

**SECTION 733 PETITION BEFORE THE UNITED STATES DEPARTMENT OF
INTERIOR, OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT
SEEKING TERMINATION OF WEST VIRGINIA'S APPROVED SMCRA PROGRAM
AND THE IMMEDIATE IMPLEMENTATION AND PROMULGATION OF A
FEDERAL REGULATORY PROGRAM**

**APPALACHIAN CATHOLIC WORKER; APPALACHIAN VOICES; CATHOLIC
COMMITTEE OF APPALACHIA; CENTER FOR BIOLOGICAL DIVERSITY;
CENTER FOR HEALTH, ENVIRONMENT & JUSTICE; CHRISTIANS FOR THE
MOUNTAINS; COAL RIVER MOUNTAIN WATCH; EARTHJUSTICE; KEEPER OF
THE MOUNTAINS FOUNDATION; LEAGUE OF WOMEN VOTERS OF WEST
VIRGINIA; MOUNTAIN HEALTH AND HERITAGE ASSOCIATION; NATIONAL
WILDLIFE FEDERATION; OHIO VALLEY ENVIRONMENTAL COALITION;
SIERRA CLUB; WEST VIRGINIA CITIZEN ACTION; WEST VIRGINIA
ENVIRONMENTAL COUNCIL; WEST VIRGINIA HIGHLANDS CONSERVANCY;
and WEST VIRGINIA RIVERS COALITION**

Petitioners

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INTRODUCTION

Appalachian Catholic Worker, Appalachian Voices, Catholic Committee of Appalachia, Center for Biological Diversity, Center for Health, Environment & Justice, Christians For The Mountains, Coal River Mountain Watch, Earthjustice, Keeper of the Mountains Foundation, League of Women Voters of West Virginia, Mountain Health and Heritage Association, National Wildlife Federation, Ohio Valley Environmental Coalition, Sierra Club, West Virginia Citizen Action, West Virginia Environmental Council, West Virginia Highlands Conservancy, and West Virginia Rivers Coalition present information below that shows the State of West Virginia is acting in violation of its approved State program and that such violations are the result of the State's failure to enforce its program effectively. In accordance with 30 U.S.C. § 521(b) and 30 C.F.R. § 733.12, this letter respectfully requests that Office of Surface Mining Reclamation and Enforcement (OSM)

PETITION SEEKING TERMINATION OF WEST VIRGINIA'S APPROVED SMCRA PROGRAM AND THE IMMEDIATE IMPLEMENTATION AND PROMULGATION OF A FEDERAL REGULATORY PROGRAM

investigate West Virginia's approved State program and determine that the State is not properly implementing, administering, enforcing, and maintaining its program and thus is inconsistent with the Surface Mining Control and Reclamation Act (SMCRA). West Virginia's program has consistently and systematically failed to comply with SMCRA mandates intended to protect the State's residents and natural resources. While mining operations in West Virginia have been cited for at least 6,301 SMCRA violations since 2006,¹ many more violations have been ignored and unenforced. West Virginia has failed to take action to address the systematic problems evidenced by these violations. These failures can no longer be tolerated. After thirty years of failure,² it is past time for OSM to assume control of SMCRA permitting, implementation, and enforcement in West Virginia.

The situation could not be more dire nor the stakes higher. In particular, since mountaintop removal mining has become common, West Virginia's failure to properly enforce its approved State program has enabled coal operators to use destructive mining practices that have devastated significant areas of its diverse, mountainous, and productive landscape. Forested mountain ridges and valleys have been flattened into moonscapes incapable of supporting any meaningful use or vegetation. Mountain streams have been permanently buried beneath the rubble of what were once mountaintops. Waters have been contaminated for generations to come. These mining activities have caused communities and downstream areas to be subjected to increased flooding risks. Complete upstream watersheds have been rendered incapable of maintaining proper hydrological function. A huge portion of southern West Virginia has been permanently scarred by inadequately regulated mining and tens of thousands of additional acres are currently under permit or slated for permitting that would cause widespread additional significant harm to communities and their environment. Unless West Virginia's current illegal and ineffective implementation of SMCRA ceases and lawful administration and enforcement of SMCRA occurs, West Virginia's land, waters and wildlife will be either lost or permanently scarred and many communities will suffer the adverse economic, social and environmental impacts that SMCRA was specifically designed to prevent. This is unacceptable. OSM must act now.

EPA has repeatedly voiced its concern regarding these matters. In its review of Appalachian Surface Coal Mining Operations, EPA found that:

The environmental legacy of mining operations in the Appalachian region is far-reaching. Recent studies, as well as the experiences of Appalachian coalfield communities, point to new environmental and health challenges that were largely unknown even ten years ago. Since 1992, more than 1,200 miles of Appalachian streams have been filled by Appalachian surface coal mining practices, at an estimated ongoing rate of 120 miles per year. Further, while precise estimates are limited, the estimated scale of deforestation from existing Appalachian surface

¹ Statistics from raw data taken from the WVDEP website and compiled by Coal River Mountain Watch. W. VA. DEPT. OF ENV'T'L PROT., *Mining Permit Search*, <http://www.dep.wv.gov/insidedep/Pages/miningpermitsearch.aspx> (last visited Dec. 30, 2012).

² 30 C.F.R. § 948.10 (2012) (noting the Secretary's approval of West Virginia's plan in 1981).

mining operations is greater in size than the State of Delaware, or 5,700 square kilometers predicted to be affected by 2012. The full cumulative effects of surface coal mining operations at this scope and scale are still largely unknown. Appalachian deforestation has been linked to significant changes in aquatic communities as well as to modified storm runoff regimes, accelerated sediment and nutrient transport, reduced organic matter inputs, increased algal production, and altered stream thermal regimes. Such impacts have placed further stresses on water quality and the ecological viability of watersheds. Possible human health impacts from coal mining activities have also been documented, including peer-reviewed public health literature that has preliminarily identified associations between increases in surface coal mining activities and increasing rates of cancer, birth defects, and other health problems in Appalachian communities.³

West Virginia's failure to administer its surface mining program consistent with SMCRA's mandates has exacerbated many of the problems SMCRA sought to prevent.

West Virginia Department of Environmental Protection's (WVDEP) failure to administer and enforce its surface mining program consistent with its mandated responsibilities under SMCRA reveals a callous disregard for the law and for the environment it is charged with protecting. This disregard was illustrated upon a recent review of WVDEP's own records showing that, rather than focus limited resources on properly implementing SMCRA, WVDEP has chosen to spend money on legal fees to defend industry, sue EPA, and unsuccessfully fight cases charging them with NPDES violations. For example, WVDEP paid \$860,000 in legal fees to the law firm Bailey and Glasser between November 5, 2010 and November 25, 2012.⁴ During approximately this same period, WVDEP spent only \$130,000 on a study⁵ purportedly conducted in response to citizen allegations of serious human health impacts resulting from coal mining in the community of Prenter, West Virginia.⁶ Children in Prenter were reported to have lost the enamel on their teeth and residents complained that their skin burns after showering due to heavy metals polluting their domestic water supply.⁷ Shockingly, WVDEP's study found that the water was not contaminated by coal mining, despite substantial evidence of widespread contamination wreaking havoc on the health of local residents. This is just one example of many instances where WVDEP worked to protect the mining industry at the expense of public health and the environment. Over the years, WVDEP's record of

³ Memorandum from Peter S. Silva, Assistant Adm'r for Water, & Cynthia Giles, Assistant Adm'r for Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, to Shawn Garvin et al., Detailed Guidance: Improving EPA Review of Appalachian Surface Coal Mining Operations under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order 2 (Apr. 1, 2010), *available at* [http://yosemite.epa.gov/sab/SABPRODUCT.nsf/1AF3B472FCA0AE8D8525773F005D3336/\\$File/Improving+EPA+Review+of+Appalachian+Surface+Coal+Mining+Operations-4-1-10.pdf](http://yosemite.epa.gov/sab/SABPRODUCT.nsf/1AF3B472FCA0AE8D8525773F005D3336/$File/Improving+EPA+Review+of+Appalachian+Surface+Coal+Mining+Operations-4-1-10.pdf).

⁴ W. VA. DEPT. OF ENVTL. PROT., WVDEP INVOICES FROM BAILEY AND GLASSER LLP 3 (Nov. 27 2012), *available at* <https://www.dropbox.com/s/ue9n3jrlol8ngwv/DEP%20B%26G%20Invoices%2011-5-10%20to%2011-25-12.pdf>.

⁵ *DEP releases Prenter water study*, W. VA. DEP'T OF ENVTL. PROT., Jan. 24, 2012, <http://www.dep.wv.gov/news/Pages/DEPreleasesPrenterwaterstudy.aspx>.

⁶ *Id.* See also Charles Duhigg, *Clean Water Laws Are Neglected, at a Cost in Suffering*, N.Y. TIMES, Sept. 12, 2009, http://www.nytimes.com/2009/09/13/us/13water.html?_r=0; Jeff Biggers, *Coal Slurry Smiles: NY Times Nails Clean Water Act Crimes and Punishment*, HUFFINGTON POST, Sept. 14, 2012, http://www.huffingtonpost.com/jeff-biggers/coal-slurry-smiles-ny-tim_b_286648.html.

⁷ Duhigg, *supra* note 8.

placing the interests of the coal industry above human health and the environment has had devastating impacts for the communities of West Virginia's coal fields.

In evaluating this Petition, OSM and The Secretary should be mindful that Congress enacted SMCRA in order to protect the land, water and environment surrounding communities in coal-producing States. Unfortunately, the devastating environmental, economic and social harms SMCRA was designed to prevent are occurring today in West Virginia specifically because WVDEP has systematically failed to administer and enforce its approved State program as mandated by SMCRA. Congressional findings in 1977 substantially coincide with and appropriately describe the impact of West Virginia's failures to administer and enforce SMCRA:

Water users and developers incur significant economic and financial losses . . . Reduced recreational values, fishkills, reductions in normal waste assimilation capacity, impaired water supplies, . . . increased flood frequencies and flood damages, reductions in designed water storage capacities at impoundments, and higher operating costs for commercial waterway users are some of the most obvious economic effects that stem from mining-related pollution.⁸

WVDEP's failure to properly administer and enforce its approved SMCRA permanent regulatory program subverts Congressional intent. The detailed documentation set forth below provides overwhelming evidence of the misfeasance and malfeasance that has characterized the West Virginia regulatory program for many years.

