpreting the buffer zone rule to impose stricter standards than those set forth under § 404 of the CWA. Int. Br. 49-50; DEP Br. 39-40. Section 1292(a) provides that nothing in SMCRA "shall be construed as superseding, amending, modifying or repealing" the CWA. DEP and Intervenors argue that, if the buffer zone rule is stricter than § 404, it would supersede, amend, modify or repeal the CWA, in

violation of § 1292(a). Id.

This argument is erroneous for three reasons. First, it is an indirect challenge to the validity of OSM's buffer zone rule and OSM's approval of the State rule, and therefore is being raised in the wrong court at the wrong time. This Court has consistently held that such arguments may not be raised in this Circuit. Clinchfield Coal Co. v. D.O.I., 802 F.2d 102 (4th Cir. 1986); Commonwealth of Virginia v. Watt, 741 F.2d 37 (1984), cert. dismissed sub nom. Virginia ex rel. Dept. of Conservation & Economic Development v. Clark, 469 U.S. 1198 (1985); Tug Valley Recovery Center v. Watt, 703 F.2d 796 (4th Cir. 1983); see also Pittston Coal Co. v. Babbitt, 66 F.3d 714 (4th Cir. 1995). Even if Appellants could attack the buffer zone regulation in this Court, the challenge is time barred. 30 U.S.C. § 1276(a)(1); Commonwealth of Virginia, supra; Coal Corp. Operating Co. v. Hodel, 669 F. Supp. 362 (W.D. Okl. 1987).

Second, as shown above, the dry land extending 100 feet on either side of the stream bank is covered by the buffer zone rule, but not by the 404(b)(1) Guidelines. For this area, there is no overlapping jurisdiction between the CWA and SMCRA. Consequently, there is no conflict between these two statutes for this area, and no issue under § 1292(a).

Third, for the area within the stream bank, both the buffer zone rule and the

404(b)(1) Guidelines require compliance with federal and state water quality standards. 38 C.S.R. § 2-5.2; 40 C.F.R. § 230.10(b)(1). OSM and EPA have determined that the federal and West Virginia buffer zone rules are not in conflict with those standards or with the Clean Water Act. SMCRA specifically provides that federal regulations and state program requirements cannot be approved by OSM unless it has “obtained the written concurrence” of EPA “with respect to those aspects” of federal regulations and a State program “which relate to air or water quality standards promulgated under the authority of the [CWA] and the Clean Air Act.” 30 U.S.C. §§ 1251(b), 1253(b)(2). When it enacted § 1292(a), Congress was concerned about direct conflicts between air or water quality standards, and it believed that the EPA concurrence procedure would be sufficient to address such conflicts. The 1977 House Report contains a section entitled “Relation of H.R. 2 to Other Laws” that states, in relevant part:

The committee felt that the requirement for the Secretary of the Interior to obtain the concurrence of the Administrator of the Environmental Protection Agency is necessary to insure that any environmental requirement of this act is consistent with the environmental programs and authorities of EPA and, in particular, those programs authorized under the Clean Air Act, as amended, and the Federal Water Pollution Control Act, as amended. Specifically, the Secretary must obtain the Administrator’s concurrence in the coal surface mining regulations and requirements under the environmental protection and State program approval provisions of the bill, as well as the final approval of any State program. The EPA has been directed by the Congress to insure the environmental well-being of the country. EPA has established water quality

standards, air quality standards, and implementation and compliance requirements for the coal mining and processing industry, and issues permits to the industry to insure appropriate pollution abatement and environmental protection. The committee concluded that because of the likeness of EPA's abatement programs and the procedures, standards, and other requirements of this bill, it is imperative that maximum coordination be required and that any risk of duplication or conflict be minimized.

H. Rep. No. 218, p. 142.⁶

Pursuant to this section, EPA gave written concurrence in 1983 that the federal buffer zone rule was consistent with water quality standards under the CWA. 48 Fed. Reg. at 30327. In 1990 and 1996, EPA gave written concurrence that West Virginia's buffer zone rule was consistent with water quality standards under the CWA. 55 Fed. Reg. at 21336-37; 61 Fed. Reg. at 6533. In EPA's 1990 concurrence, EPA specifically raised concerns about valley fills and insisted that nothing in the

⁶The earlier 1974 House Report on a similar but unenacted bill contained this same passage, but also added a statement recognizing that the CWA "can deal only with a part of the problem" and does not "prevent the variety of other damages to the land, the soil, the wildlife, and the aesthetic and recreational values that can result from coal mining." H. Rep. No. 1072, 93d Cong., 2d Sess. 124 (1974). To minimize those effects, the "broader authority . . . proposed [in the SMCRA bill] is necessary . . ." *Id.*

state's rules be deemed to allow filling activities that would violate water quality standards under the Clean Water Act:

EPA also expressed concern about the construction of instream waste treatment impoundments and the placement of valley fills, side hill fills, durable rock fills, refuse slurry impoundments and sedimentation ponds in waters of the United States. Although the State revised its regulations to alleviate some of EPA's earlier concerns, EPA's concurrence on the revised provisions is based upon the understanding that Subsection 14.5(b) of the State's rules, which requires compliance with applicable Clean Water Act requirements, takes precedence over any possible inconsistent applications of State regulations, which may appear to allow instream treatment activities to occur in waters of the United States in violation of the Clean Water Act. The Secretary acknowledges these concerns and emphasizes that section 1292(a)(3) of SMCRA provides that nothing in the Act shall be construed as superseding, amending, modifying or repealing the Clean Water Act, as amended, State laws enacted pursuant thereto, or other Federal laws relating to preservation of water quality. EPA itself noted that Subsection 14.5(b) of the proposed State rules requires compliance with the Clean Water Act. Furthermore, the Secretary is requiring the State to amend Subsection 5.2 to require that, before approving any mining within 100 feet of an intermittent or perennial stream, the Commissioner first find that such activities cannot cause or contribute to the violation of applicable State or Federal water quality standards. The Secretary is confident that his actions and the resolution of these issues by the State will eventually satisfy all of EPA's concerns. [emphasis added]

55 Fed. Reg. at 21337. Thus, since EPA provided its concurrence concerning the buffer zone rule, the requirements of § 702(a) were satisfied. In addition, OSM specifically found that valley fills must comply with state water quality standards and that the Clean Water Act's requirements "take[] precedence over any possible inconsistent applications of State regulations" that purport to authorize the filling of streams.

Thus, both the 404(b)(1) Guidelines and the buffer zone rule require compliance with state water quality standards. The district court's interpretation ensures compliance with those standards. In contrast, as we show below, Appellants' interpretation would allow violations of the anti-degradation requirements and waste assimilation prohibition in those standards. It is therefore Appellants' interpretation, not Bragg's, that would violate § 702(a). Under that section, the buffer zone rule cannot be read to allow placement of valley fills that would violate state water quality standards under the Clean Water Act.

In any event, regardless of water quality standards, the 404(b)(1) Guidelines do not establish any specific standards for stream flow, stream gradient, fish migration, and water quantity. Consequently, there is no inconsistency between the buffer zone rule and the Guidelines concerning those parameters.

Finally, as the United States has demonstrated in its brief, § 702(a) only applies to situations in which it is impossible to comply with both SMCRA and the CWA. U.S. Br. 45-49. Mining companies can comply with both statutes by only locating valley fills where they do not adversely affect perennial and intermittent streams.

Appellants' argument also wrongly presumes that § 404 is a one-way street and inflexibly prohibits states from restricting the placement of fill material.

However, that statute expressly allows states to enact additional controls on the placement of fill material. Section 404(t) provides that nothing in that section “shall preclude or deny the right of any State . . . agency to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State . . .” 33 U.S.C. § 1344(t). Courts have interpreted this section to allow states to impose additional conditions. Friends of the Earth v. United States Navy, 841 F.2d 927, 936-37 (9th Cir. 1988); United States v. Marathon Development Corp., 867 F.2d 96, 100 (1st Cir. 1989). Thus, § 404(t) gives states considerable freedom to regulate fill activities by applying additional requirements. One state has specifically prohibited the placement of waste fills in perennial streams. Tenn. Comp. R. & Regs. R. § 0400-3-7-.03(1)(d). Appellants may not use § 702(a) as an excuse for allowing State waters to be buried by valley fills that violate State water quality standards and other buffer zone variance requirements.

**C. The District Court Correctly Granted Summary Judgment on
Count 3: DEP Has Violated the Buffer Zone Rule by Authorizing
Valley Fills that Bury Perennial and Intermittent Streams**

**1. Valley Fills Indisputably Violate Six Requirements in the
Buffer Zone Rule**

The district court correctly held that the buffer zone rule does not authorize DEP to permit valley fills to bury perennial or intermittent streams. The district court

found that:

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.

JA 2841. These findings are undisputed and supported by the evidence. No party presented contrary evidence suggesting that valley fills do not have these effects on filled stream segments for any valley fills in West Virginia.⁷

Thus, valley fills cannot meet six requirements for a variance under the state buffer zone rule. They (1) adversely affect the normal flow or (2) gradient of the stream, (3) adversely affect fish migration or (4) related environmental values, and (5) materially damage the water quantity or (6) quality of the stream. 38 C.S.R. § 2-

⁷Contrary to the United States' position (U.S. Br. 50), Bragg presented evidence concerning the effects of more than just three valley fills. Bragg showed that hundreds of miles of streams have been buried by valley fills and dozens of buffer zone variances for valley fills have been approved. JA 53, #365, Ex. 2; JA 1930, 2112-14, 2162-92. Judge Haden relied on this evidence. JA 2804-05, 2844 n. 41.

5.2. The United States agrees that valley fills have these adverse environmental effects. U.S. Br. 50-51. Since it is undisputed that these requirements cannot be satisfied for stream segments filled by valley fills, DEP has a nondiscretionary duty under that rule, and under 30 U.S.C. § 1260(b) and 38 C.S.R. § 2-3.32.d, to withhold approval of permits for such fills.

DEP does not even address the district court's holding on this issue in its brief. Instead, DEP erroneously assumes that it can grant buffer zone variances "without requiring buffer zone variance findings" on these six requirements, so long as there is compliance with CWA §§ 401 and 404. DEP Br. 20. The district court's order therefore must be affirmed, because it is undisputed that valley fills cannot satisfy these six requirements, regardless of this Court's determination on the seventh requirement, *i.e.*, no violations of water quality standards.

2. Valley Fills Violate the Anti-Degradation Policy in West Virginia Water Quality Standards

The seventh finding required under the state buffer zone rule is that the disturbance "will not cause or contribute to violations of applicable State or Federal water quality standards." 38 C.S.R. § 2-5.2. The district court correctly held that valley fills violate the anti-degradation policy in West Virginia water quality standards, because they degrade the existing uses in the stream segment filled. JA

2842-45.

The Clean Water Act has contained an anti-degradation policy since 1972. 33 U.S.C. § 1313(d)(4)(B); PUD No. 1 v. Washington Dept. of Ecology, 511 U.S. 700, 718 (1994). Under this policy, “existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.” Id., quoting 40 C.F.R. § 131.12(a)(1). EPA has explained that this policy means that “no activity is allowable . . . which could partially or completely eliminate any existing use.” Id. at 718-19, quoting EPA, Questions and Answers on Antidegradation 3 (Aug. 1985).