This Petition does not require the Secretary or OSM to enter uncharted waters. In *West Virginia Highlands Conservancy v. Norton*, 161 F. Supp. 2d 676, 683, 684 (S.D.W.V. 2001), the Chief Judge of the United States District Court for the Southern District of West Virginia discussed an earlier occasion when West Virginia's approved regulatory program had also been driven off the tracks by endemic failures of administration and enforcement:

States may regulate their own programs so long as they are consistent with federal law. But where a state program is inconsistent, it may not be approved, and the statutory timelines for both the State and the Secretary to achieve State compliance are short: 60 days apiece.⁹

Importantly, in *WVHC v. Norton*, the Court found that the "direct consequences" of West Virginia's unlawful reclamation bonding system included "thousands of acres of unreclaimed strip-mined land, untreated polluted water, and millions (potentially billions) of dollars of State liabilities."¹⁰ The indirect results of an inadequate State regulatory program, the Court observed, can "be more damaging."¹¹ In words equally appropriate to the current massive failures of WVDEP, the Court emphasized that West Virginia's regulatory failures created "a climate of

⁸ H.R. REP. NO. .95-218, at 59 (1977), reprinted in 1977 U.S.C.C.A.N 597.

⁹ *West Virginia Highlands Conservancy v. Norton*, 161 F.Supp.2d 676, 683, 684 (S.D.W.V. 2001),

¹⁰ *Id.*

¹¹ *Id.*

lawlessness, which creates a pervasive impression that continued disregard for federal law and statutory requirements goes unpunished”¹²

This petition urges OSM to perform its mandatory oversight duty and withdraw all or part of West Virginia’s State program in order to restore a climate of lawfulness. Only when SMCRA is administered and enforced properly in West Virginia will the economy, environment, and social fabric of coalfield communities be protected as Congress intended when SMCRA was enacted three and a half decades ago.

Section I of this petition provides an overview of SMCRA generally, including the purposes for which it was enacted and the enforcement and implementation scheme it utilizes to ensure achievement of those purposes. Section II provides an overview of West Virginia’s surface mining program, including examination of WVDEP’s specific failures in the administration of its surface mining program. Section III details WVDEP’s failure to adhere to SMCRA’s mandated permitting process, including issuance of permits despite unabated violations, allowing expired permits to proceed, and WVDEP’s failure to adequately enforce permits due to chronic understaffing. Section IV addresses enforcement failures, including problems with inspections, failure to use enforcement tools, and failure to enforce dam safety provisions. Section V addresses the massive array of harms resulting from WVDEP’s failure to protect the hydrologic balance. These include watershed disturbances, stream impairment that violates water quality standards, massive flooding, failure to issue SMCRA violations where Clean Water Act violations exist, suspension of State narrative water quality criterion, significant harm to aquatic resources resulting from selenium and conductivity pollution, inadequate bonding requirements, and improper identification of cumulative hydrologic impact areas. Section VI addresses West Virginia’s failure to meet SMCRA mine site reclamation requirements, and Section VII addresses WVDEP’s failure to comply with mandates of the Endangered Species Act. Section VIII concludes this petition and asks OSM to withdraw approval of West Virginia’s program.

As a result of West Virginia’s failure to properly implement and enforce the State program, and as required by 30 C.F.R. § 733.12(g)(2)(i), we respectfully request that the Secretary withdraw approval of all or part of West Virginia’s approved State program and substitute direct Federal implementation and enforcement. In support of this request the undersigned offer this petition.

PETITIONERS’ STATEMENTS OF INTEREST

The **Appalachian Catholic Worker** provides sacred space and hope in the mountains by addressing issues of poverty through Education, Contemplation and Outreach. Allowing the destruction of our environment, including fundamentally changing the hydrological regime of the

¹² *Id.* at 683.

region, negatively impacts all of us starting with the poor and not hiring enough workers to enforce regulations is furthering crimes against humanity and Earth.

Appalachian Voices is an award-winning, environmental non-profit committed to protecting the natural resources of central and southern Appalachia, focusing on reducing coal's impact on the region and advancing our vision for a cleaner energy future. Through its work at the regional and federal level, Appalachian voices has raised many of the concerns outlined in this petition, which thus far have not been adequately addressed by either the WVDEP or the OSM.

The **Center for Health, Environment & Justice** (CHEJ) works to empower people to build healthy communities and prevent harm to human health caused by exposure to environmental threats. CHEJ supports efforts to stop the inhumane consequences of mountaintop removal mining.

The **Catholic Committee of Appalachia** is a network of faith-based people raising a prophetic voice for justice in Appalachia and with her people. Surface mining, and mountaintop removal in particular, threatens communities, their water and wellbeing and the WVDEP must exercise its responsibility to hold surface mining companies to the strictest regulation standards for the health of everyone.

The **Center for Biological Diversity** is a non-profit organization dedicated to the preservation, protection, and restoration of biodiversity, native species, and ecosystems. Mountaintop removal and other harmful coal mining techniques threaten biological diversity and the health and well-being of local communities throughout Appalachia and the Center is working to eliminate this threat.

Christians For The Mountains (CFTM) is a network of persons advocating that Christians and their churches recognize their God-given responsibility to live compatibly, sustainably, and gratefully joyous upon this God's earth. The highest calling of government is to protect its citizens and the place they live upon. The WVDEP is failing that mission.

The mission of **Coal River Mountain Watch** is to stop the destruction of our communities and environment by mountaintop removal mining, to improve the quality of life in our area and to help rebuild sustainable communities. West Virginia's failure to enforce SMCRA has had devastating impacts on the communities in which we live and work.

Earthjustice is a non-profit public interest law firm dedicated to protecting the magnificent places, natural resources, and wildlife of this earth, and to defending the right of all people to a healthy environment. Earthjustice joins its clients and partners in this petition because West Virginia's failure to enforce the surface mining law harms the State's people and its environment and undermines the rule of law.

The **Keeper of the Mountains Foundation** aims to educate and inspire people to work for healthier, more sustainable mountain communities and an end to mountaintop removal. The failure of the WVDEP to enforce laws intended to protect our environment means devastating impacts on our people, our communities and our land which is why the Keeper of the Mountains Foundation strongly supports this effort to hold the WVDEP accountable for its failings.

The **League of Women Voters of West Virginia** is a nonpartisan organization that encourages the informed and active participation of citizens in government, works to increase understanding of major public policy issues, and influences public policy through education and advocacy. Even though the Surface Mining Control and Reclamation Act (SMCRA) was passed in the 1970s, we continue to see the disastrous effects of mountaintop removal mining on the people, the waters, and the lands of West Virginia.

The mission of our **Mountain Health and Heritage Association** is to hold elected and administrative government persons accountable in their duty to protect the Human Citizens and our critical Clean Air and Clean Water Resources from industrial pollution and damage. After nearly forty years of WVDEP authority to enforce SMCRA, the People and critical Natural Resources in richest coal regions of West Virginia, continue to suffer the worst health, economic opportunities, education, environmental conditions and overall quality of life from among all in the United States.

National Wildlife Federation (NWF) is the nation's largest conservation organization with affiliate organizations in forty-eight States and Territories, including West Virginia. Its mission is to inspire Americans to protect wildlife for our children's future. NWF is very concerned about the impact to wildlife and communities in West Virginia due to the failure to properly protect the State's natural resources from mountaintop removal mining.

The mission of the **Ohio Valley Environmental Coalition** (OVEC) is to organize and maintain a diverse grassroots organization dedicated to the improvement and preservation of the environment through education, grassroots organizing and coalition building, leadership development, media outreach, and strategic litigation. OVEC has organized against mountaintop removal for more than sixteen years; using litigation, OVEC has helped stop mountaintop removal permit expansion in several areas of southern West Virginia and has used the regulatory process to force the WVDEP to rewrite illegal surface mine permits.

The mission of the **Sierra Club** is to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives. The Club is participating in this petition because improper mining practices in West Virginia poison our water, destroy beautiful, diverse forests and wildlife habitat, increase the risks of flooding, wipes out entire communities, and threaten the health and safety of West Virginia's people.

Since 1974, **West Virginia Citizen Action** (WV-CAG) has been dedicated to increasing citizen participation in economic, environmental, and political decision-making. WV-CAG has long documented the relationship of the coal industry's political contributions and the connection with WVDEP's failure to enforce SMCRA.

The **West Virginia Environmental Council** is a collaboration of environmental and social justice groups in West Virginia. Its interests lie in the formation and enforcement of policy that protects the citizens of West Virginia from the devastation of pollution.

West Virginia Highlands Conservancy (WVHC) is a nonprofit grassroots membership organization located in West Virginia. Established in 1967, WVHC is one of the state's oldest environmental advocacy organizations and for the past four decades has been a leader in citizen efforts to protect West Virginia's people, land, and water resources from the effects of coal mining.

West Virginia Rivers Coalition (WVRC) is dedicated to the restoration and conservation of West Virginia's exceptional rivers and streams. WVRC is interested in the full enforcement of SMCRA to protect the quality of the state's water resources.

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I. OVERVIEW OF THE SURFACE MINING CONTROL AND RECLAMATION ACT

One of the primary motivations behind SMCRA is to protect the public health and environment from the harms caused by surface mining. To ensure that surface mining is conducted in a way that minimizes the harms to the public health and the environment, SMCRA utilizes a system of cooperative federalism and allows OSM to withdraw approval of programs that violate SMCRA and do not maintain adequate safeguards for human health and the environment.

a. SMCRA was Enacted to Protect Public Health and Environment from the Harm Caused by Surface Mining

Congress passed SMCRA to, *inter alia*, “establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations”¹³ and “assure that surface coal mining operations are so conducted as to protect the environment.”¹⁴ To carry out the purposes of the Act, Congress created OSM as a subdivision within the Department of the Interior (DOI), with the Secretary of DOI (Secretary) acting through OSM to administer the various State programs for controlling surface coal mining pursuant to the Act.¹⁵

Congress identified thirteen purposes of SMCRA.¹⁶ Primary among them are to “establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations”¹⁷ and to “assure that surface coal mining operations are so conducted as to protect the environment.”¹⁸ Another key purpose is to protect surface landowners from mining operations.¹⁹ Additionally, SMCRA seeks to ensure adequate reclamation, including prohibiting mining in areas where reclamation is not feasible.²⁰ These purposes indicate that Congress’ primary goal in enacting SMCRA was environmental protection, not the development of coal resources.²¹

SMCRA permits are issued by OSM unless a State has an OSM-approved program.²² To obtain approval of such a program, the State must pass a law that meets SMCRA’s minimum national

¹³ 30 U.S.C. § 1202(a) (2012).