West Virginia water quality standards contain an anti-degradation policy that mirrors the language in the federal rule. 46 C.S.R. § 1-4.1. Under those standards, the “existing use” of the intermittent and perennial streams of the State is, at a minimum, the “propagation and maintenance of fish and other aquatic life.” 46 C.S.R. §§ 1-2.5, 1-2.6, 1-6.1. Consequently, the partial or complete elimination of fish and aquatic life in a stream would violate the anti-degradation policy.

DEP, Intervenor and Amici argue that valley fills permitted under § 404 are exempt from compliance with these water quality standards. DEP Br. 25-26; Int. Br. 57-60; AEI Resources Amicus Br. 21-29. They argue that, by definition, all fills under § 404 necessarily replace an aquatic area with dry land, thereby degrading the

existing use of the area filled. Relying on EPA’s Water Quality Standards Handbook, they argue that water quality standards, like the anti-degradation policy, are satisfied so long as there is no “significant degradation” to the aquatic ecosystem. DEP Br. 26; Int. Br. 59.

This argument is erroneous. Section 404 activities must comply with state water quality standards. Congress expressly required that § 404 activities receive a certification from states under § 401 that water quality standards will be met. 33 U.S.C. § 1341. See Heck v. U.S., 134 F.3d 1468, 1471 (Fed. Cir. 1998); Friends of the Earth v. Hintz, 800 F.2d 822, 834 (9th Cir. 1986); Reichelt v. U.S. Army Corps of Engineers, 923 F. Supp. 1090, 1094 (N.D. Ind. 1996).⁸ The legislative history of this section states that “[t]he purpose of the certification mechanism provided in this law

⁸The § 404 authorization is contingent on DEP finding that the activity does not violate water quality standards. 33 C.F.R. § 330.4(c)(1)(state water quality certification is required before NWP is issued); id., § 325.2(b)(state water quality certification is required before individual § 404 permit is issued). Indeed, one of the State’s conditions to NWP 21, condition 13, requires that fill activities authorized pursuant to § 404 comply with water quality standards. JA 2269.

is to assure that Federal licensing and permitting agencies cannot override State water quality requirements.” S. Rep. No. 414, 92d Cong., 1st Sess. 69 (1971).

EPA’s 404(b)(1) Guidelines provide that “[n]o discharge of dredged or fill material shall be permitted if it: (1) causes or contributes . . . to violations of any applicable State water quality standard.” 40 C.F.R. § 230.10(b)(1). This requirement is independent of, and in addition to, the further requirement in those same Guidelines that “no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States.” *Id.*, § 230.10(c). Compliance with both prohibitions is required. See U.S. Br. 30. Intervenor’s are therefore misguided in assuming that they can “harmonize” these two prohibitions into one. Under their interpretation, violations of water quality standards would be allowed if they did not cause “significant degradation” to the aquatic ecosystem. Such an interpretation reads the first prohibition out of the regulations and makes it superfluous. “Regulations, like statutes, are interpreted according to canons of construction. Chief among these canons is the mandate that ‘constructions which render regulatory provisions superfluous are to be avoided.’” *Black & Decker Corp. v. C.I.R.*, 986 F.2d 60, 65 (4th Cir. 1993)(citations omitted). A regulation must be read “so as to give effect, if possible, to all of its provisions.” *Id.*

Even if there were an irreconcilable conflict between the anti-degradation

policy and § 404, EPA’s statement in its Water Quality Standards Handbook about how the issue should be resolved has two limitations that make it inapplicable here. EPA stated that it “interprets 40 C.F.R. 131.12(a)(1) of the antidegradation policy to be satisfied with regard to fills in wetlands if the discharge did not result in ‘significant degradation’ to the aquatic ecosystem as defined under Section 230.10(c) of the Section 404(b)(1) guidelines” (emphasis added). JA 1944, 2228.

First, by its terms, this interpretation only applies to “fills in wetlands,” not fills that bury entire segments of intermittent and perennial streams.⁹ Furthermore, the buffer zone rule accommodates the concern about a total prohibition on filling by allowing valley fills to be placed in ephemeral streams.¹⁰

⁹The Corps has developed extensive expertise in mitigating wetland loss by creating new wetlands to replace filled wetlands. E.g., Friends of Payette v. Horseshoe Bend Hydroelectric, 988 F.2d 989, 993 (9th Cir. 1993). New streams, however, cannot be created, so their loss cannot be mitigated. Thus, mitigation may work for wetlands, but not for streams.

¹⁰Even if it made sense to harmonize § 404 and the anti-degradation policy

by allowing *de minimis* harm to streams, it does not make sense to allow hundreds of miles of streams to be filled with billions of cubic yards of mining waste. There is no indication in either the CWA or SMCRA that Congress intended this extreme result.

Second, even if EPA’s interpretation applies to streams, it does not apply to “high quality” waters protected under § 131.12(a)(2).¹¹ High quality waters “exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water.” 40 C.F.R. § 131.12(a)(2). West Virginia water quality standards similarly define these waters as “waters whose quality is equal to or better than the minimum levels necessary to achieve the national water quality goals.” 46 C.S.R. § 1-2.8. EPA’s Handbook confirms the distinction between high quality and other waters, by assigning a higher level of protection to high quality waters:

If any wetlands were found to have better water quality than “fishable/swimmable”¹² [i.e., if they are high quality waters or better], the State would be allowed to lower the water quality to the no significant degradation level as long as the requirements of 131.12(a)(2) [46 C.S.R. § 1-4.1(b)] were followed. [emphasis added]

JA 1945, 2228. Section 131.12(a)(2) and 46 C.S.R. § 1-4.1(b) provide, in turn, that degradation may occur only after intergovernmental coordination procedures are

¹¹EPA’s interpretation applies to waters subject to § 131.12(a)(1). The quality of these waters has not achieved the statutory goal of supporting the propagation of aquatic life and contact recreation. JA 1942.

¹² According to the EPA Handbook, “[e]ven though the shorthand expression ‘fishable/swimmable’ is often used, the actual objective of the Act is to ‘restore and maintain the chemical, physical and biological integrity of our Nation’s waters’ (section 101(a) [33 U.S.C. § 1251(a)]). The term ‘aquatic life’ would more accurately reflect the protection of the aquatic community that was intended in section 101(a)(2) of the Act.” JA 1944.

followed and an opportunity for public comment and hearing is allowed. DEP admits in its brief that high quality waters can only be degraded “if the procedures of § 131.12(a)(2) are followed.” DEP Br. 26.

Furthermore, even if these procedures were followed, the limited degradation of high quality streams may not eliminate an existing stream use. West Virginia water quality standards provide that, even if limited degradation is allowed for high quality waters, “it shall not result in injury or interference with existing stream water uses . . .” 46 C.S.R. § 1-4.1.b. EPA’s Handbook confirms that water quality in high quality streams:

may not be lowered to less than the level necessary to fully protect the “fishable/swimmable” uses and other existing uses. This provision [40 C.F.R. § 131.12(a)(2)] is intended to provide relief only in a few extraordinary circumstances where the economic and social need for the activity clearly outweighs the benefit of maintaining water quality above that required for fishable/swimmable water, and both cannot be achieved. The burden of demonstration on the individual proposing such activity will be very high. In any case, moreover, the existing use must be maintained and the activity shall not preclude the maintenance of a “fishable/swimmable” level of water quality protection. [emphasis added]

JA 1946. Thus, even if non-high-quality streams may be buried by fill material, the uses of high quality waters may not be affected at all until the intergovernmental coordination and public participation procedures have been followed, and in no event may those waters be degraded below the “fishable/swimmable” level.

In this case, it is undisputed that West Virginia has allowed valley fills to be placed in high quality waters without following these intergovernmental coordination and public participation procedures. It is also undisputed that placing a valley fill in a high quality water destroys existing stream uses and destroys the ability of the stream segment filled to be fishable and swimmable. The district court so found. JA 2841, 2843-44. Not a single appellant has challenged the correctness of this finding. It is therefore clear that valley fills necessarily violate the antidegradation policy in West Virginia's water quality standards.

3. Valley Fills Violate the Waste Assimilation Prohibition in West Virginia Water Quality Standards

The district court also correctly found that valley fills violate federal and West Virginia water quality standards that prohibit the use of state waters for waste assimilation. 40 C.F.R. § 131.10(a); 46 C.S.R. § 1-6.1(a)("[w]aste assimilation and transport are not recognized as designated uses"). Under West Virginia water quality standards, certain characteristics of "industrial wastes . . . cause pollution and are objectionable in all waters of the State." 46 C.S.R. § 1-3.1. Industrial wastes mean "any . . . solid . . . or other waste substance . . . from or incidental to the development, processing or recovery of any natural resources . . ." W.Va. Code § 22-11-3(11). A DEP official admitted that mining spoil falls within this definition. JA 804.

Under West Virginia water quality standards, it is impermissible for industrial wastes to cause “deposits . . . on the bottom” of streams, “materials in concentrations which are harmful, hazardous or toxic to . . . aquatic life,” adverse alterations of “the integrity of the waters,” or “significant adverse impact to the chemical, physical, hydrologic or biological components of aquatic ecosystems.” 46 C.S.R. § 1-3.2. The district court correctly found that valley fills contain “industrial waste [that] is mortal to animal or aquatic stream life in the stream segment buried.” JA 2844. Judge Haden also correctly recognized the reality that “valley fills are waste disposal projects so enormous that, rather than the stream assimilating the waste, the waste assimilates the stream.” JA 2842. Valley fills therefore violate the waste assimilation prohibition.

DEP and Intervenors do not deny that valley fills bury a stream with waste. Instead, DEP argues that valley fills are exempt from the prohibition because they are not assimilated or transported by a stream, and instead stay in one place. DEP Br. 27. However, West Virginia’s prohibition covers both stationary and moveable waste in streams. It explicitly covers “deposits . . . on the bottom” of streams. 46 C.S.R. § 1-3.2.

DEP and Intervenors also argue that EPA has harmonized the waste assimilation prohibition, like the antidegradation policy, with § 404 and concluded

that waste can be disposed in streams if it does not cause “significant degradation.” DEP Br. 26-27; Int. Br. 58-59. However, DEP and Intervenors have no basis for claiming such an exception. The waste assimilation prohibition is separate and independent from the antidegradation policy. In its Water Quality Standards Handbook, EPA “interpret[ed] § 131.12(a)(1) of the antidegradation policy,” not § 131.10(a) of the waste assimilation policy. JA 1944, 1950. EPA did not find any conflict between § 404 and the waste assimilation provisions. There is no conflict. Indeed, the waste assimilation provisions are consistent with the Corps’ longstanding exclusion of waste from its definition of fill material under § 404. 33 C.F.R. § 323.2(e). The Corps therefore explicitly recognized that a waste prohibition is part of the § 404 program. In contrast, if DEP’s construction were accepted, it would create a conflict between § 404 and the water quality standards.

D. Appellants’ and Amici’ Other Defenses to Violations of the Buffer Zone Rule Are Without Merit

Unable to offer any factual arguments to excuse DEP’s violations of the buffer zone rule, Appellants and Amici instead offer several legal arguments and interpretations in an attempt to justify the placement of mining waste in streams.

1. The District Court’s Ruling Is Consistent With SMCRA’s Regulatory Program

DEP and Intervenors argue that the district court’s interpretation of the buffer

zone rule is inconsistent with the state and federal regulatory program. DEP Br. 14-20; Int. Br. 37-48. However, their proffered constructions of SMCRA are unsupportable. The buffer zone rule is fully consistent with the purpose and structure of SMCRA.

DEP and Intervenors argue that SMCRA “presumes” the use of large valley fills, because those fills are necessary for surface coal mining. DEP Br. 14-15, 40-41; Int. Br. 38. They claim that the district court’s interpretation must be wrong because it “effectively bans mining” by making it “a physical impossibility.” DEP Br. 40; Int. Br. 1-2, 27, 37-39.

This is simply not true. Appellants never even attempted to prove their apocalyptic claim that enforcement of the buffer zone rule would ban mining. After a year and a half of discovery and case development, Appellants dumped their cited affidavits on this point in the district court, “uninvited and in disregard of the briefing order,” on the day before Judge Haden granted the stay pending appeal. The affidavits contained no evidence of any kind on the issue of whether mining plans could be reconfigured to avoid intermittent and perennial streams. To gauge the impact of enforcement of the rule, Appellants would have had to identify the location where unprotected ephemeral streams end and protected intermittent streams begin. However, DEP never enforced the rule, and never developed a method to identify the

location of the ephemeral/intermittent line.¹³

¹³DEP also argues that, if valley fills violate water quality standards under the CWA, then all fills will be outlawed, even in ephemeral streams, because those standards apply to all state waters. DEP Br. 38, 41. However, Bragg's claims arise under the SMCRA buffer zone rule, which does not protect ephemeral streams. Bragg has not sought any relief under the CWA against fills in ephemeral streams.

Seventeen years ago, OSM rejected the argument that “Congress would have addressed the issue of buffer zones directly in the Act if it had intended to impose such a drastic requirement on operators.” 48 Fed. Reg. 30312. OSM found that the buffer zone rule was “authorized by Sections 102, 201, 501, 503, 504, 506, 507, 508, 510 and 517” of SMCRA. *Id.* OSM specifically rejected comments that the buffer zone rule was inconsistent with that Act and posed an “onerous and unnecessary burden” on coal operators. *Id.*¹⁴ OSM also found that the reference in the rule to protection of water quality standards “would ensure that the physical and chemical integrity of the stream will be maintained in accordance with the standards of the

¹⁴Intervenors’ and DEP’s arguments to the contrary are tantamount to an attack on the validity of the rule, and therefore are time-barred and raised in the wrong court. Clinchfield; 30 U.S.C. § 1276(a)(1).

Clean Water Act.” 47 Fed. Reg. 13467 (March 30, 1982).¹⁵

When it enacted SMCRA, Congress found that surface coal mining operations “result in disturbances of surface areas . . . by polluting the water, 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). The first stated purpose of SMCRA is “to protect society and the environment from the adverse effects of surface coal mining operations.” 30 U.S.C.

¹⁵The only evidence that Intervenors muster in support of their position is an isolated sentence in an OSM preamble that assumes without analysis that excess spoil fills may sometimes be placed in intermittent and perennial streams in Kentucky. Int. Br. 46. OSM made the statement in passing while discussing the different subject of stream diversions, where stream segments are moved to preserve environmental quality, not buried by waste. Nothing in the cited portion of OSM’s preamble expressly or implicitly authorizes any SMCRA regulatory authority to approve valley fills that violate state water quality standards or buffer zone rules. Passing statements in a preamble’s discussion of one regulation cannot override the plain language of a different rule. Pennsylvania v. U.S. Dept. of Health & Human Serv., 101 F.3d 939, 944 n.4 (3rd Cir. 1996).

§ 1202(a). The House Report on the 1977 bill stated:

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

H. Rep. No. 218, p. 96. The environmental standards in SMCRA and the state program prescribe that mining operations must “minimize the disturbances to the prevailing hydrologic balance at the mine-site,” and to “minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values.”

30 U.S.C. § 1265(b)(10), (b)(24); W.Va. Code § 22-3-13(b)(10), (b)(24).

Furthermore, although Congress authorized mountaintop removal as a permissible mining method in 1977, it did not envision that this practice would result in the wholesale and permanent destruction of streams. One of the conditions for obtaining a mountaintop removal variance from the approximate original contour requirements in SMCRA is that “no damage will be done to natural watercourses.”

30 U.S.C. § 1265(c)(4). Filling hundreds of miles of streams with valley fills is flatly inconsistent with this requirement.

Nevertheless, DEP and Intervenors argue that DEP’s regulations implicitly authorize the construction of valley fills in all streams. DEP Br. 15; Int. Br. 38.

They argue that, to “harmonize” the regulations, the buffer zone rule must be interpreted to allow valley fills in intermittent and perennial, as well as ephemeral, streams. Id.

DEP and Intervenors first rely on the State regulation concerning “natural drainways,” which provides:

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

38 C.S.R. § 2-5.1. The term “natural drainway” is defined as “any natural watercourse which may carry water to the tributaries and rivers of the watershed.”

Id., § 2-2.77. DEP and Intervenors argue that this regulation allows placement of overburden in natural drainways, that intermittent and perennial streams are natural drainways, and thus valley fills may be placed in those streams. DEP Br. 15-17; Int. Br. 38.

The district court correctly rejected this argument. Its decision is based on a straightforward reading of the plain language of the regulations. According to the regulatory definition, natural drainways “carry water to the tributaries and rivers of the watershed.” JA 2817, quoting 38 C.S.R. § 2-2.77 (emphasis added). Thus, natural drainways do not include a watershed’s tributaries and rivers. Instead, they

are the smaller water courses that feed into those tributaries and rivers. The regulations further support the district court's conclusion that these "tributaries" do not include intermittent and perennial streams. DEP's regulations provide separate definitions for natural drainways, intermittent streams, and perennial streams. 38 C.S.R. §§ 2-2.69, 2-2.77, 2-2.86. If those two types of streams were included in natural drainways, there would be no need to have these separate definitions.

DEP's interpretation of "natural drainways" is not based on the plain language and structure of the regulations, but instead on "common parlance" and usage by hydrological experts. DEP Br. 15-16. But, as the district court correctly noted, these secondary sources are irrelevant: "'natural drainway' is a defined term with legal implications within the regulations and its explicit definition must be respected." JA 2817, n.18. The district court's interpretation is faithful to the plain language of the regulations. DEP's interpretation is not.

The district court also correctly noted that the structure of the regulations provides different rules for "natural drainways" than for intermittent and perennial streams. JA 2818. Overburden is allowed in natural drainways under two conditions: if it does not materially increase the sediment load or materially affect stream quality. 38 C.S.R. § 2-5.1. In intermittent and perennial streams, no overburden is allowed unless the seven specific findings for a buffer zone variance

are made. Id., § 2-5.2. The second rule is more specific and limiting than the first. It applies to a different category of waterbodies and imposes more specific requirements. Even if natural drainways included intermittent and perennial streams, those streams would be subsets of natural drainways. Section 2-5.1 does not authorize spoil placement in all natural drainways. When read together, that section and the buffer zone rule only authorize spoil placement in natural drainways that are not intermittent or perennial streams. Thus, the more specific protections for intermittent and perennial streams in the buffer zone rule control the less specific rule in § 5.1. Warren v. North Carolina Dept. Of Human Resources, 65 F.3d 385, 390 (4th Cir. 1995)(specific statutory provision controls over a more general one).

In contrast, DEP's and Intervenors' interpretation would make the buffer zone rule superfluous, by allowing unlimited amounts of overburden to be placed in any stream without obtaining a variance. “[C]onstrutions which render regulatory provisions superfluous are to be avoided.” Black & Decker Corp. v. C.I.R., 986 F.2d at 65. A regulation must be read “so as to give effect, if possible, to all of its provisions.” Id. DEP's and Intervenors' reading of § 5.1 and the buffer zone rule creates unnecessary conflict between the two regulations. The regulations are properly harmonized by reading § 5.1 and § 5.2 to authorize only those disturbances to natural watercourses that would not lead to violations of the buffer zone rule. In

addition, DEP's and Intervenors' reading would make the state buffer zone rule less stringent than the federal rule—a result that is prohibited by 30 U.S.C. § 1255.

Second, DEP argues that Section 515(b)(22) of SMCRA and the state program authorize the disposal of excess spoil in areas containing “springs, natural water courses or wet weather seeps,” and this phrase should be read to include intermittent or perennial streams. DEP Br. 17, citing 30 U.S.C. § 1265(b)(22)(D); W.Va. Code § 22-3-13(b)(22). However, this argument is inconsistent with OSM's interpretation of SMCRA in the buffer zone rule. Congress gave OSM the authority to issue rules “as may be necessary to carry out the purposes and provisions of” SMCRA. 30 U.S.C. § 1211(c)(2). OSM interpreted Section 515(b) when it issued the buffer zone rule and specifically found that the rule is consistent with Sections 515(b)(10) and (b)(24). 48 Fed. Reg. 30312; 30 U.S.C. § 1265(b)(10), (b)(24). Those two subdivisions specifically require that disturbances to the hydrological balance, water quality, water quantity, fish, wildlife, and related environmental values be minimized. When it promulgated the buffer zone rule, OSM harmonized these environmental requirements with the spoil placement provisions in subdivision (b)(22), and determined that spoil may be placed in natural watercourses as long as they are not intermittent or perennial streams.

Third, DEP and Intervenors argue that sedimentation ponds, like valley fills,

bury portions of streams, but are nevertheless expressly authorized. DEP Br. 18; Int. Br. 44. However, sedimentation ponds, unlike valley fills, are not used to dispose of mining waste and do not eliminate long stream segments. Instead, like buffer zones, they are used to control pollution caused by stormwater runoff from the mine site. OSM stated in its 1983 preamble to the buffer zone rule that “stream buffer zones are an effective method, in conjunction with sedimentation ponds and other measures, to prevent excessive sedimentation of streams by runoff from disturbed surface areas.” 48 Fed. Reg. 30312 (emphasis added). Thus, both sedimentation ponds and stream buffer zones function to protect the environment. Valley fills do not.

In addition, in this same preamble, OSM rejected a comment that it should allow “significant disturbances” in the buffer zone in order to construct sedimentation ponds. Id. at 30313. Instead, OSM concluded that “[u]nder final § 816.57(a), the use of erosion and drainage-control measures near the stream will be allowed if they are approved by the regulatory authority in accordance with the specified requirements.”

Id. Thus, according to OSM, sedimentation ponds that are within the 100-foot buffer zone must meet the buffer zone variance requirements.¹⁶

¹⁶DEP argues that, under the district court’s ruling, no sediment pond can qualify for a variance because, like valley fills, they bury portions of a stream with fill. DEP Br. 18. However, the court’s injunction only applies to “disposal of excess spoil . . . for the primary purpose of waste disposal.” JA 2845. Sediment ponds do not contain excess spoil, because they are “constructed before beginning

Fourth, DEP and Intervenors argue that OSM’s regulations allow intermittent and perennial streams to be diverted. DEP Br. 18; Int. Br. 44, citing 30 C.F.R. § 816.43(b). However, a diversion, unlike a valley fill, does not permanently destroy a stream. Like the buffer zone rule, OSM’s rule on diversions requires a finding that they “will not adversely affect the water quantity and quality and related environmental values of the stream.” Id., § 816.43(b)(1).

Fifth, DEP and Intervenors argue that the federal regulation governing rock-core chimney drains depends on the assumption that fills will be built in areas with intermittent or perennial stream flow. DEP Br. 18; Int. Br. 42-43. That rule provides:

A rock-core chimney drain may be used in a head-of-hollow fill, instead of the underdrain and surface diversion system normally required, as long as the fill is not located in an area containing intermittent and perennial streams.