¹⁴ 30 U.S.C. § 1202(d).

¹⁵ 30 U.S.C. § 1211(a), (c); *see also* Penn. Fed’n of Sportsmen’s Clubs v. Hess, 297 F.3d 310, 315 (3d Cir. 2002).

¹⁶ 30 U.S.C. § 1202 (2012).

¹⁷ *Id.* § 1202(a).

¹⁸ *Id.* § 1202(d).

¹⁹ *Id.* § 1202(b).

²⁰ *Id.* § 1202(c), (e).

²¹ Nat’l Mining Assoc. v. Kempthorne, 512 F.3d 702, 710 (D.C. Cir. 2008) (“protecting against the harmful effects of surface mining . . . is the primary aim of the statute.”).

²² 30 U.S.C. §§ 1211(c)(1), 1253 (2012).

standards and demonstrate that it has the capability to enforce that law.²³ West Virginia has an approved program. As such, SMCRA permits in West Virginia are issued by the WVDEP with oversight by OSM.²⁴

The SMCRA permitting process is a public process that requires notice, a comment period, and, if requested, an informal conference for objections to be heard.²⁵ Any permit issued under SMCRA “shall require that such surface coal mining operations will meet all applicable performance standards of [SMCRA], and such other requirements as the regulatory authority shall promulgate.”²⁶ Section 515(b) of SMCRA lists twenty-five environmental protection performance standards applicable to surface coal mining,²⁷ while § 515(a) of SMCRA provides that permits shall require coal mining operations to “meet all applicable performance standards of this chapter, and such other requirements as the regulatory authority shall promulgate.”²⁸ These performance standards include, *inter alia*:

requirements for restoration of land to its prior condition after mining, restoration of land to its approximate original contour, segregation and preservation of topsoil, minimization of hydrologic disturbances from mining, construction of coal mine waste piles used as dams or embankments, utilization of explosives, revegetation of mined areas, reclamation of mountaintop mines, and spoil disposal for steep-slope mines.²⁹

These rigorous performance standards, as well as SMCRA’s enforcement mechanisms, ensure that the process for permitting surface mining activities provides regulatory entities with an opportunity to reduce the harm that surface mining causes to public health and the environment.

b. SMCRA Utilizes a System of Cooperative Federalism to Ensure that Surface Coal Mining Operations Adequately Protect the Environment

SMCRA was passed with the goal of encouraging States to assume primacy of their State’s SMCRA program. When SMCRA was passed, Congress stated that “because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations . . . should rest with the States.”³⁰ As such, SMCRA accomplishes its purposes through a system of “cooperative federalism” in which responsibility for the regulation of surface coal mining in the United States

²³ *Id.* § 1253(a).

²⁴ 30 C.F.R. § 948.10 (2012).

²⁵ 30 U.S.C. § 1263 (2012).

²⁶ *Id.* § 1265(a).

²⁷ *Id.* § 1265(b).

²⁸ *Id.* § 1265(a).

²⁹ *See* *Ky. Riverkeeper v. Midkiff*, 800 F. Supp. 2d 846, 854 (E.D. Ky. 2011) (quoting *In re Surface Mining Regulation Litig.*, 627 F.2d 1346, 1350 (D.C. Cir. 1980)) (citing 30 U.S.C. § 1265(b)).

³⁰ 30 U.S.C. § 1201(f) (2012).

is shared between the U.S. Secretary of the Department of the Interior and State regulatory authorities.³¹

To implement this program of cooperative federalism “[a]fter a transition period of direct regulation under the Secretary of the Interior, each State in which coal is mined has the option of submitting to the Secretary its own program for supervising mining and reclamation within its borders.”³² The Secretary will approve the program crafted by that State if it is “adequate to protect environmental concerns that lay behind the adoption of the Act.”³³ The ability of the State to properly enforce the law and protect these environmental concerns is crucial. Without it, the State’s program cannot move forward.

Critical to this cooperative federalism is the continuing Federal role to review and evaluate State programs. OSM is required to conduct oversight inspections as “necessary to evaluate the administration of approved State programs, or to develop or enforce any Federal program.”³⁴ As discussed further below, the Director of OSM must evaluate the administration of each State program annually or upon receipt of a petition establishing the need for evaluation.³⁵ If, at the conclusion of the evaluation process, OSM determines that the State has failed to enforce all or any part of the State program and has not adequately demonstrated its capability and intent to enforce its program, OSM must substitute Federal enforcement or recommend that the Secretary withdraw approval.³⁶

c. OSM is Charged with Approval, Oversight, and, When Necessary, Withdrawal of Approval for a State Program

As stated above, State surface mining programs may not be approved unless they provide “for the regulation of surface coal mining and reclamation operations in accordance with the requirements of [SMCRA].”³⁷ Once approved, oversight by OSM continues.

SMCRA and its implementing regulations provide a mechanism for OSM to evaluate state programs; and, where necessary, substitute federal enforcement or withdraw approval of a state program.³⁸ Section 521(b) of SMCRA provides:

³¹ See generally *id.* § 1253.

³² *In re Surface Mining Regulation Litig.*, 617 F.2d 807, 808 (D.C. Cir. 1980) (citing 30 U.S.C. § 1253).

³³ *Id.*

³⁴ 30 U.S.C. § 1267(a) (2012).

³⁵ 30 C.F.R. § 733.12(a) (2012).

³⁶ *Id.* § 733.12.

³⁷ 30 U.S.C. § 1253(a)(1) (2012).

³⁸ SMCRA also imposes a separate non-discretionary duty to promulgate a federal program if the state “fails to implement, enforce, or maintain its approved State Program as provided for in [SMCRA].” *Id.* § 1254(a)(3). This Petition, however, is addressed to the process for substituting federal enforcement and withdrawing approval, described in Section 521(b) of SMCRA and in 30 C.F.R. Part 733.

Whenever on the basis of information available to him, the Secretary has reason to believe that violations of all or any part of an approved State program result from a failure of the State to enforce such State program or any part thereof effectively, he shall after public notice and notice to the State, hold a hearing thereon in the State within thirty days of such notice. If as a result of said hearing the Secretary finds that there are violations and such violations result from a failure of the State to enforce all or any part of the State program effectively, and if he further finds that the State has not adequately demonstrated its capability and intent to enforce such State program, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Secretary that it will enforce this [Act], the Secretary shall enforce, in the manner provided by this [Act], any permit condition required under this [Act], shall issue new or revised permits in accordance with requirements of this [Act], and may issue such notices and orders as are necessary for compliance therewith³⁹

SMCRA regulations provide the procedure for federal review and withdrawal of State programs. Applicable regulations provide that “States with an approved State program shall implement, administer, enforce and maintain it in accordance with [SMCRA] . . . and the provisions of the approved State program.”⁴⁰

Section 733.12 regulates procedures for substituting Federal enforcement or withdrawing approval. This section provides that the Director of OSM “shall evaluate the administration of each State program at least annually.”⁴¹ It also provides that “[a]ny interested person may request the Director to evaluate a State program.”⁴² Such a request “shall set forth a concise statement of the facts which the person believes establishes the need for evaluation.”⁴³ “The Director shall verify the allegations and determine within 60 days whether or not the evaluation shall be made and mail a written decision to the requestor.”⁴⁴ The sixty-day deadline imposed on the Director demonstrates that the agency is expected to act expeditiously upon receipt of an evaluation request.

If, as a result of the evaluation process, the Director determines the State’s program is not sufficient, Part 733 provides a mandatory process to ensure the program is remedied and SMCRA is properly administered. Part 733 states that:

If the Director has reason to believe that a State is not effectively implementing, administering, maintaining or enforcing any part of its approved State program, the Director shall promptly notify the State regulatory authority in writing. The Director’s notice [to the State] shall—

- (1) Provide sufficient information to allow the State regulatory authority to determine what portions of the program the Director believes are not being effectively implemented, administered, maintained, or enforced;
- (2) State the reasons for such belief; and

³⁹ *Id.* § 1271(b).

⁴⁰ 30 C.F.R. § 733.11 (2012).

⁴¹ *Id.* § 733.12(a)(1).

⁴² *Id.* § 733.12 (a)(2).

⁴³ *Id.*

⁴⁴ *Id.*

(3) Specify the time period for the State regulatory authority to accomplish any necessary remedial actions.⁴⁵

In addition,

[t]he Director shall provide the State regulatory authority an opportunity for an informal conference if the State requests an informal conference within 15 days after the expiration of the time period [that the Director has specified to accomplish remedial actions in her notice to the State]. The informal conference may pertain to the facts or the time period for accomplishing remedial actions as specified by the Director's notification.⁴⁶

However,

[i]f an informal conference is not held . . . , or if, following such a conference, the Director still has reason to believe that the State is failing to adequately implement, administer, maintain or enforce a part or all of a State program, the Director shall give notice to the State and to the public, specifying the basis for that belief and shall hold a public hearing in the State within 30 days of the expiration of the time period [provided in the Director's original notice to the State] or as modified at the informal conference⁴⁷

After a hearing and the review of relevant information, the State will continue to enforce its approved program unless the Director finds that the State has failed to implement, administer, maintain, or enforce effectively all or part of its approved State program.⁴⁸ If the Director further finds that the State has not demonstrated its capability and intent to administer the State program, the Director *shall* substitute for the State regulatory authority either direct Federal enforcement of all or part of the State program or recommend to the Secretary the withdrawal of approval, in whole or in part.⁴⁹

The requirements for substituted Federal enforcement and withdrawal are provided in the regulations. For substituted Federal enforcement, the Director shall give public notice of a finding that the State has not demonstrated the capability or intent to administer the State program and specify the extent to which the Director is instituting direct Federal enforcement of the State program.⁵⁰ The regulations provide that the Director enforce the State program until the State demonstrates it will do so effectively.⁵¹

Upon the Director's recommendation of withdrawal, "the Director shall institute direct Federal enforcement [of the State program] in accordance with [subsection] (f)," discussed in the

⁴⁵ *Id.* § 733.12(b).

⁴⁶ *Id.* § 733.12(c).

⁴⁷ *Id.* § 733.12(d).

⁴⁸ *Id.* § 733.12(e).

⁴⁹ *Id.*

⁵⁰ *Id.* § 733.12(f)(1).

⁵¹ *Id.* § 733.12(f)(2).

preceding paragraph.⁵² The regulations require that:

[u]pon receipt of the Director's recommendation [to withdraw the program] and accompanying information . . . the Secretary *shall* either—

- (i) Withdraw approval of the State program in whole or in part if the Secretary finds that failure by the State to administer or enforce part or all of its State program cannot effectively be remedied by substitution of direct Federal enforcement for all or part of the State program, or
- (ii) Instruct the Director to continue direct Federal enforcement . . .⁵³

Finally, “[t]he Secretary shall give public notice of a finding [to withdraw all or part of the State program], and specify the extent to which approval of a State program is being withdrawn.”⁵⁴ SMCRA further provides that “[n]ot later than the issuance of the notice, the Director shall propose promulgation of, and thereafter promulgate and implement a Federal program for the affected State, in accordance with 30 CFR Part 736 [governing the implementation of a Federal program].”⁵⁵ The regulations provide OSM with the authority to take over either all or only the most problematic parts of West Virginia’s program. As discussed in great detail *supra*, West Virginia has consistently failed to comply with SMCRA’s mandates, thereby causing significant harm to both public health and the environment. West Virginia’s myriad failures compel OSM to substitute Federal implementation and enforcement of surface mining law there. By properly implementing SMCRA’s mandates through the promulgation and implementation of a Federal program, OSM can take immediate steps to rectify the harms caused by West Virginia’s failures to properly administer its program.

II. OVERVIEW OF WEST VIRGINIA’S PROGRAM FOR ADMINISTERING SURFACE MINING

Since West Virginia’s program was approved in 1981, it has failed to comply with the law and protect the State’s precious resources. These failures place West Virginia’s future at risk and can no longer be tolerated. As of December 30, 2012, mining activities are permitted on 463,139 acres in West Virginia.⁵⁶ The harm to humans and the environment resulting from West Virginia’s faulty administration of its surface mining program is substantial. After thirty years of failure, it is past time for OSM to assume control of SMCRA permitting, implementation, and enforcement in West Virginia.

West Virginia submitted a program to the Secretary of Interior in 1980 and the program was

⁵² *Id.* § 733.12(g)(1).

⁵³ *Id.* § 733.12(g)(2) (emphasis added).

⁵⁴ *Id.* § 733.12(g)(3).

⁵⁵ *Id.*

⁵⁶ Statistics from raw data taken from the WVDEP website and compiled by Coal River Mountain Watch. W. VA. DEPT. OF ENV’T’L PROT., *Mining Permit Search*, <http://www.dep.wv.gov/insidedep/Pages/miningpermitsearch.aspx> (last visited Dec. 30, 2012).

approved in 1981.⁵⁷ West Virginia originally received primacy in the form of a conditional approval pending correction of a number of deficiencies in its program. These problems remained unaddressed by West Virginia until 1988, when West Virginia initiated an emergency rulemaking session to forestall Federal takeover of all or part of its program. The 1988 emergency rules largely concerned hydrological assessments of the impacts of mines and added regulatory definitions of “cumulative impact” and “cumulative impact area.” The Secretary approved the amendments in a final rule promulgated in 1990.⁵⁸ West Virginia’s “Surface Coal Mining and Reclamation Act” (SCMRA) is laid out in § 22-3 of the West Virginia Code.⁵⁹ The statute lays out a comprehensive scheme for regulating surface coal mining:

[T]he Legislature finds that unregulated surface coal mining operations may result in disturbances of surface and underground areas that burden and adversely affect commerce, public welfare and safety by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural and forestry purposes; by causing erosion and landslides; by contributing to floods; by polluting the water and river and stream beds; by destroying fish, aquatic life and wildlife habitats; by impairing natural beauty; by damaging the property of citizens; by creating hazards dangerous to life and property; and by degrading the quality of life in local communities, all where proper mining and reclamation is not practiced.⁶⁰

Despite legislative recognition of these significant problems, West Virginia’s program has failed to curtail them. In both 1991 and 1995, OSM concluded that the West Virginia program needed to be amended due to a failure to implement adequate bonding.⁶¹ After the 1991 and 1995 OSM findings, both West Virginia and OSM failed to act. In response to this inaction, West Virginia Highlands Conservancy (WVHC) sued in 2000 to force OSM to initiate Part 733 proceedings against West Virginia.⁶²

The WVHC case resulted in multiple rulings between 2001 and 2003. Using a plain reading of requirements in Part 732 and Part 733, the court found that, because West Virginia failed to

⁵⁷ See 30 C.F.R. § 948.10 (2012) (noting the Secretary’s approval of West Virginia’s plan). West Virginia law provides the Director of the West Virginia Division of Environmental Protection (DEP) with the authority to provide for the regulation of surface coal mining within the State. See W. VA. CODE § 22-3-2 (2012). The Director of DEP has promulgated state regulations to regulate surface mining. See W. VA. CODE R. § 38-2-1 *et seq.*

⁵⁸ See *Ohio River Valley Env’tl. Coal. v. Kempthorne*, 473 F.3d 94, 98 (4th Cir. 2006) (citations omitted).

⁵⁹ W. VA. CODE §§ 22-3-1 *et seq.* (2012).

⁶⁰ *Id.* § 22-3-2.

⁶¹ The 1991 and 1995 findings by OSM were made pursuant to 30 C.F.R. Part 732. Part 732 requires that once OSM has determined that an aspect of the program fails to comply with SMCRA, a state must submit a timetable for an amendment of its program within 60 days of OSM’s determination, comply with that timetable, and receive OSM approval of the amendment. 30 C.F.R. § 732.17 (2012). If this does not occur consequences must follow, including withdrawal of the program under Part 733 if the Director of OSM “has reason to believe that such action is warranted because the State is not effectively implementing, administering, maintaining or enforcing all or part of its approved State program.” *Id.* § 732.17(f)(2).

⁶² *West Virginia Highlands Conservancy v. Norton*, 161 F. Supp. 2d 676 (S.D. W.V. 2001).

amend its program, OSM had a mandatory duty to begin Part 733 proceedings.⁶³ Part 733 proceedings were initiated in June of 2001.

The court also addressed several issues highlighting WVDEP's failure to protect the environment. It ruled that OSM's ten-year delay in commencing Part 733 proceedings constituted a violation of both SMCRA and the APA because OSM had unlawfully withheld and unreasonably delayed performing nondiscretionary duties.⁶⁴ In so ruling, the court detailed the damage done by OSM's refusal to properly oversee the inadequate West Virginia program. It noted many direct impacts and wide ranging indirect impacts, finding:

a climate of lawlessness, which creates a pervasive impression that continued disregard for federal law and statutory requirements goes unpunished, or possibly unnoticed. Agency warnings have no more effect than a wink and a nod, a deadline is just an arbitrary date on the calendar and, once passed, not to be mentioned again. Financial benefits accrue to the owners and operators who were not required to incur the statutory burden and costs attendant to surface mining; political benefits accrue to the state executive and legislators who escape accountability while the mining industry gets a free pass. Why should the state actors do otherwise when the federal regulatory enforcers' findings, requirements, and warnings remain toothless and without effect?⁶⁵

West Virginia's bonding program, which has not yet achieved compliance with the law, continues to be the subject of litigation.

In 2000, as a result of *Bragg v. Robertson*,⁶⁶ WVDEP entered into a consent decree in which the WVDEP Director agreed to enforce State surface mining laws regarding the buffer zone rule, pond placement, hydrologic reclamation plans in permits, approximate original contour (AOC) variances, and contemporaneous reclamation variances. The Director additionally agreed "to create policy documents explaining the application of hydrologic reclamation plans and habitat development."⁶⁷ The Director, *inter alia*, also agreed:

to propose and submit to the Legislature proposed regulations or statutory provisions allowing commercial forestry and homesteading post-mining land uses for operations receiving AOC variances, and addressing bonding for surface mining operations that receive an AOC variance. The Director [further] agree[d] to propose and submit to the Legislature the AOC variance provision found at 30 U.S.C. § 1265(c)(3)(B)(ii) requiring that the post-mining land use be shown to be obtainable according to data regarding expected need and market, and to coordinate review of approved post-mining land uses with state or local economic development authorities before approving future AOC variances.⁶⁸

In approving the Consent Decree, the court noted that:

⁶³ *Id.* at 682.

⁶⁴ *Id.* at 681–84.

⁶⁵ *Id.* at 684.

⁶⁶ 83 F. Supp. 2d 713 (S.D. W.Va. 2000), *aff'd sub nom.* *Bragg v. West Virginia Coal Ass'n*, 248 F.3d 275 (4th Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002).

⁶⁷ *Id.* at 718.

⁶⁸ *Id.*

[b]y signing this Consent Decree, the Director commits the WVDEP to a state surface coal mining program that will uphold the law according to its spirit and its intent. In the Decree, the Director explicitly promises to enforce surface mining law in areas where Plaintiffs alleged prior enforcement failures caused environmental degradation. The Director urges the Court to accept the Decree and rely on these promises. It is a basic presumption of our system of government that public servants abide by the law and their sworn duty to uphold it. In accepting this Decree the Court relies, as it must, on the Director's acknowledgment of his statutory duties and his promises to carry out these obligations. The public interest would be ill-served by any failure to fulfill this agreement or any falling away from the high standards the Director voluntarily has undertaken and set for WVDEP in signing this Decree to end this litigation. The Court finds and concludes the Consent Decree is in the public interest. The Court retains jurisdiction to ensure, insofar as is judicially possible, that the promises made herein will be fulfilled.⁶⁹

Many of these changes have been either improperly implemented or not implemented at all.

Many other aspects of West Virginia's program have been the subject of ongoing controversy and litigation. The extensive history of litigation over West Virginia's program will not be included in this petition, but it is worth noting that millions of taxpayer dollars have been put into defending West Virginia's failed program.

As a result of West Virginia's consistent and systematic failure to comply with the law and to protect the State's residents and natural resources, it is both necessary and appropriate for OSM to take over enforcement of surface mining laws in West Virginia.