30 C.F.R. § 816.72(b). This regulation also states that “[i]n no case may intermittent

any surface mining activities,” 30 C.F.R. § 816.46(b)(3), and “spoil” is defined as “overburden that has been removed during surface coal mining operations,” id., § 701.5. Sedimentation ponds are constructed to remove waste from streams, not for the primary purpose of waste disposal. In addition, there is no evidence in the record that sediment ponds can never qualify for a buffer zone variance.

or perennial streams be diverted into the rock core.” Id., § 816.72(b)(3). Intervenors claim that if the buffer zone rule already prohibited all valley fills in such streams, these regulations concerning rock-core chimney drains would be superfluous. Int. Br. 43.

The district court correctly rejected this argument. JA 2819. This regulation only prescribes when and where rock-core chimney drains in valley fills are prohibited. It does not consider other kinds of drains and does not affirmatively authorize valley fills in intermittent and perennial streams. JA 2820. DEP and Intervenors are attempting to use a negative inference from the rock-core chimney drain rule (i.e., that fills not expressly prohibited are implicitly authorized) to override the plain language of the buffer zone rule and allow valley fills to bury hundreds of miles of streams. Faced with a choice between the two, the plain language of the buffer zone rule is controlling. U.S. v. Ahmad, 213 F.3d 805, 810 (4th Cir. 2000)(using a negative inference from a secondary source to override the plain language of a statute is a “perilous course” at odds with principles of statutory construction).

Sixth, DEP argues that, because the West Virginia Legislature or Congress expressly prohibited mining activities in specific locations, they must have meant to allow valley fills in all locations, including intermittent and perennial streams,

because there is no express prohibition against them. DEP Br. 19. However, Congress gave OSM rule-making authority to implement SMCRA (30 U.S.C. § 1211(c)(2)), and OSM exercised that authority in the buffer zone rule to prohibit disturbances in intermittent and perennial streams that have adverse environmental effects. The district court’s decision is based on the plain language of that Congressionally-authorized rule and its counterpart in the federally-approved state program.

Seventh, Intervenors argue that the federal buffer zone rule, 30 C.F.R. § 816.57, allows the Director to grant variances for mining “through” streams. Int. Br. 41. Intervenors argue that, since mining through a stream will necessarily affect a segment of the stream adversely, it is reasonable to infer that the buffer zone rule allows disturbances to stream segments and only considers adverse impacts on the stream as a whole. Id. at 41.

However, valley fills are an entirely different type of activity than mining through a stream. Valley fills permanently fill a stream with mining waste, while mining activities temporarily disrupt and divert a stream bed to recover coal. The stream must be diverted during mining and restored after mining is completed. 30 C.F.R. §§ 816.57(a)(2), 816.43(b). See 44 Fed. Reg. 15177, JA 1933. The diversion is a temporary disruption, and the diversion channel must “be designed and

constructed so as to restore and approximate the premining characteristics of the original stream channel . . . to promote the recovery and the enhancement of the aquatic habitat.” 30 C.F.R. § 816.43(a)(3). Thus, when mining is permitted through a stream, the mine operator must follow rules designed to preserve the stream. The result is no net loss of streams. In contrast, valley fills permanently destroy long segments of streams.

Eighth, Intervenor argues that state and federal mining regulations contemplate placement of valley fills in streams because those fills are required to contain drainage systems. Int. Br. 38, 42. However, the buffer zone rule explicitly contemplates placement of fills in ephemeral streams. Thus, it is unremarkable that drainage systems are required in such fills, while similar fills are prohibited in downstream intermittent and perennial segments.

Thus, the buffer zone rule is not implicitly overruled by other sections of the State and federal Surface Mining Acts and their implementing regulations.

2. To the Extent Necessary to Support Her SMCRA Claims, Bragg Submits that the District Court Correctly Analyzed the Corps’ Authority Under § 404 to Regulate Valley Fills

Judge Haden held that the Corps does not have jurisdiction under § 404 of the CWA to authorize the discharge of the mining spoil into waters of the U.S. because such waste, dirt, and rock do not meet the Corps’ definition of “fill material” under

33 C.F.R. § 323.2(e). JA 2829. The District Court's holding was based not only on the plain language of the regulation, but also on its earlier decision in West Virginia Coal Ass'n v. Reilly, 728 F. Supp. 127 (S.D.W.Va. 1989), and this Court's unpublished opinion affirming that decision, 932 F.2d 964, 1991 WL 75217 (4th Cir. 1991). In her December 1998 Settlement Agreement with the Corps, Bragg agreed that she would not challenge the Corps' authority under CWA § 404 to regulate valley fills based on the Corps' current definition of fill material, but reserved the right to challenge the legality of valley fills under SMCRA. JA 286, 292.¹⁷ To comply with this Agreement, Bragg did not raise this issue in her motion for summary judgment against DEP on her buffer zone claims under SMCRA and did not seek any relief against the Corps. Rather, Appellants raised the § 404 issue in response to that motion and in support of the Buffer Zone MOU. JA 53, #370, pp. 12-15. Judge Haden then addressed that issue to support his ruling that the Corps

¹⁷Thus, there is no inconsistency between the Settlement Agreement and Bragg's challenge to DEP's application of the buffer zone rule. The Settlement Agreement addressed the Corps' issuance of § 404 permits, and preserved Bragg's right to litigate her buffer zone claims, which involve DEP's approval of SMCRA permits. JA 286, 292. The two permits involve separate legal requirements.

lacked authority under § 404 to enter into the Buffer Zone MOU.

DEP, Intervenors and Amici argue in this Court that Judge Haden misconstrued the Corps' authority to regulate valley fills under § 404, while the Corps argues that this Court need not reach this issue. DEP Br. 28-30; Int. Br. 51-57; U.S. Br. 27-29. To the extent that it is necessary to respond to Appellants' argument and to support Judge Haden's ruling against DEP on her SMCRA claims, Bragg agrees that the Corps lacks jurisdiction to authorize the discharge of waste, dirt and rock for the primary purpose of waste disposal.

In addition, Bragg disagrees with the Corps' and Intervenors' argument that Judge Haden resolved the Corps' CWA authority to regulate valley fills in his June 1999 order, when he approved the December 1998 Settlement Agreement between Bragg and the Corps. U.S. Br. 26, 30-31; Int. Br. 52. A district court's role in reviewing a proposed settlement does not extend to resolving disputed issues of law or jurisdiction. "The trial court in approving a settlement need not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy . . ." Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117, 1126 (D.C. Cir. 1983)(quoting Metropolitan Housing Development Corp. v. Village of Arlington Heights, 616 F.2d 1006, 1014 (7th Cir. 1980); Cronin v. Browner, 898 F. Supp. 1052, 1058 (S.D.N.Y. 1995). In the December 1998 settlement, Bragg agreed

not to question the Corps' jurisdiction under § 404 to regulate valley fills, but did not concede that the Corps' position on this issue was correct. When Judge Haden approved the agreement, he made no ruling on this specific legal issue. Instead, he only "reviewed the Agreement as a whole," and decided that it was "fair, adequate, reasonable, and faithful to the environmental statutes under which the litigation was brought." 54 F.Supp.2d at 670.

II. The District Court Had Jurisdiction to Consider Bragg's Claims

Appellants make two jurisdictional arguments: (1) that the citizen suit provision of SMCRA does not authorize Bragg's suit; and (2) that the Eleventh Amendment bars Bragg's suit. The statutory issue should be decided before the Eleventh Amendment issue. Vermont Agency of Natural Resources v. United States ex rel. Stevens, 120 S.Ct. 1858, 1866 (2000).

A. Bragg's Claims Are Authorized Under § 1270(a)(2)

1. Bragg's Claims Arise Under Federal, Not State, Law

DEP, Intervenors, and Amici argue that the district court lacked jurisdiction over Bragg's buffer zone claims because DEP's duties arise solely under state law. DEP Br. 56-59; Int. Br. 28-29. However, as the United States has shown in its brief, the plain language and structure of SMCRA confirm repeatedly that the federally-approved provisions of a state program arise under federal, not state, law. U.S. Br.

35-37.¹⁸

Congress authorized citizens to bring a citizen suit in federal court to enforce the “failure to perform any act or duty under this Act which is not discretionary . . . with the appropriate State regulatory authority.” 30 U.S.C. § 1270(a)(2)(emphasis added). One of the State regulatory authority’s nondiscretionary duties “under this Act” is to properly administer the permitting program. Section 510(b) of SMCRA provides that “[n]o permit . . . application shall be approved unless the application affirmatively demonstrates and the regulatory authority finds. . . that all the requirements of this Act and the State or Federal program have been complied with.” 30 U.S.C. § 1260(b)(emphasis added).

¹⁸OSM’s interpretation of this section is entitled to respect, since it is the agency charged with administering SMCRA. Christensen v. Harris County, 120 S.Ct. 1655, 1663 (2000).

Thus, section 1260(b) imposes an explicit, nondiscretionary, federal statutory duty on States that choose to submit a State program for federal approval. Those states must withhold approval of any permit that does not comply with “the requirements of this Act and the State or Federal program.”¹⁹ 30 U.S.C. § 1260(b). The federal law is SMCRA. The implementing regulations are in the Federal program or the approved State program. Compliance with both SMCRA and its implementing regulations is required. The duties in those programs therefore arise “under this Act” and are enforceable in a federal citizen suit under § 1270(a)(2).

West Virginia’s federally-approved program contains the same nondiscretionary duty that “no permit application . . . shall be approved unless the application affirmatively demonstrates and the Director finds in writing . . . [that] the applicant has complied with all requirements of the [state] Act and these regulations.” 38 C.S.R. § 2-3.32.d. DEP’s duties under the buffer zone rule are in a State regulation that is part of West Virginia’s federally-approved State program under

¹⁹Contrary to Amicus State of Virginia’s argument (Va. Amicus Br. 12), this clear and unambiguous duty operates directly on state officials in issuing permits. It is not merely a requirement at the “programmatically” level for approval of state permit programs.

SMCRA. Bragg alleges that DEP has violated both its federal statutory duty, and its duty under the federally-approved West Virginia buffer zone rule. JA 1793-97.

Multiple provisions in SMCRA demonstrate that the federally-approved provisions of a state program arise under federal, not state, law. Congress defined a “state program” as “a program established by a State . . . in accord with the requirements of this Act and regulations issued by the Secretary pursuant to this Act.” 30 U.S.C. § 1291(25). A State that submits a State program for approval must “demonstrate[] that such State has the capability of carrying out the provisions of this Act . . .” *Id.*, § 1253(a). To do this, it must enact a law that regulates surface coal mining “in accordance with the requirements of this Act,” *id.*, § 1253(a)(1) and (a)(3), and must establish a permit system “meeting the requirements of this title,” *id.*, § 1253(a)(4). Once the State agency’s program is federally approved, it becomes the “State regulatory authority,” which is defined as “the department or agency in each State which has primary responsibility at the State level for administering this Act.” *Id.*, § 1291(26)(emphasis added). The “regulatory authority” is further defined to mean “the State regulatory authority where the State is administering the Act under an approved state program or the Secretary where the Secretary is administering this Act under a Federal program . . .” *Id.*, § 1291(22). These provisions demonstrate that Congress defined the state role as administering the federal law of SMCRA

through the federally-approved state program. A state that chooses to submit such a program for federal approval becomes, in effect, a “‘deputized’ federal regulator.” See MCI Telecommunications Corp. v. Illinois Bell Telephone Co., 2000 U.S. App. LEXIS 17739, at *55 (7th Cir., July 24, 2000).