III. WVDEP'S FAILURE TO ADHERE TO SMCRA'S PERMITTING PROCESSES

WVDEP is failing to properly administer the surface mining permitting program that is at the very core of SMCRA. SMCRA's mandate states that "[n]o permit or revision application shall be approved unless the application affirmatively demonstrates and the regulatory authority finds in writing . . . the permit application is accurate and complete and that all the requirements of this chapter and the State or Federal program have been complied with."⁷⁰ WVDEP has failed to ensure that permit applications are accurate and complete and that all permits comply with all State and Federal laws.

a. WVDEP Violates SMCRA by Issuing and Renewing Mining Permits Where Applicants have Unabated Violations of SMCRA and Other Environmental Laws

WVDEP's practice of ignoring the law on permitting when unabated violations exist compels OSM to withdraw its surface mining program. As part of a permit application,

⁶⁹ *Id.* at 719.

⁷⁰ 30 U.S.C. § 1260(b)(1) (2012).

SMCRA requires applicants to file a schedule listing all of the environmental violations the applicant has received over the last three years. This schedule must include “violations of this Act and any law, rule, or regulation of the United States, or of any department or agency in the United States pertaining to air or water environmental protection incurred by the applicant in connection with any surface coal mining operation.”⁷¹ West Virginia’s SCMRA echoes SMCRA’s mandate and is even more explicit in listing the broad array of violations of environmental and other statutes that must be included in the schedule filed as part of permit applications:

The applicant shall file as part of the permit application a schedule listing all notices of violation, bond forfeitures, permit revocations, cessation orders or permanent suspension orders resulting from a violation of the federal Surface Mining Control and Reclamation Act of 1977, as amended, this article or any law or regulation of the United States or any department or agency of any state pertaining to air or environmental protection received by the applicant in connection with any surface-mining operation during the three-year period prior to the date of application, and indicating the final resolution of any notice of violation, forfeiture, revocation, cessation or permanent suspension.⁷²

WVDEP does not require applicants to follow this simple threshold requirement; it regularly issues permits that fail to list outstanding SMCRA and Clean Water Act (CWA) violations. SMCRA makes plain that permits may not be issued to applicants with outstanding violations except in certain limited circumstances:

The schedule shall also indicate the final resolution of any such notice of violation. *Where the schedule or other information available to the regulatory authority indicates that any surface coal mining operation owned or controlled by the applicant is currently in violation of this chapter or such other laws referred to in this subsection, the permit shall not be issued until the applicant submits proof that such violation has been corrected or is in the process of being corrected to the satisfaction of the regulatory authority, department, or agency which has jurisdiction over such violation and no permit shall be issued to an applicant after a finding by the regulatory authority, after opportunity for hearing, that the applicant, or the operator specified in the application, controls or has controlled mining operations with a demonstrated pattern of willful violations of this chapter of such nature and duration with such resulting irreparable damage to the environment as to indicate an intent not to comply with the provisions of this chapter.*⁷³

Under the emphasized portion of this rule, an applicant is explicitly blocked from receiving an additional permit if one of its existing operations is in violation of environmental laws unless the operator submits proof that it has either abated or is currently abating the problem.

WVDEP routinely issues SMCRA permits to companies with outstanding SMCRA violations. According to WVDEP’s own records, since 1990 418 new permits have been issued to companies whose subsidiaries have outstanding SMCRA violations. Of those 418 permits, 102

⁷¹ 30 U.S.C. § 1260.510(c) (2012).

⁷² W. VA. CODE § 22-3-9(f).

⁷³ 30 U.S.C. § 1260(c) (2012) (emphasis added).

have been issued since 2005. Not counting prospecting permits, 216 new SMCRA permits with outstanding violations have been issued since 1990, and thirty-four have been issued since 2005. Although the “applicant violator” provision applies to parent companies and renewals, this analysis does not include parent companies. If parent companies had been included, violations of this express statutory requirement would almost certainly be even higher.⁷⁴

In regard to permit renewals, SMCRA provides that:

[a]ny valid permit issued pursuant to this chapter shall carry with it the right of successive renewal upon expiration with respect to areas within the boundaries of the existing permit. The holders of the permit may apply for renewal and such *renewal shall be issued* (provided that on application for renewal the burden shall be on the opponents of renewal), subsequent to fulfillment of the public notice requirements of sections 1263 and 1264 of this title *unless* it is established that and written findings by the regulatory authority are made that—

- (A) *the terms and conditions of the existing permit are not being satisfactorily met;*
- (B) *the present surface coal mining and reclamation operation is not in compliance with the environmental protection standards of this chapter and the approved State plan or Federal program pursuant to this chapter;* or
- (C) the renewal requested substantially jeopardizes the operator’s continuing responsibility on existing permit areas. . . .⁷⁵

Similarly, regulations require that certain factors be met before a permit renewal is approved:

- (1) Criteria for approval. The regulatory authority shall approve a complete and accurate application for permit renewal, unless it finds, in writing that--
 - (i) *The terms and conditions of the existing permit are not being satisfactorily met;*
 - (ii) *The present surface coal mining and reclamation operations are not in compliance with the environmental protection standards of the Act and the regulatory program;*
 - (iii) The requested renewal substantially jeopardizes the operator’s continuing ability to comply with the Act and the regulatory program on existing permit areas.⁷⁶

Accordingly, under the law governing permit renewal, if an applicant is out of compliance, its permit may not be renewed. By renewing such permits, WVDEP shows a gross disregard for the law.

Representing WVDEP, attorney A.M. “Fenway” Pollack highlighted the agency’s great disregard for the law in his arguments in front of the West Virginia Surface Mine Board in 2009. The case involved a permit renewed by WVDEP despite the company’s outstanding violations under both SMCRA and the CWA. He argued that no permits would ever be renewed if WVDEP considered outstanding water pollution violations because the law, “taken to its logical

⁷⁴ *Id.*

⁷⁵ 30 U.S.C. § 1256(d)(1) (2012) (emphasis added).

⁷⁶ 30 C.F.R. § 774.15(c) (2012) (emphasis added).

conclusion . . . would mean no one gets renewal. We'll just shut down mining.”⁷⁷ Not only does his argument show WVDEP’s shocking disregard for compliance with statutory mandates, it is also simply untrue. Hundreds of SMCRA permits in West Virginia are not associated with a single CWA violation. WVDEP’s argument demonstrates that it considers its role in implementing SMCRA to be clearing an easy path for mining even when companies fail to comply with the terms of their permits. This does not comport with the role SMCRA envisioned for States.

Despite its express legal mandate, WVDEP also routinely issues SMCRA permits to companies with outstanding CWA violations resulting from their failure to comply with CWA National Pollution Discharge Elimination System (NPDES) permits. Since 2006, 197 new permits under SMCRA have been issued to subsidiaries with water quality violations. Excluding prospecting permits, seventy-two permits have been issued to companies with outstanding CWA violations since 2006.⁷⁸ This disregard for the law is especially significant for OSM’s review of this petition because “*when a citizen files a complaint that a State regulatory authority as a general matter is failing to obtain permit blocks against operators who are in violation of the Clean Water Act, that particular grievance is cognizable under the Federal takeover regulations at 30 C.F.R. §733.12.*”⁷⁹

An illustration of the problem can be seen by looking at Fola Coal Company, a subsidiary of Consol Energy. According to WVDEP’s own records, Fola Coal Company violated their NPDES permits 2,056 times between January 1, 2006 and May 31, 2011. In that time, Fola had at least one outlet out of compliance every single month. During this same period, subsidiaries of Consol Energy were issued at least fifteen new SMCRA permits in West Virginia,⁸⁰ three of which were issued directly to Fola Coal Company, despite its failure to abate its water quality violations.⁸¹ The permits are listed in the following table:

⁷⁷ Katheryne Hoffman, *MTR Mining Equipment Taken Off Gauley Mountain – For Now* 5, OHIO VALLEY ENVTL. COAL. (Aug. 2009), http://www.ohvec.org/newsletters/woc_2009_08/woc.pdf.

⁷⁸ The law also applies to parent companies and permit renewals. However, this analysis only included subsidiaries and applications for new permits, thus the true number of new permits issued to companies with outstanding NPDES violations is likely even higher. Statistics from raw data taken from the WVDEP website and compiled by Coal River Mountain Watch. W. VA. DEPT. OF ENVT’L PROT., *Mining Permit Search*, <http://www.dep.wv.gov/insidedep/Pages/miningpermitsearch.aspx> (last visited Dec. 30, 2012).

⁷⁹ West Virginia Highlands Conservancy et al., 152 IBLA 161 (2000) (emphasis added).

⁸⁰ *Id.*

⁸¹ Fola Coal Company, Permit # S-2006-05, Permit Details, https://apps.dep.wv.gov/WebApp/_dep/search/Permits/OMR/Permit_details.cfm?permit_id=S200605&dep_office_id=OMR&responsible_party_name=FOLA%20COAL%20COMPANY%20LLC (last visited Dec. 30, 2012); Fola Coal Company, Permit # S-2003-07, Permit Details, https://apps.dep.wv.gov/WebApp/_dep/search/Permits/OMR/Permit_details.cfm?permit_id=S200307&dep_office_id=OMR&responsible_party_name=FOLA%20COAL%20COMPANY%20LLC; Fola Coal Company, Permit # S-2004-09, Permit Details, https://apps.dep.wv.gov/WebApp/_dep/search/Permits/OMR/Permit_details.cfm?permit_id=S200409&dep_office_id=OMR&responsible_party_name=FOLA%20COAL%20COMPANY%20LLC.

| SMCRA Permit Number | Date Issued | Number of NPDES Outlets in Violation in Month Prior to Issuance of SMCRA Permit | Number of NPDES Outlets in Violation for two Consecutive Months Prior to Issuance of SMCRA Permit |
|---------------------|-------------|---|---|
| S200605 | 11/03/06 | 17 | 10 |
| S200307 | 5/14/09 | 5 | 2 |
| S200409 | 02/14/11 | 4 | 2 |

Furthermore, WVDEP approved this application despite the fact that CWA violations were not even listed in the schedule of violations in the above permit applications.

Similarly, by approving permits in watersheds listed on the State’s 303(d) list of impaired waters where the total maximum daily load (TMDL) identification process has not been completed, WVDEP is failing to meet the requirement that it not issue permits where environmental laws are being violated.⁸² Section 303(d) of the CWA requires States to identify waters that are water quality limited and to establish a TMDL of pollutants for them.⁸³ These required effluent limitations “must control all pollutants or pollutant parameters (either conventional, nonconventional or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.”⁸⁴ When WVDEP authorizes the additional release of pollutants into an impaired watershed without a TMDL, this results in the per se cause or contribution to the existing water quality violation because, absent an established TMDL limit, additional discharges of pollutants already resulting in impairments will necessarily cause or contributing to existing impairments. The exceedance of these limits is a significant problem.