In Hodel v. Virginia Surface Mining & Reclamation Ass’n, 452 U.S. 264 (1981), the Supreme Court endorsed this interpretation and rejected a constitutional challenge to SMCRA based on the Tenth Amendment. The Court stated that SMCRA “establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory program . . .” Id. at 289. The Court rejected the claim that these federal minimum standards had an impermissible coercive effect on State sovereignty. It held that SMCRA was constitutional even though it “prescribes federal minimum standards governing surface coal mining, which a State may either implement itself or else yield to a federally administered program.” Id.

Later, in Printz v. United States, 521 U.S. 898, 925 (1997), the Court characterized Hodel as a decision in which “we sustained statutes against constitutional challenge only after assuring ourselves that they did not require the States to enforce federal law.” Amicus State of Virginia relies on this language as a confirmation that federally-approved state programs do not arise under federal law.

Va. Amicus Br. 5. However, the Court’s next sentence, which Virginia ignores, states that SMCRA “made compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field . . .” 521 U.S. at 925. See also, New York v. U.S., 505 U.S. 144, 168 (1992)(SMCRA is a “permissible method of encouraging a State to conform to federal policy choices”). Thus, SMCRA does not require states to enact or administer a federal regulatory program, but allows states to administer SMCRA if they choose to do so. Thus, if a state elects to participate as a “state regulatory authority,” SMCRA requires state officials to comply with both the requirements of SMCRA and with their federally-approved state programs to ensure compliance with the full mandate of federal law. That federal law includes the duties that Bragg seeks to enforce in this case.

To avoid a federal program, West Virginia decided to submit for approval its own state program meeting federal standards. West Virginia also consented to follow and enforce its federally-approved state program. It is constitutionally permissible for Congress to enforce its minimum federal standards by authorizing citizens to enforce those standards against a noncompliant state official in federal court. MCI, *supra*; Michigan Bell Telephone Co. v. Climax Telephone Co., 202 F.3d 862, 868 (6th Cir. 2000).

In In Re: Permanent Surface Mining Regulation Litigation, 653 F.2d at 518-

19, the D.C. Circuit described the federal-state relationship under SMCRA in more detail:

Congress chose a special kind of regulatory structure for the Surface Mining Act, in which the federal government shares administrative responsibility with the states. Rather than reposing all decisionmaking power with the Secretary of Interior, Congress afforded the states an opportunity to propose regulatory programs of their own, conforming to the requirements of the Act and regulations promulgated by the Secretary. Under a state program, the state makes decisions applying the national requirements of the Act to the particular local conditions of the state.

* * *

In an approved and properly enforced state program, the state has the primary responsibility for achieving the purposes of the [federal] Act. . . . As long as the state properly enforces its approved program, it is the exclusive “on the scene” regulatory authority. It is, essentially, the entity that applies the general standards of the Act to the particular geographical and geological circumstances of the state.

The legislative history of SMCRA supports this interpretation. The original impetus for enactment of a federal surface mining law was the inadequacy of state regulation of surface mining. The first House report in 1974 on the proposed bill cited the “disappointing record” and “failure” of past State regulation of surface coal mining. H. Rep. No. 1072, 93d Cong., 2d Sess. 61 (1974). It stated that “[o]nly Federal regulation establishing uniform requirements can deal with this situation” and concluded that “Federal grants to the States and Federal enforcement standards uniformly applied to provide the necessary minimum protection of environmental values and off-site properties will ensure continuance of coal surface mining to meet

the energy needs of the Nation, and will also eliminate many if not all of the regulatory problems which have plagued the States and frustrated citizens of the coal-producing regions.” *Id.* at 63. This theme of federal uniformity carried through the next three Congresses, culminating in a statement in the 1977 Conference Report on Section 503 of the final bill, the section on approval of permanent state regulatory programs:

The conferees agreed to clarify the language of the bill dealing with the consistency of state laws and regulations with Federal laws and the Secretary’s regulations. They adopted the principle of the Senate amendment that an approved program requires (1) a State law consistent with the Federal law and (2) state rules and regulations consistent with the Secretary’s regulations. The Conference Report retains the basic principle that the Federal law and regulations are minimum standards which may be exceeded by the States.

H. Rep. No. 493, 95th Cong., 1st Sess. 102 (1977).

Consistent with this principle, SMCRA ensures the supremacy of federal law in regulating surface coal mining. Unless and until a state program is federally approved, the federal program controls. 30 U.S.C. § 1252(e). State programs may be approved only if they are consistent with minimum federal standards. *Id.*, § 1253(a).

State laws that are inconsistent with SMCRA are pre-empted by federal law, unless they are more stringent. *Id.*, § 1255. State laws are not effective or enforceable under SMCRA until they are approved by OSM. 30 C.F.R. § 732.17(g); State of W.Va. ex rel. W. Va. Highlands Conservancy v. W.Va. Div. of Env. Protection, 191

W.Va. 719, 724 n.23 (1994). If there is conflict between a provision in a state program approved by OSM and a federal regulation promulgated by OSM under SMCRA, the federal regulation is controlling. Canestraro v. Faerber, 179 W.Va. 793, 795 (1988). If a State fails to enforce its federally-approved program, OSM may enforce that program by issuing a notice of violation and cessation order to the violator. 30 U.S.C. §§ 1254(b), 1271(b); 30 C.F.R. § 843.12. Thus, SMCRA authorizes direct federal intervention and enforcement of state programs if state regulators do not act. This demonstrates that a state program implements federal law, because federal officials have no authority to enforce state law. See Indiana Coal Council v. Lujan, 774 F. Supp. 1385, 1400-02 (D.D.C. 1991)(state permit decisions under SMCRA are federal undertakings).

Appellants rely on language in Section 503 indicating that states with federally-approved programs assume “exclusive jurisdiction” for regulation of surface mining in the state. Int. Br. 10-11, 33; WLF Amicus Br. 11. According to the D.C. Circuit, under an approved and properly enforced state program, the state agency is the exclusive “on the scene” regulatory authority. In Re Permanent Surface Mining Regulation Litigation, 653 F.2d at 519. But Appellants have confused the responsibilities of the regulated industry under a state program with the responsibilities of the regulatory authority under federal law.

The regulated industry in a state with a federally-approved program must comply with state laws and regulations enacted to implement SMCRA. The legislative history indicates that Congress used the “exclusive jurisdiction” concept to tell the regulated industry which laws it should follow to determine compliance. The 1977 Senate Report states:

Promulgation of a Federal program gives the Secretary *exclusive jurisdiction* for regulation of surface mining operations in the State in those areas not being adequately enforced by the State. Surface mine operators need to know which regulations—Federal or State—they must follow at any given point in time.

[emphasis in original]

S. Rep. No. 128, p. 72. Thus, “exclusive jurisdiction” provides a guide to permittees. It tells permittees which program (state or federal) is controlling. Permittees need only look to one set of regulations in order to determine whether compliance has been achieved. The “exclusive jurisdiction” language does nothing more.

At the same time, the state regulators under a federally-approved state program have a mandatory duty to conform the administration of that state program to the federal Act. Under the federal Act, the state regulatory authority cannot approve a mining permit unless “all the requirements of this Act and the State or Federal program have been complied with.” 30 U.S.C. § 1260(b). Similarly, under OSM’s

federal regulations, “States with an approved State program shall implement, administer, enforce and maintain it in accordance with the Act, this chapter [30 C.F.R. Parts 700-955], and the provisions of the approved State program.” 30 C.F.R. § 733.11. Thus, a federally-approved state program implements federal law.

West Virginia’s federally-approved program, and revisions thereto, are also codified in the Code of Federal Regulations. 30 C.F.R. Part 948. The federally-approved state programs for 36 States under SMCRA fill over three hundred pages in Subchapter T of Title 30 of those regulations. That Subchapter provides that “[t]he program applicable within each State is codified in the part for that State.” 30 C.F.R. § 900.11 (emphasis added). The part containing the West Virginia approved program fills over a dozen pages and “contains all rules applicable only within West Virginia that have been adopted under [SMCRA].” *Id.*, § 948.1. There would be no need to fill the C.F.R. with this material if federally-approved programs were considered to be purely state law.

A similar issue concerning incorporation of state standards into federal law arose in Arkansas v. Oklahoma, 503 U.S. 91 (1992). An EPA regulation under the Clean Water Act requires a water discharge permit issued under that Act to comply “with the applicable water quality requirements of all affected States.” 40 C.F.R. § 122.4(d). 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. [footnote omitted]

503 U.S. at 110. It follows a fortiori that 30 U.S.C. § 1260(b) and 30 C.F.R. § 733.11 effectively incorporate into federal law those portions of a state surface mining program that OSM has approved under SMCRA.

This Court’s decision in Molinary v. Powell Mountain Coal Co., Inc., 125 F.3d 231 (4th Cir. 1997), confirms this conclusion. In that case, this Court held that State-promulgated regulations that comprise a federally-approved State program under SMCRA are “issued pursuant to” that Act and therefore are federally enforceable. 125 F.3d at 235-37. Like the present case, Molinary involved a citizen suit under SMCRA. This Court analyzed “whether Virginia [State mining] regulations violated by Powell Mountain were issued ‘pursuant to’ [SMCRA], such that the district court had subject matter jurisdiction over the complaint under § 520(f)” of SMCRA. Id. at 235. This Court held that they were, because “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 § [127]0(f), ‘pursuant to’ [SMCRA].” Id. at 236. Molinary applies with full force here. If the requirements in a federally-approved State program are federal law for mine

operators, they must also be federal law for the state agency that issued those requirements to regulate those operators.²⁰

²⁰This case involves § 1270(a)(2) of SMCRA, rather than § 1270(f). However, there is no meaningful difference between these two subsections of the citizen suit provision. The words “issued pursuant to this Act” in § 1270(f) are functionally the same as the phrase “under this Act” in § 1270(a)(2). In both cases, the legal requirements of a federally-approved State program must conform to federal law, and therefore arise under federal law.

The relationships among the federal government, the state regulators and the regulated industry are clear and consistent. In a state with a federally-approved program, the regulated industry looks exclusively to the federally-approved state program for its compliance obligations. In a state with a federal program, the regulated industry looks exclusively to the federal program for its compliance obligations. Under either program, state or federal regulators look to the federal Act for their program administration obligations. Thus, the regulators are implementing federal law, and the regulated are following federal law, either directly under a Federal program or indirectly under a federally-approved state program. No one may “opt out” of federal law and follow purely state law. Indeed, during its three-year consideration of SMCRA prior to enactment, Congress twice rejected a “states’ rights amendment” that would have allowed states with comparable laws to “opt out and run their own program.” 123 Cong. Rec. 15581-90 (1977)(Sen. Danforth); 121 Cong. Rec. 6185-87 (1975). Cf. U.S. v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 43-46 (1st Cir. 1991)(approved state program under RCRA does not displace federal program).²¹

²¹For these reasons, Haydo v. Amerikohl Mining, Inc., 830 F.2d 494 (3rd Cir.

1987), on which DEP relies (DEP Br. 52), and its recent progeny, Pennsylvania Federation of Sportsman's Clubs v. Seif, Civil No. 1:CV-99-1791 (M.D. Pa., July 6, 2000), are wrongly decided. In Molinary, this Court correctly declined to follow Haydo. 125 F.3d at 236, n.5.

When state or federal regulators violate SMCRA, Congress explicitly made them accountable to citizens in federal court. In § 1270(a)(2), Congress authorized citizens to force state or federal regulators to comply with their duties “under this Act.” In enacting this section, Congress necessarily assumed that State regulatory authorities may violate their duties after their State programs were approved, and that citizens needed a remedy to stop those violations. Otherwise, there was no reason to include the phrase “State regulatory authority” in that section. If Intervenor’s theory were correct, and states with federally-approved programs “opt out” of federal law, then § 1270(a)(2) would only apply to suits against OSM in states with federal programs. State regulatory authorities could never be sued under § 1270(a)(2) before their programs were approved, because OSM would be the responsible authority, and they could never be sued under § 1270(a)(2) after their programs were approved, because their actions would be taken solely under state law. If Congress had intended this result, it would have referred only to the “Secretary” in § 1270(a)(2), rather than to “the Secretary or the appropriate State regulatory authority.”

Consequently, accepting Appellants’ argument would, in effect, strike these words from the statute and invalidate an Act of Congress. That extreme judicial action is justified “only upon a plain showing that Congress has exceeded its constitutional bounds.” U.S. v. Morrison, 120 S.Ct. 1740, 1748 (2000). Appellants have not even

attempted to make such a showing here.

This Court addressed a similar issue of statutory construction in Molinary. Section 1270(a)(1) authorizes citizens to enforce state regulations in states with federally-approved programs. 30 U.S.C. § 1270(a)(1). Section 1270(b)(1)(B) precludes such suits if a state is prosecuting a civil action to require compliance with those regulations. Id., § 1270(b)(1)(B). This Court reasoned that “[b]ecause a state would only prosecute a compliance action if it were a primacy state, the language of these subsections shows that Congress contemplated that federal citizen suits for compliance would be brought in primacy states.” 125 F.3d at 236. The language of § 1270(a)(2) similarly shows that Congress contemplated that citizen suits for enforcement of nondiscretionary duties under federally-approved state programs would be brought in federal court.²²

The D.C. Circuit’s decision in In re Permanent Surface Mining Regulation Litigation, 653 F.2d at 518-19, confirms this conclusion:

Once the state has assumed all these [permitting and enforcement] functions [under a state program,] the Secretary’s role is primarily one of oversight . . .

The Secretary’s oversight function is shared in part by the public, which is

²²The legislative history of SMCRA supports this interpretation. See H. Rep. No. 218, p. 89; S. Rep. No. 128, p. 88.

given the right to sue in federal court, to compel compliance with the State program and its permits.

The role of the state, then, is to administer the federal law in that state as a “deputized” federal regulator, and Congress created an oversight role for citizens to ensure that the state agency complies with the federal Act as well as the federally-approved state program. Approval of a state’s enforcement program does not displace or supplant federal citizen suits.

In sum, there are three reasons why a federally-approved state program under SMCRA becomes enforceable as federal law. First, a federally-approved state program must be consistent with, and not less stringent than, federal law. Second, SMCRA is a federal law that incorporates federally-approved state programs. Third, Congress authorized citizens to enforce federally-approved state programs as federal law in federal court.

2. DEP’s Duties Are Nondiscretionary

Intervenors and DEP next argue that § 1270(a)(2) does not confer jurisdiction over DEP’s approval of buffer zone variances, because those approvals are based on discretionary findings about whether a particular activity “adversely affects” or “materially damages” a stream. Int. Br. 30; DEP Br. 42-44. Bragg is not challenging DEP’s discretionary findings in individual cases. Instead, Bragg is challenging

DEP's failure to perform its nondiscretionary duty to withhold approval of buffer zone variances for valley fills, where it is undisputed that those fills destroy the filled stream segment.

As we have shown, SMCRA authorizes citizens to enforce a failure to perform a nondiscretionary "act or duty under this Act." 30 U.S.C. § 1270(a)(2). Both SMCRA and the approved West Virginia state program contain the nondiscretionary duty that "no permit . . . application shall be approved unless the application affirmatively demonstrates and the regulatory authority finds in writing" that all the requirements of SMCRA and the State program have been complied with. 30 U.S.C. § 1260(b); 38 C.S.R. § 2-3.32.d. Thus, DEP has a nondiscretionary duty under SMCRA to issue permits that comply with its approved State program, including its approved regulations. The buffer zone regulation in West Virginia's federally-approved program contains a nondiscretionary duty that "no land . . . shall be disturbed" within 100 feet of intermittent and perennial streams unless DEP makes certain findings. *Id.*, § 2-5.2. The language in these provisions from SMCRA and the federally-approved state program is mandatory and unequivocal. It removes any discretion by DEP to grant variances that fail to meet the standards for a variance. When an agency has a nondiscretionary duty to regulate in an area, it has a "mandatory duty to ascertain the relevant facts, correctly construe the applicable

statutes and regulations, and properly apply the law to the facts.” National Wildlife Federation v. Hanson, 859 F.2d 313, 315-16 (4th Cir. 1988).

Citizens may enforce mandatory duties under citizen suit provisions when the factual determinations that trigger the duty are undisputed. Kennecott Copper Corp. v. Costle, 572 F.2d 1349, 1355 (1978)(once the EPA Administrator determines that a state implementation plan under the Clean Air Act does or does not meet the statutory requirements, “there is a nondiscretionary duty to act in accordance with his determination”); NRDC v. Train, 545 F.2d 320, 327-28 (D.C. Cir. 1976)(once EPA made the discretionary factual determination that lead injures human health, it had a nondiscretionary duty under the Clean Air Act to issue air quality standards for that pollutant). Since no party disputes the fact that valley fills cannot meet the buffer zone variance criteria for the filled stream segment, there is a nondiscretion-ary duty to deny the variance for these activities.

A federal citizen suit to enforce a non-discretionary duty is analogous to a mandamus suit under 28 U.S.C. § 1361 to compel government officials to carry out a mandatory duty. Federal courts have held that mandamus is available under § 1361 when government officials ignore or violate regulatory standards delimiting the scope or manner in which their discretion is exercised. Work v. United States, 267 U.S. 175, 177 (1925)(mandamus is appropriate if officials transgress the limits of their

discretion); Burnett v. Tolson, 474 F.2d 877, 882 n.8 (4th Cir. 1973); Barron v. Reich, 13 F.3d 1370, 1376 (9th Cir. 1994). DEP has ignored the standards for granting buffer zone variances and followed standards that are not in its regulations, thereby transgressing the limits of its discretion.

Furthermore, OSM has interpreted West Virginia's buffer zone rule as imposing nondiscretionary duties (1) to deny variances unless there is a finding of no adverse effect on the filled stream segment (U.S. Br. 41); and (2) to disapprove mining activities within stream buffer zones that unquestionably cause adverse environmental effects (id. at 49-50). If the federal agency charged with enforcing the statute reasonably construes it to impose nondiscretionary duties, that construction must be sustained. Monongahela Power Co. v. Reilly, 980 F.2d 272, 278 (4th Cir. 1992).

3. Bragg Need Not Exhaust Administrative Remedies

Intervenors and DEP argue that Bragg cannot use the federal citizen suit provision because other remedies may be available, such as state administrative review or a citizen suit in state court. Int. Br. 30; DEP Br. 45-49. As the district court correctly held, this argument is directly inconsistent with the plain language of SMCRA. JA 152-59.

It is fundamental that Congress decides “who may enforce [statutory rights] and in what manner.” Davis v. Passman, 442 U.S. 228, 241 (1979). “[A]ppropriate deference to Congress’ power to prescribe the basic procedural scheme under which a claim may be heard in a federal court requires fashioning of exhaustion principles in a manner consistent with congressional intent and any applicable statutory scheme.” McCarthy v. Madigan, 503 U.S. 140, 144 (1992)(quoting Patsy v. Board of Regents of Florida, 457 U.S. 496, 501-02 and n.4 (1982)). “Of ‘paramount importance’ to any exhaustion inquiry is congressional intent.” Id.

In enacting SMCRA, Congress did not intend to require citizens to exhaust any administrative or state judicial remedies. The judicial review section of SMCRA, 30 U.S.C. § 1276(e), provides that:

Action of the State regulatory authority pursuant to an approved State program shall be subject to judicial review by a court of competent jurisdiction in accordance with State law, but the availability of such review shall not be construed to limit the operation of the rights established in section 520 [30 U.S.C. § 1270] except as provided therein. [emphasis added]

Section 520, in turn, authorizes citizens to sue State regulatory authorities whenever they fail to perform a non-discretionary duty under the Act, so long as citizens comply with the pre-suit notification condition. 30 U.S.C. §§ 1270(a)(2), (b)(2).

Thus, read together, the plain language of these two sections unambiguously provides that citizens may sue a State regulatory authority for failing to perform a non-

discretionary duty in issuing a permit, even if there is an available avenue for judicial review of that permit. Congress did not require exhaustion of state judicial review procedures before filing a SMCRA citizen suit against a state regulatory authority.²³ “If the intent of Congress is clear from the plain meaning of the statutory provision, that will be the end of the judicial inquiry.” Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 843 (1984); Stiltner v. Beretta U.S.A. Corp., 74 F.3d 1473, 1482 (4th Cir.), cert. denied, 519 U.S. 810 (1996).

Even if the statute were ambiguous and consulting its legislative history were necessary, that history fully supports the same conclusion. At the time this amendment was adopted,²⁴ the Conference Committee explained (H. Rep. No. 189, 94th Cong., 1st Sess. 84 (1975)):

Subsection (a) assures that no operator can be sued *under this section* if he is operating in compliance with all regulations, orders, and an approved permit, even though the regulatory authority or the Secretary has failed to properly

²³The federal courts have not required exhaustion for citizen suits under other federal environmental statutes, reasoning that compliance with the 60-day notice requirement is the only form of deferral required prior to filing suit. E.g., Citizens for a Better Environment v. Union Oil Co., 83 F.3d 1111, 1119 (9th Cir. 1996); Susquehanna Valley Alliance v. Three Mile Island, 619 F.2d 231, 244 (3rd Cir. 1980); Culbertson v. Coats American, Inc., 913 F. Supp. 1572, 1578 (N.D. Ga. 1995).

²⁴The pre-amendment language is contained in H. Rep. No. 45, 94th Cong., 1st Sess. 35 (1975). The post-amendment language is contained in H. Rep. No. 189, p. 50.

implement the Act. In such cases, the suit must be brought against the regulatory authority. [italics in original, underlining added].

Thus, Congress expressly contemplated challenges to state permit decisions in citizen suits against the regulatory authority under § 1270(a)(2). That is exactly what Bragg has done here.

DEP relies on several cases that have required exhaustion of administrative remedies in SMCRA suits. DEP Br. 45. However, in those cases, a coal mine operator challenged a federal cessation order under § 1271(a) or a penalty order under § 1268(c). Mullins Coal Co. v. Clark, 759 F.2d 1142 (4th Cir. 1985); Shawnee Coal Co. v. Andrus, 661 F.2d 1083 (6th Cir. 1981); Graham v. OSM, 722 F.2d 1106 (3rd Cir. 1983). In requiring exhaustion, the courts relied on statutory language requiring judicial review of administrative orders to be based on the administrative record. E.g., Mullins, 759 F.2d at 1145-46. These cases are inapposite. They were not citizen suits under § 1270(a)(2). Those cases also did not address the exhaustion exception in § 1276(e).