⁸² “Where the schedule or other information available to the regulatory authority indicates that any surface coal mining operation owned or controlled by the applicant is currently in violation of this chapter or such other laws referred to in this subsection, the permit shall not be issued until the applicant submits proof that such violation has been corrected or is in the process of being corrected to the satisfaction of the regulatory authority, department, or agency which has jurisdiction over such violation and no permit shall be issued to an applicant after a finding by the regulatory authority, after opportunity for hearing, that the applicant, or the operator specified in the application, controls or has controlled mining operations with a demonstrated pattern of willful violations of this chapter of such nature and duration with such resulting irreparable damage to the environment as to indicate an intent not to comply with the provisions of this chapter.” 30 U.S.C. § 1260(c) (2012) (emphasis added).

⁸³ 33 U.S.C. § 1313(d) (2012); 40 C.F.R. § 130.7 (2012).

⁸⁴ 40 C.F.R. § 122.44(d)(1)(i). See also *id.* at 122.44(d)(1)(iii) (“When determining whether a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criteria within a State water quality standard, the permitting authority shall use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water.”)

WVDEP is allowing these kinds of exceedances in waters impaired due to mining. In 2008, West Virginia listed Seng Creek of the Big Coal River, Workman's Branch of the Pond Fork of the Little Coal River, and Coal Fork of Cabin Creek as biologically impaired due to mining.⁸⁵ Despite not having completed the TMDL process established in 40 C.F.R. § 130.7, WVDEP still approved permits in these watersheds after listing them as impaired. In the Coal Fork watershed, WVDEP approved Wildcat #2, S302606 on January 8, 2008, a permit that allows for eighteen outlets into Coal Fork on the associated WV1022156. In the Workman's Branch watershed, WVDEP approved Synergy #2, S501707 on April 15, 2009, a permit that allows for at least four discharges into Workman's Branch on the associated WV1023209. This permit includes two valley fills in the headwaters of Workman's Branch. In the Seng Creek watershed, WVDEP approved N-Extension, S300408, on July 17, 2009 even though it had at least sixteen discharges into Seng Creek on the associated WV1022563. WVDEP's decision to grant permits in watersheds impaired by mining where it has not even established the TMDL is highly problematic and indicative of a programmatic failure to ensure that all environmental laws are complied with prior to the issuance of permits.

b. WVDEP's Failure to Terminate Expired Not-Started Permits

In addition to approving permits for companies that have SMCRA and CWA violations, WVDEP also routinely allows mining to begin on expired non-started permits by granting extensions that violate SMCRA's extension requirements. After the issuance of a permit under SMCRA, a company has three years to commence mining and if the company fails to do so, then the permit must be automatically terminated and a new permit would be required for mining to commence.⁸⁶ However, WVDEP enacted a policy, unlawfully implemented without approval from OSM, allowing it to bend the rules. Under its unlawful policy, WVDEP does not automatically terminate a permit that has not commenced mining within three years and it also routinely allows mining to begin on such a permit after the statutorily allocated time frame.

As discussed above, the permitting requirements are a central component of both SMCRA and SCMRA.⁸⁷ Each permit is granted for a five-year term and the operator must renew the permit at the end of the term.⁸⁸ Despite the fact that a permit is issued for a five-year period, a permit will become invalid at the end of three years if the operator has not begun coal mining operations.⁸⁹ Under SMCRA and SCMRA,⁹⁰ "[a] permit shall terminate if the permittee has not commenced

⁸⁵ W. VA. DEPT. ENV'T'L PROT., West Virginia Integrated Water Quality Monitoring and Assessment Report (2008), http://www.dep.wv.gov/WWE/watershed/IR/Documents/IR_2008_Documents/WV_IR_2008_Report_Only_EPA_Approved.pdf.

⁸⁶ W. VA. CODE R. § 22-3-8 (a)(3) (2012); *see also* 30 U.S.C. § 1256(c) (2012).

⁸⁷ 30 U.S.C. § 1256(a) (2012).

⁸⁸ *Id.* § 1256(b).

⁸⁹ *Id.* § 1256(c).

⁹⁰ W. VA. CODE § 22-3-8(a) (2012).

the surface coal mining operations covered by such permit within three years of the issuance of the permit.”⁹¹

However, certain conditions do exist which may warrant an extension of a permit. An extension may be granted if commencement was stalled due to “litigation precluding commencement, or threatening substantial economic loss to the permittee, or by reason of conditions beyond the control and without the fault or negligence of the permittee.”⁹² Additional extensions are available for leases granted by the Federal Mining Leasing Act and mining activities for use in a synthetic fuel facility or electric generating facility.⁹³ Not-started permit extensions must be in writing and published within a reasonable time.⁹⁴

WVDEP created its own policy on not-started permits in January of 1993.⁹⁵ WVDEP’s policy, as stated in its Handbook, is that permittees should receive notice of the termination of their permit prior to termination and with plenty of time to submit a renewal request to WVDEP.⁹⁶ If this process is not followed before termination it must be followed *after* the date of termination, allowing for the retroactive approval of permit extensions.⁹⁷ WVDEP’s policy requiring notice has illegally allowed certain mining operations to begin after the three-year period has run in two principal ways. First, it grants extensions based on information submitted by companies that fail to fully or accurately meet the standards for such extensions under SMCRA. Second, extensions are routinely unlawfully granted after the date of permit expiration.

This contravenes the plain language requirements of both SMCRA and SCMRA. Further, a State policy can only be legally effective if it is submitted to OSM and approved as part of the approved State program,⁹⁸ but WVDEP did not submit this policy to OSM. OSM has followed up with WVDEP to point out that its approved program does not allow for retroactive approval of permit extensions.⁹⁹

⁹¹ *Id.*

⁹² 30 U.S.C. § 1256(c) (2012); 30 C.F.R. § 773.19(e)(2) (2012).

⁹³ 30 U.S.C. § 1256(c) (2012); 30 C.F.R. § 773.19(e)(3) (2012).

⁹⁴ 30 C.F.R. § 773.19(e)(4) (2012).

⁹⁵ W. VA. DIV. OF ENVTL. PROT., INSPECTION AND ENFORCEMENT HANDBOOK § 3, 10–15 (1992), *available at* <http://www.dep.wv.gov/dmr/handbooks/Documents/Inspection%20and%20Enforcement%20Handbook/1%20and%20E%20Handbook.pdf>.

⁹⁶ *Id.* at 11–12.

⁹⁷ *Id.*

⁹⁸ 30 C.F.R. § 732.17(g) (2012).

⁹⁹ Letter from Roger W. Calhoun, Director, Charleston Field Office, Office of Surface Mining, U.S. Dept. of the Interior, to Thomas Clark, Director, Div. of Mining & Reclamation, W. Va. Dept. of Env'tl. Prot. 5 (June 8, 2012) (on file with author).

WVDEP's unlawful action was the recent subject of OSM action and subsequent media attention.¹⁰⁰ On June 8, 2012, OSM wrote to WVDEP that its decision to extend a permit "clearly exceeds its legal authority under the State's approved permanent regulatory program" and to convey its finding that WVDEP's "actions with regard to the extension of Marfork Coal Company Permit No. S-3028-05" were "arbitrary, capricious and an abuse of discretion."¹⁰¹ OSM has made significant efforts to reach out to WVDEP to remedy these problems but WVDEP has not been responsive to these efforts.

WVDEP's policy has created an outstandingly large number of permits that should be terminated. Currently, 143 permits have been issued in West Virginia that are expired because more than three years have passed and mining activity has not yet begun, but have not been terminated by WVDEP.¹⁰² Additionally, on over 100 permits, WVDEP has allowed operators to begin mining activities after the three-year period had run.¹⁰³ In total, WVDEP has allowed for 246 permit violations by not properly terminating permits.¹⁰⁴

WVDEP's failure to properly terminate not-started permits is not just a procedural problem. Permits are meant to capture the current state of an area at that moment. Significant changes such as storms, new technologies, economic trends, and new science can result in dramatic changes to the contents of a permit, yet WVDEP seems content to rely on outdated permits and their outdated analysis despite the resulting risks to the environment. WVDEP's failure to terminate not-started permits indicates that WVDEP cares more about facilitating mining operations than administering the law and compels OSM to withdraw West Virginia's surface mining program.

¹⁰⁰ See Taylor Kuykendall, *OSMRE: DEP shouldn't have extended MTR permit*, THE STATE JOURNAL (June 11, 2012, 1:21 PM PDT), <http://www.statejournal.com/story/18758779/osmre-dep-shouldnt-have-extended-mtr-permit?clienttype=printable>.

¹⁰¹ *Id.*

¹⁰² *SMCRA 3 year NS Violations*, <https://docs.google.com/file/d/0ByJhQ0gWmub1YjVmNzVINDItZTc5Yy00YzE3LWI5NzQtODI2NjMzYTg1NjQ2/edit?pli=1> (last visited Dec. 28, 2012).

¹⁰³ *Id.*

¹⁰⁴ *Id.* For a complete listing of permits where three years have passed since permit issuance and mining has not started, as well as where three years have passed since permit issuance and mining has started, see Appendix A.

c. Chronic Understaffing, and WVDEP's Failure to Remedy this Problem, Significantly Contributes to Permitting Failures

i. WVDEP's Entire Surface Mining Program has been Chronically Understaffed

WVDEP's surface mining program is perpetually understaffed; this chronic problem results in many failures, including the permitting failures discussed above.¹⁰⁵ WVDEP's staffing problems, especially in the permitting program, partially explain why WVDEP's surface mining program is so inadequately administered. OSM has made a substantial effort to provide WVDEP with support to allow it to get the staff it needs to properly administer its program for the regulation of surface mining, but WVDEP has failed to remedy the problem and OSM's annual evaluation reports indicate that this chronic problem is only getting worse. At the end of the 2011 evaluation year, WVDEP's regulatory program for surface mining had thirty-three vacancies, twenty-three of which were in the permitting and inspection departments.¹⁰⁶ At the end of the 2010 evaluation year, the regulatory program also had thirty-three vacancies.¹⁰⁷ Once again, the majority of these vacancies were in the permitting and inspection departments. It is astounding that WVDEP is not filling these positions.