DEP also relies on a decision requiring exhaustion in a citizen suit under the Resource Conservation and Recovery Act (RCRA). DEP Br. 48, citing Palumbo v. Waste Technologies Industries, Inc., 989 F.2d 156 (4th Cir. 1993). Unlike SMCRA, RCRA's citizen suit provision does not authorize suits against state permitting

authorities for violations of non-discretionary duties, and its judicial review provision contains no exception to the normal exhaustion requirement. 42 U.S.C. §§ 6972(a), 6976(b). The court stated that there was “no evidence” that Congress intended to allow such an attack on permitting decisions. 989 F.2d at 162.

In contrast, in SMCRA, Congress explicitly authorized Bragg to challenge DEP’s exercise of its nondiscretionary duties in making permitting decisions, without exhausting any administrative remedies. The district court therefore had jurisdiction over Bragg’s suit.

4. The District Court Had Jurisdiction to Consider DEP’s Violations of Water Quality Standards

DEP argues that Bragg can only challenge DEP’s compliance with water quality standards by challenging its § 401 certification in an action under the Clean Water Act, not by challenging its buffer zone decisions in a citizen suit under SMCRA. DEP Br. 49-51. The district court correctly rejected this argument. JA 2830, n.29. First, the buffer zone rule establishes an independent requirement under SMCRA that the Director find that buffer zone variances will not lead to violations of water quality standards. That nondiscretionary duty is enforceable in a SMCRA citizen suit.

Second, challenges to § 401 certifications are not the exclusive method for

raising claims that state water quality standards are being violated.²⁵ The case cited by DEP, Dubois v. U.S. Dept. of Agriculture, 102 F.3d 1273, 1300 (1st Cir. 1996), cert. denied, 521 U.S. 1119 (1997), actually supports Bragg’s position. The First Circuit addressed the issue of “whether a state court action is the plaintiffs’ *only* recourse, or whether, in the alternative, they had a right to challenge in federal court the federal agency’s issuance of a federal permit in reliance on the state certification, where the basis for their challenge is that the project fails to meet the minimum standards of the federal Clean Water Act” (emphasis in original). The court stated that plaintiffs’ remedy was not exclusive (id.):

If a state seeks to approve a standard that is less stringent than the federal CWA’s floor, or seeks to apply a standard in a way that is otherwise invalid under *federal law*, then federal agencies and federal courts are obligated to resolve the application of the federal CWA in any case that properly comes before them. [emphasis in original]

²⁵DEP relies on Tennant v. Callaghan, 490 S.E.2d 845 (W.Va. 1997). DEP Br. 50. That case involved a petition for judicial review of the issuance of a state mining permit. The court merely held that, on judicial review of such a permit, the petitioner cannot challenge the permittee’s separate NPDES permit under the Clean Water Act. Instead, there is a separate judicial review mechanism for NPDES permits.

That case has no applicability here. Bragg has not petitioned for judicial review of NPDES permits. Instead, she has brought a federal citizen suit to enforce the nondiscretionary duties of a state regulatory authority. Bragg fully satisfies the conditions in 30 U.S.C. § 1270(a)(2) for bringing her suit. Furthermore, the judicial review provision of SMCRA expressly states that the availability of judicial review of permits “shall not be construed to limit the operation” of the right to bring such a citizen suit. 30 U.S.C. § 1276(e).

While the First Circuit ultimately decided not to review the § 401 certification, it did so only because the suit was brought under the National Environmental Policy Act (NEPA), and the CWA expressly prohibits reconsideration of § 401 certifications in NEPA suits. *Id.*, citing 33 U.S.C. § 1371(c)(2)(A). However, the CWA contains no prohibition against review of a state's compliance with its water quality standards in non-NEPA suits like this one.

Here, DEP is seeking to apply a state water quality standard in a way that is invalid under federal law. DEP has an explicit, non-discretionary duty under the SMCRA buffer zone rule to require compliance with water quality standards. This Court has clear jurisdiction to address the violation of that duty in this citizen suit to compel compliance with DEP's nondiscretionary duties under § 1270(a)(2) of SMCRA.

B. Bragg's Suit Is Not Barred by the Eleventh Amendment

Intervenors and DEP argue that Bragg's suit is barred by the Eleventh Amendment, which prohibits suits against States in federal court. They contend that the Eleventh Amendment prevents federal courts from forcing State officials to conform their conduct to state law, and that adequate state remedies displace SMCRA citizen suits. Int. Br. 31-35; DEP Br. 54-62. The district court correctly

ruled that Bragg’s claims fall within the Ex Parte Young exception to Eleventh Amendment immunity. JA 147-52, 2807-09.

1. Bragg’s Claims Fall Within the Ex Parte Young Exception to Eleventh Amendment Immunity

Ex Parte Young, 209 U.S. 123 (1908), establishes that the Eleventh Amendment does not preclude federal court jurisdiction over suits against State officials seeking prospective injunctive relief to end continuing violations of federal law. Bragg’s suit complies with these limitations. She has sued the Director of DEP in his official capacity seeking prospective injunctive relief to force him to conform his conduct to federal law.

Congress clearly intended to allow citizen suits in federal court against state regulatory authorities. Section 1270(a)(2) is a direct Congressional restatement of the Ex Parte Young principle. Citizens can sue state regulators to “compel [their] compliance with this Act” whenever they fail “to perform any act or duty under this Act which is not discretionary . . .” 30 U.S.C. § 1270(a)(2).

Furthermore, the SMCRA citizen suit provision authorizes citizens to sue government instrumentalities “to the extent permitted by the eleventh amendment.” 30 U.S.C. § 1270(a)(2). Congress used this same language in the citizen suit provision of the Endangered Species Act (ESA). 16 U.S.C. § 1540(g)(1)(A). “The

very fact that Congress has limited its authorization to suits allowed by the Eleventh Amendment reinforces the conclusion that a citizen could seek an injunction against a state's violations of the ESA." Strahan v. Coxe, 127 F.3d 155, 166 (1st Cir. 1997). The Ninth Circuit has held that the Clean Water Act citizen suit provision, which also contains this language, implicitly authorizes suits against State officials. 33 U.S.C. § 1365(a)(1); Natural Resources Defense Council v. Cal. DOT, 96 F.3d 420, 423-24 (9th Cir. 1996). Congress therefore authorized citizens to bring Ex Parte Young suits against State officials who have the responsibility to comply with SMCRA and federally-approved State programs under that Act. Powder River Basin Resource Council v. Babbitt, 54 F.3d 1477, 1483 (9th Cir. 1995)(Eleventh Amendment does not bar a citizen suit against a Wyoming State official under SMCRA).

Intervenors and DEP argue that claims against a state regulatory authority under § 1270(a)(2) are based on state law and, under Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984), Ex Parte Young does not authorize such suits. Int. Br. 31-35; DEP Br. 56-59. This is the same issue that we addressed above as a matter of statutory interpretation. As we have shown, states with federally-approved programs under SMCRA are both (1) bound by federal statutory mandates that govern their activities and (2) applying federal law whenever they implement their approved programs. This case therefore falls within the Ex Parte Young

exception to Eleventh Amendment immunity.

The availability of prospective relief under Ex Parte Young is necessary to give life to the Supremacy Clause generally and SMCRA specifically. “The Young doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States.” Pennhurst, 465 U.S. at 105. That principle applies with full force to SMCRA, since Congress enacted SMCRA’s citizen suit provision to “assur[e] the regulatory authority’s compliance with the requirements of the act.” H. Rep. No. 218, p. 89.

2. SMCRA Citizen Suits Are Not Displaced By Other Remedies

Relying on Seminole Tribe v. Florida, 517 U.S. 44 (1996), DEP argues that the Ex Parte Young doctrine should not be applied in this case because it would conflict with alternative federal and state remedies. DEP Br. 59-62. DEP claims that Bragg’s only permissible remedies are to ask OSM to revoke West Virginia’s federally-approved program or to file a citizen suit against DEP in state court. Id.

DEP has misapplied Seminole Tribe. That decision left the basic tenets of Ex Parte Young untouched. 517 U.S. at 71-75, nn. 14, 16, 17. The Court held that, where Congress prescribes a detailed remedial scheme for enforcement of a statutory right, a court should not lift the Eleventh Amendment bar to apply “its full remedial

powers” in an Ex Parte Young suit against a state officer in a manner inconsistent with the legislative scheme. Id. at 74-76. That principle is inapplicable here, since Bragg’s suit is completely consistent with, and expressly authorized by, SMCRA’s legislative scheme. This Court need not cast aside any statutory limitations on citizen enforcement or supplement the citizen suit provision. The Court need only apply the remedies that Congress has expressly provided.

Furthermore, in Seminole Tribe, the Court held that the remedial scheme in that case “strongly indicates that Congress had no wish to create” Ex Parte Young jurisdiction. 517 U.S. at 74, 76. Under the statute in Seminole Tribe, “Congress chose to impose upon the State a liability that is significantly more limited than would be imposed upon the state officer in Ex Parte Young.” Id. at 75-76. In contrast, in SMCRA, Congress gave the district court full equitable power to enjoin state regulatory authorities to comply with their nondiscretionary duties. Indeed, the language § 1270(a)(2) is a direct restatement of the Ex Parte Young doctrine, and the legislative history shows that Congress wanted to “assur[e] the regulatory authority’s compliance with the requirements of the act.” H. Rep. No. 218, p. 89. Congress therefore intended to create Ex Parte Young jurisdiction for such suits. See MCI, supra.

DEP also cites Idaho v. Coeur d’Alene Tribe of Idaho, 521 U.S. 261, 271-74

(1997), for the proposition that the “existence of an adequate state forum” bars recourse to the Ex Parte Young doctrine. DEP Br. 60-61. Again, DEP has misread the Court’s decision. In Coeur d’Alene, there was no majority opinion. DEP relies on Parts II-B and II-C of the plurality opinion, which garnered the votes of only two Justices. Those Parts were rejected by the remaining seven Justices. Furthermore, none of the Justices agreed with the proposition advanced by DEP. The five Justices in the plurality and concurring opinions agreed that Young has been applied “[e]ven if there is a prompt and effective remedy in a state forum.” 521 U.S. at 274, 293. The four Justices in the dissenting opinion stated that “the notion that availability of a state forum should have some bearing on the applicability of Ex Parte Young is . . . at odds with precedent . . . [and] basic jurisdictional principles.” Id. at 315. See Summit Medical Associates v. James, 984 F. Supp. 1404, 1424 (M.D. Ala. 1998)(adequacy of state forum “plays no role in the court’s analysis of the eleventh amendment immunity question”).²⁶

²⁶Recently, in Pennsylvania Federation of Sportsman’s Clubs v. Seif, a district court in the Third Circuit relied on Coeur d’Alene to hold that Pennsylvania’s federally-approved state program implicated special sovereignty interests and that a SMCRA citizen suit against the Pennsylvania official responsible for administering that program therefore fell outside the Ex Parte Young exception. Mem. 17. This reasoning is inconsistent with the Supreme Court’s decision in Hodel that SMCRA is a valid exercise of Congress’ power to regulate interstate commerce and does not invade any sovereign interests reserved to the States under the Tenth Amendment. 452 U.S. at 289-93. The result in Coeur

In sum, Bragg’s claims fall within the core application of the Ex Parte Young doctrine. The district court therefore had jurisdiction over her claims.