Inadequate staffing results in an unreasonable workload for existing staff. Over half a decade ago, in 2007, OSM made the following statements regarding staffing in the Evaluation Report:

The state's FY2007 A&E grant application proposes to reduce the permitting staff by one position, from 86 to 85. However, only 54 of these positions are designated as technical review while another 19 of the 54 positions are designated primarily as NPDES review. In addition, another 7 technical review positions are now vacant. Therefore, only 28 positions appear to be used specifically for SMCRA permitting work. *The small permitting staff processes 2 to 3 times as many permitting actions with those about half as many reviewers as several other states.*¹⁰⁸

In its 2008 Evaluation Report, OSM again mentioned concerns regarding staffing, noting that "[g]iven the State's permitting workload and the number of vacancies, OSM has encouraged the State to be more aggressive in filling these vacant positions."¹⁰⁹ In 2009, West Virginia had still not gotten around to filling vacant staff positions and OSM declared this to be a priority issue. "Given the continued decline in total State staffing and the increase in vacancies, OSM plans to

¹⁰⁵ A comprehensive data collection that provides thirteen pages of data on staffing figures, including raw figures and tables, utilized for all staffing sections in this petition is found in Appendix B.

¹⁰⁶ Office of Surface Mining Reclamation and Enforcement, West Virginia Annual Evaluation Report 29 (2011), available at <http://odocs.osmre.gov/qdocs.aspx>.

¹⁰⁷ Office of Surface Mining Reclamation and Enforcement, West Virginia Annual Evaluation Report 35 (2010), available at <http://odocs.osmre.gov/qdocs.aspx>

¹⁰⁸ Office of Surface Mining Reclamation and Enforcement, West Virginia Annual Evaluation Report 29 (2007), available at <http://odocs.osmre.gov/qdocs.aspx> (emphasis added).

¹⁰⁹ Office of Surface Mining Reclamation and Enforcement, West Virginia Annual Evaluation Report 32 (2008), available at <http://odocs.osmre.gov/qdocs.aspx>.

make staffing a priority issue with the State.”¹¹⁰ OSM’s concerns about staffing continued in 2010. “WVDEP has made some progress in filling vacancies, but more aggressive action may be necessary, given the number of people within the agency who are eligible to retire.”¹¹¹ The report noted the “continued decline in total WVDEP regulatory staffing and the number of vacancies,” that “the OSM continues to make staffing a priority issue with the State,” “State officials have admitted that they have had difficulty hiring and retaining technical staff,” and that it “has encouraged the State to reevaluate its own staffing needs.”¹¹² In 2011, OSM once again voiced its concerns about WVDEP not having enough staff to maintain its programs properly, despite the fact that OSM has provided WVDEP with significant funding to help resolve the problem.¹¹³ OSM continued to raise its concerns about the significant number of staff who were nearing retirement, and noted that WVDEP “has made little progress in eliminating its backlog of vacancies. OSM will continue working with the WVDEP to fill vacant positions and to identify other sources of revenue to fund the State’s regulatory program.”¹¹⁴ However, WVDEP appears not to be anxious to fill this gap, despite OSM’s evaluations and the intense workload placed on existing staff.

Each member of WVDEP’s staff is responsible for a vast acreage of surface mine sites. The following table shows how staffing levels and permitted acreage have changed over the past seven years.¹¹⁵

| Year | Regulatory Program Vacancies | Change in Total FTE Positions | Actual FTE Staff | Permitted Acreage |
|-------------|-------------------------------------|--------------------------------------|-------------------------|--------------------------|
| 2011 | 33 | -2 | 233.1 | 352,274 |
| 2010 | 33 | -3.25 | 235.1 | 351,410 |
| 2009 | 24 | +1.7 | 247.3 | 348,890 |
| 2008 | 13 | -9.2 | 256.6 | 337,360 |
| 2007 | 25 | -2.4 | 253.8 | 327,540 |
| 2006 | 22 | -0.75 | 259.2 | 334,087 |
| 2005 | 22 | -8.05 | 260.0 | 322,100 |

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¹¹⁰ Office of Surface Mining Reclamation and Enforcement, West Virginia Annual Evaluation Report 30 (2009), available at <http://odocs.osmre.gov/qdocs.aspx>.

¹¹¹ Office of Surface Mining Reclamation and Enforcement, West Virginia Annual Evaluation Report 10 (2010), available at <http://odocs.osmre.gov/qdocs.aspx>.

¹¹² *Id.* at 35–36.

¹¹³ *Id.* at 11.

¹¹⁴ *Id.*

¹¹⁵ OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, *REG-8 Oversight Database*, <http://odocs.osmre.gov/qdocs.aspx> (last visited Dec. 30, 2012) (include West Virginia and the relevant years to obtain Annual Evaluation Reports).

¹¹⁶ The above numbers were compiled by Coal River Mountain Watch from OSM’s Annual Evaluation.

WVDEP has steadily decreased the number of positions while vacancies have risen. The number of full time equivalent (FTE) staff members has declined while the total permitted acreage has steadily increased. WVDEP's refusal to adequately staff its regulatory program demonstrates a disregard for the importance of SMCRA. At this point, WVDEP has ignored OSM's concerns for long enough that substantive intervention by OSM is appropriate.

ii. Chronic Understaffing in the Permitting Program

The consequences of staffing shortages are especially acute in the permitting program. In 2011, WVDEP had three and a half fewer FTE permit review staff than it did in 2003. Although the total number of permits has declined since 2003, the total permitted acreage has increased by 47,074 acres. Compared to 2003, in 2011 each permit staffer was responsible for an additional 1,654 permitted acres. This means each permit review employee is responsible for twenty-five percent more permitted acres than in 2003. The process of permitting surface mines is rigorous by design—it is a primary mechanism for ensuring the orderly operation of mines. With a massive number of acres assigned to permitting staff, the required rigor is not feasible.

The requirements for mining permits in West Virginia are laid out in Section 22-3-9 of the West Virginia Code.¹¹⁷ The statute lays out a comprehensive scheme for the permitting process and the reclamation plans that must be included in each permit.¹¹⁸ Ensuring that these plans contain the requisite level of detail and reflect an appropriate plan for reclaiming each specific site is an intensive inquiry that requires a substantial investment into understanding each mine site, including all of its unique characteristics and uses, in its entirety. This inquiry requires permitting staff to be familiar with every aspect of the mining site, but as the acreage assigned to each permitting employee increases it is impossible for permitting staff to diligently undertake the site specific inquiry necessary to achieve due diligence in their permit reviews. This has significant on-the-ground impacts for mining communities where the mine permits do not contain all of the safeguards necessary to protect communities from harm.

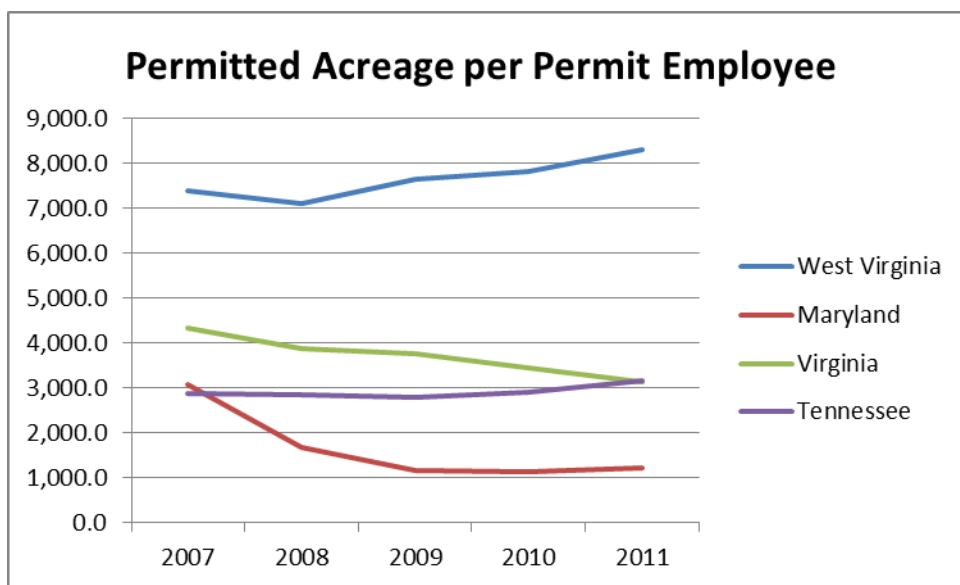
Lack of funding for permitting staff cannot be blamed for understaffing because OSM has committed substantial resources to ensure that WVDEP has funding for permitting and other staff. The aforementioned increase in workload occurred simultaneously with a \$3,246,867 increase in OSM funding for the West Virginia Regulatory Program between 2003 and 2011.¹¹⁹ OSM has expressly prioritized funding this program, so the only remaining problem is WVDEP's refusal to hire adequate permitting staff.

¹¹⁷ W. VA. CODE ST. R. § 22-3-9 (2012).

¹¹⁸ *Id.* § 22-3-10.

¹¹⁹ OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, *REG-8 Oversight Database*, <http://odocs.osmre.gov/qdocs.aspx> (last visited Dec. 30, 2012). *See also*, Appendix B.

A comparison of several surrounding States over the last five years shows the unreasonably heavy workload placed on West Virginia’s technical regulatory staff.¹²⁰ These staff numbers do not include non-technical staff such as administrative, clerical, or fiscal personnel. The following analyses of staffing issues were compiled by Coal River Mountain Watch using numbers reported in the evaluation reports for each State from 2007 through 2011 published by the Office of Surface Mining.¹²¹



The following chart shows the five-year average permitted acreage per permitting employee in several nearby States, plainly illustrating the significance of the staffing problem in West Virginia.

| State | Permitted Acreage per Permitting Employee |
|---------------|---|
| West Virginia | 7,646 |
| Maryland | 1,657 |
| Virginia | 3,708 |
| Tennessee | 2,920 |

As the chart shows, WVDEP staff is responsible for 3,938 acres more per permitting employee than second place Virginia. West Virginia’s permitting employees are responsible for over

¹²⁰ Tennessee is a particularly useful benchmark because the program is run by the OSM. Kentucky’s program is not included for comparison but it also has a very low ratio of staff to permitted acreage, as recognized by OSM in oversight reports.