3. Alternatively, West Virginia Waived Its Immunity

A state waives its Eleventh Amendment immunity when it “voluntarily invokes” federal jurisdiction or “makes a ‘clear declaration’ that it intends to submit itself” to federal jurisdiction. College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Board, 527 U.S. 666, 675-76 (1999). Since College Savings, two of three federal courts of appeals have held that, under the Telecommunications Act of 1996, states waive their Eleventh Amendment immunity when they choose to “participate in the federal regulatory function delegated to them by the federal government on the condition that their participation be reviewable in federal court.” MCI, 2000 U.S. App. LEXIS 17739, at *49; MCI

d’Alene is a narrow limitation on Ex Parte Young, and does not extend to a state’s interest in administering federally-approved programs. J.B. ex rel. Hart v. Valdez, 186 F.3d 1280, 1286-87 (10th Cir. 1999), and cases cited therein. The court in Seif also relied on the ability to bring the same claims in Pennsylvania state courts. Mem. 17. However, the availability of state remedies is irrelevant to Ex Parte Young analysis.

Telecommunications Corp. v. Public Serv. Comm'n, 2000 U.S. App. LEXIS 14348, at *22 (10th Cir. June 20, 2000); contra, GTE North, Inc. v. Strand, 209 F.3d 909, 922 n.6 (6th Cir. 2000). The states waived their immunity “by accepting the federal government’s invitation to act as regulators of the local telephone market.” MCI, 2000 U.S. App. LEXIS 17739, at *49. In exchange, Congress required the states to agree to submit to federal jurisdiction to review their actions. Id.

This same principle applies to SMCRA. States like West Virginia, that choose to submit a state program for federal approval, accept the federal government’s invitation to act as regulators of surface coal mining in the state. In exchange, Congress required the states to agree to submit to federal jurisdiction under § 1270(a)(2) to review their non-discretionary actions for conformity with federal law. West Virginia therefore waived its immunity to the claims raised by Bragg in this case.²⁷

III. The District Court’s Issuance of a Permanent Injunction Was Proper

A. The Corps Waived Its Overbreadth Argument by Not Raising It Below

The Corps argues that the injunction is overly broad because it enjoins DEP

²⁷Contrary to DEP’s argument (DEP Br. 54), Bragg preserved this argument below. JA 18, #49, p. 3 n.2.

from authorizing “minor spoil disposal activities that do not involve the filling of stream segments.” U.S. Br. 52. The Corps claims, without any citation to the record, that “some placement of excess spoil may not cause adverse environmental effects and therefore may be appropriately approved under the stream buffer zone rule.” Id. The Corps asks that the injunction be vacated and remanded for the entry of a narrower injunction that does not prohibit this activity.

The Corps never raised this argument in the district court. The Corps did not file a brief on the cross-motions for summary judgment on the buffer zone claims. Neither the Corps nor any other party presented facts to support this argument. Instead, the non-federal defendants pursued an all-or-nothing strategy and argued against the entry of any injunction.²⁸ JA 53-54, #368, 370, 373.

The well-established rule is that an appellate court ordinarily will not consider issues raised for the first time on appeal. Karpa v. C.I.R., 909 F.2d 784, 788 (4th Cir. 1990); National Wildlife Federation v. Hanson, 859 F.2d at 318.²⁹ “This principle applies with even more force when [an appellate court] address[es] questions of the

²⁸All parties were on notice of the scope of the requested injunctive relief. The district court’s injunction contains essentially the same language as that requested in Bragg’s motion. R. 364.

²⁹The Corps identifies no exceptional circumstances or injustice that would justify a departure from this general rule.

proper exercise of the equitable powers of the court, either inherent or statutorily granted.” Matter of Quenzer, 19 F.3d 163, 165 (5th Cir. 1993). Since equitable considerations are “largely fact-driven,” the trial court has broad discretionary power in framing an injunction, and must rely on full development and examination of facts presented. Id.

In Phillip Morris, Inc. v. Harshbarger, 159 F.3d 670, 679-80 (1st Cir. 1998), the defendant similarly attempted to challenge the breadth of an injunction for the first time on appeal. In rejecting this argument, the court stated (id. at 680):

Having pursued the advantages of an all-or-nothing strategy in arguing against the injunction, the Commonwealth may not belatedly obtain the benefits of the more moderate approach that, in light of its defeat, now looks more attractive.

. . . As a general rule, a disappointed litigant cannot surface an objection to a preliminary injunction for the first time in an appellate venue. *See United States v. Zenon*, 711 F.2d 476, 478 (explaining that parties are required to “state their objections to the injunction to the district court, so that the district court can consider them and correct the injunction if necessary, without the need for appeal”). Having failed to comply with this basic rule, the Commonwealth has forfeited the opportunity to obtain consideration of whether the preliminary injunction, as framed, is overbroad.

Consequently, since the Corps failed to object to the scope of the injunction in the district court, it waived this objection and cannot raise it for the first time here.

B. Even Absent a Waiver, the Corps’ Overbreadth Argument Is Erroneous

Even if the Corps had properly preserved its argument that the buffer zone rule

allows “minor” filling of streams, that argument lacks merit. The buffer zone rule says that “no land within 100 feet” of a perennial or intermittent stream “shall be disturbed.” The word “no” is unambiguous. It means no disturbance. The Corps itself cites four cases rejecting “arguments to read into a statute or regulation a threshold requirement of significance when the statute or regulation does not include such a threshold.” U.S. Br. 44 and n.14.

The Corps also suggests that it has authority to create exceptions for disturbances that are *de minimis*, but not “significant.” *Id.* However, when it promulgated the rule, OSM said nothing about any exception to its terms. Thus, even if OSM had authority to create such an exception, it never exercised that authority with this rule and cannot apply it for the first time in a footnote in the agency’s appeal brief. *Martin v. OSHRC*, 499 U.S. 144, 156 (1991).

IV. The District Court Had Jurisdiction to Enter the Consent Decree Against DEP Concerning Bragg’s Other Claims Under SMCRA

In Nos. 00-1338 and 00-1339, Intervenors have appealed the district court’s February 17, 2000 order approving the Consent Decree between Bragg and DEP concerning Bragg’s other claims under SMCRA. Intervenors’ argument on these two appeals is relegated to a single sentence in a single footnote in their brief. Int. Br. 28, n.7. Intervenors raise the same two jurisdictional arguments for the Consent Decree

appeals that they raise on the buffer zone appeals: (1) the district court lacked subject matter jurisdiction under the SMCRA citizen suit provision; and (2) the Eleventh Amendment barred Bragg's claim. Id.

Intervenors' appeals must be dismissed for four reasons. First, DEP expressly waived its Eleventh Amendment immunity, both in the Decree itself and by an oral admission in open court.³⁰ JA 1826, 1852. State officials waive their Eleventh Amendment immunity by consenting to the entry of a decree by a federal court. Kozlowski v. Coughlin, 871 F.2d 241, 244 (2d Cir. 1989); Hurley v. Coughlin, 158 F.R.D. 22, 29 (S.D.N.Y. 1993); Halderman v. Pennhurst State School and Hosp., 834 F. Supp. 757, 763 (E.D. Pa. 1993). In addition, the West Virginia Attorney General approved the Consent Decree and the West Virginia Legislature enacted many of its provisions.

Second, Intervenors lack standing to raise these issues. Since DEP did not appeal the Consent Decree, Intervenors must independently establish their standing to

³⁰Because DEP did not file a notice of appeal from the February 17, 2000 Order approving the Consent Decree, and did not preserve its right to appeal in the Decree, it has also waived this issue on appeal. ACORN v. Edgar, 99 F.3d 261, 262 (7th Cir. 1996).

appeal. Diamond v. Charles, 476 U.S. 54, 62-64 (1986); U.S. v. AVX Corp., 962 F.2d 108, 112-13 (1st Cir. 1992). Intervenors cannot demonstrate any injury since they joined in the motion to enter the Consent Decree in the district court. JA 50, #349. They also cannot demonstrate the redressability prong of Article III standing. The Consent Decree provides that “[i]n the event that this Decree is not entered or does not become effective for any other reason (except that the Court determines that it violates the public interest), it shall serve as a settlement agreement which binds the parties to its terms.” JA 2911. Intervenors have waived any argument that the agreement is unfair or against the public interest. Thus, if the Consent Decree were vacated for lack of federal court jurisdiction, it would still be a binding contract between the parties, enforceable in state court. See Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 379 n.6 (1996)(“if a State chooses to approach the preclusive effect of a judgment embodying the terms of a settlement agreement as a question of pure contract law, a federal court must adhere to that approach under [28 U.S.C.] § 1738.”) Consequently, even if this Court vacated the Decree for lack of federal court jurisdiction, it would not redress Intervenors’ purported injury.

Third, SMCRA clearly grants subject matter jurisdiction to the federal district courts to enforce nondiscretionary duties by state regulatory authorities in citizen suits. 30 U.S.C. § 1270(a)(2). Intervenors make no arguments in their brief about

why the specific duties addressed in the Consent Decree (which are separate from the duties under the buffer zone rule) are discretionary or otherwise outside the Court's jurisdiction. Rule 28(a)(9), F.R.App.P., requires the appellant's brief to contain its "contentions and the reasons for them . . ." By failing to comply with this rule, Intervenor has waived their jurisdictional arguments. Rosenberger v. Rector, 18 F.3d 269, 276 (4th Cir. 1994), rev'd on other grds, 515 U.S. 819 (1995); Ryan v. Royal Ins. Co., 916 F.2d 731, 734 (1st Cir. 1990)("issues adverted to on appeal in a perfunctory manner, unaccompanied by some developed argumentation, are deemed to have been abandoned").

Fourth, even if Intervenor has not waived these arguments, a federal court's role in determining its jurisdiction to enter a proposed consent decree does not involve addressing the merits of a plaintiff's claims. Instead, the court is limited to determining whether the claims alleged in the complaint are more than "wholly insubstantial and frivolous." Cronin v. Browner, 898 F. Supp. at 1057. In Cronin, the court considered a proposed consent decree between environmentalists and EPA which resolved plaintiffs' claim that EPA had violated a nondiscretionary duty under the Clean Water Act. Intervenor objected to the consent decree on the ground that EPA's duty was not nondiscretionary, and that the court therefore lacked jurisdiction to enter the decree. Id. The court held that its jurisdictional inquiry was limited to an

evaluation of whether plaintiffs' claim was not insubstantial or frivolous, and that once this threshold was satisfied, the court had jurisdiction to enter the decree. *Id.* at 1057-61.

This standard is satisfied here. When it granted a preliminary injunction against DEP, the district court found that “[a]s [then-Director] Miano admits, DEP is under a nondiscretionary obligation to require the operator to restore the land to AOC if a variance is not requested and approved.” 54 F. Supp.2d 635, 647; JA 1606. This finding is more than sufficient to demonstrate that Bragg’s SMCRA claims were not insubstantial or frivolous. The district court therefore had jurisdiction to enter the Consent Decree on these claims.

Conclusion

The district court enforced the state buffer zone rule according to its plain language and original intent. Its ruling is consistent with the language and structure of SMCRA, and with the interpretation of the federal agency charged by Congress with administering SMCRA. The district court properly exercised its obligation to uphold and enforce DEP’s nondiscretionary duty under the law.

For these reasons, the decisions of the district court to grant summary judgment and injunctive relief on the buffer zone claims, and to enter the consent decree on the other SMCRA claims, should be affirmed.

Respectfully submitted,

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Request for Oral Argument

Because of the number, complexity, and importance of the issues presented, Bragg respectfully requests oral argument.

Certificate of Service

I certify that two copies of the Brief of Appellees Patricia Bragg, et al., were served by first class mail on this 8th day of August, 2000 on counsel for the following parties:

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