¹²¹ OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, *REG-8 Oversight Database*, <http://odocs.osmre.gov/qdocs.aspx> (last visited Dec. 30, 2012).

double the number of acres for which their colleagues in Virginia are responsible, and almost *five times* the number of acres as their colleagues in Maryland.

West Virginia is not the worst in the nation in terms of the average number of permitting actions (new permits, renewals, etc.) per permitting employee.

| State | Permitting Actions per Permitting Staff Member |
|---------------|--|
| West Virginia | 33 |
| Maryland | 20 |
| Virginia | 35 |
| Tennessee | 13 |

However, the permits are much larger in West Virginia than in these surrounding States, resulting in a much larger total acreage per permit per permitting employee. Thus, it is more useful to look at the average total acreage of the permit actions per year and divide it by the average number of technical permit staff.

| State | Acreage of Permit Actions per Permit Employee |
|---------------|---|
| West Virginia | 237 |
| Maryland | 65 |
| Virginia | 129 |
| Tennessee | 108 |

By considering acreage of permits and not just permits per staffer, it is plain that West Virginia's permitting staff has more than double the workload of their colleagues in Virginia and almost four times the workload of their colleagues in Maryland.

At this point, it is obvious that funding and rebukes in annual reports are not going to force WVDEP to hire the staff it needs. WVDEP's refusal to correct this relatively simply problem compels OSM to withdraw its program and substitute Federal control so that it can provide the staff necessary to properly administer the surface mining program.

IV. WVDEP'S ENFORCEMENT FAILURES

Compounding the significant problems in the permitting program is the fact that WVDEP also routinely fails to properly inspect mine sites and enforce violations. SMCRA creates an obligation for enforcement actions to be taken when an inspector observes a violation of the

Act.¹²² However, WVDEP fails to properly undertake the inspections necessary to observe violations, fails to make adequate use of the many available enforcement tools, and fails to enforce dam safety requirements.

a. WVDEP has Failed to Properly Conduct Mandatory Inspections

WVDEP is failing to carry out inspections as required by its program and SCMRA. West Virginia’s program mandates that all surface-mining operations “shall be inspected at least once every thirty days.”¹²³ These inspections must be made on an irregular basis, without prior notice,¹²⁴ ensuring that mines stay in compliance all the time, not just when inspectors are en route. Inspections must be accompanied by the filing of inspection reports to assist in the enforcement SCMRA.¹²⁵ As the charts below demonstrate, WVDEP is failing to appropriately carry out its mandatory inspection program.

Just as staffing problems contribute to WVDEP’s failure to properly administer its permitting program, chronic understaffing also inhibits the agency’s ability to properly conduct mandated inspections. This failure is not just a failure to comply with a legal mandate—it also poses significant problems on the ground. The law governing surface mining is premised on the ability of inspectors to find violations and subsequently enforce the law. Inadequate capacity for administering the inspection program results in violations being overlooked and going unabated, resulting in real harm on the ground. As shown in the chart below, the permitted acreage to inspection employee ratio in West Virginia is very high compared to nearby States.¹²⁶ There is simply no way these inspectors can conduct the kind of thorough inspections necessary to detect every permit violation.

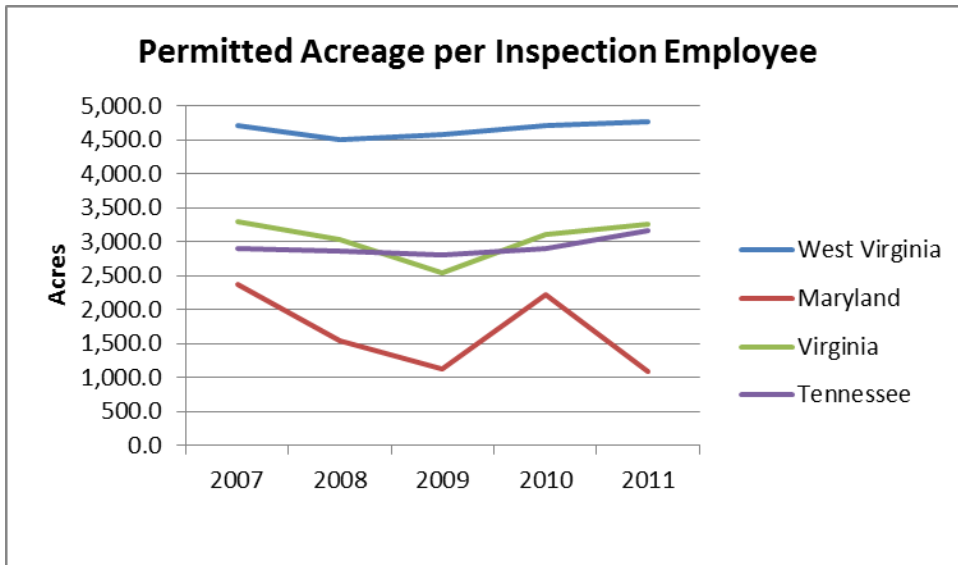
¹²² 30 U.S.C. § 1271 (2012).

¹²³ W. VA. CODE § 22-3-15(c) (2012).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, *REG-8 Oversight Database*, <http://odocs.osmre.gov/qdocs.aspx> (last visited Dec. 30, 2012).



Below is the five year average permitted acreage per inspection and enforcement (I&E) staff for each State:

| State | Average Permitted Acreage per I&E Employee |
|---------------|--|
| West Virginia | 4,649 |
| Maryland | 1,671 |
| Virginia | 3,044 |
| Tennessee | 2,920 |

Members of West Virginia’s regulatory program staff have a much higher workload than regulatory program staff in other States. This is further illustrated in the chart below, which compares inspection and enforcement staff workloads by showing the average number of complete and partial inspections conducted annually divided by the average number of technical inspection and enforcement staff members.

| State | Complete Inspections Conducted Per I&E Staff Member |
|---------------|---|
| West Virginia | 105 |
| Maryland | 97 |
| Virginia | 68 |
| Tennessee | 49 |

| State | Partial Inspections Conducted Per I&E Staff Member |
|---------------|--|
| West Virginia | 202 |
| Maryland | 170 |
| Virginia | 103 |
| Tennessee | 87 |

In addition to comparing the number of permits, it is also useful to compare the average size of inspectable units in each State. Multiplying the above numbers by the average acreage per inspectable unit provides an accurate picture of just how large the workload is for WVDEP's inspectors both for complete and partial inspections.

| State | Acreage of Complete Inspections Conducted per I&E Staff Member |
|---------------|--|
| West Virginia | 16,745 |
| Maryland | 9,061 |
| Virginia | 13,266 |
| Tennessee | 5,067 |

| State | Acreage of Partial Inspections Conducted per I&E Staff Member |
|---------------|---|
| West Virginia | 32,203 |
| Maryland | 15,890 |
| Virginia | 20,193 |
| Tennessee | 8,929 |

WVDEP’s staff is responsible for substantially more acreage than all comparable States. Notably, the acreage of inspections conducted per staff member in West Virginia is almost three times higher than in Tennessee. Tennessee’s program is, of course, administered by OSM.

The result of this overwhelming workload for WVDEP inspection staff is predictable. WVDEP frequently fails to carry out mandated monthly mine site inspections. West Virginia has not completed the required number of inspections for the past seven years.

Approximate Number of Required Inspections *Not* Conducted

| Year | Complete | Partial | Total |
|------|----------|---------|-------|
| 2011 | 765 | 0 | 765 |
| 2010 | 1,138 | 397 | 1,535 |
| 2009 | 699 | 2,807 | 3,506 |
| 2008 | 2,915 | 3,069 | 5,984 |
| 2007 | 3,641 | 4,904 | 8,545 |
| 2006 | 1,695 | 4,251 | 5,946 |
| 2005 | 2,359 | 3,361 | 5,720 |

The charts above, taken from OSM’s own Annual Evaluation Reports, plainly indicate one result of inadequate staffing at WVDEP—thousands of mandatory inspections are not getting carried out and violations may occur unabated. Inadequate staffing results in inadequate inspections which lead to real problems on the ground, including harm to the environment and communities surrounding noncompliant mines. Inspections are a crucial tool to ensure that surface mining operations comply with the law, but WVDEP has consistently failed to conduct significant numbers of mandatory inspections. OSM should withdraw West Virginia’s program and substitute Federal control in order to ensure that inspections are properly carried out so that violations can be caught in a timely manner.

b. WVDEP is Failing to Make Adequate Use of Enforcement Tools

Both SMCRA and SCMRA recognize the crucial role of enforcement tools to punish violations and ensure compliance with surface mining laws. However, WVDEP has been overwhelmingly reluctant to use these tools. Even when it does use these tools it almost always refrains from issuing orders or fines that would have a real deterrent effect, even in the face of significant violations. This section discusses WVDEP’s failure to issue show cause orders where patterns of violations plainly exist, its failure to issue fines significant enough to deter violations, and its failure to impose multiple day fines for ongoing violations.

i. Failure to Utilize Show Cause Orders Where Patterns of Violations Exist

Both SMCRA and SCMRA declare that when a pattern of violations is discovered and the violations are caused by the operator's "lack of reasonable care and diligence," or that the "violations are willfully caused by the operator," then the regulatory entity should issue an order to the permittee to "show cause as to why the permit should not be suspended or revoked."¹²⁷ This is known as a "show cause order." A pattern of violations is defined as "[v]iolations of the same or related requirements . . . during three or more Federal inspections within any 12-month period which were either caused by the unwarranted failure of the permittee to comply" with SMCRA or permit conditions, or any "willful violations."¹²⁸ WVDEP must make regular pattern of violation determinations and, where appropriate, issue show cause orders. However, WVDEP often fails to adhere to this mandate. The examples of this failure are abundant.

At the Falcon Surface Mine, S400500, the permittee received violations on August 1, 2008 (Notice of Violation or NOV 15); June 5, 2009 (NOV 25); and July 17, 2009 (NOV 27) for sediment control violations resulting in discolored water leaving the permit area. Additional sediment control violations were issued on March 5, 2009 (NOV 20); September 9, 2009 (NOV 31); May 4, 2010 (NOV 39); July 29, 2010 (NOV 41); March 10, 2011 (Compliance Order or "CO" 52); and July 25, 2011 (NOV 56). The permittee received violations on April 10, 2008 (NOV 13); August 11, 2008 (NOV 18); January 29, 2009 (NOV 19); and April 30, 2009 (NOV 23) for placing material on a downslope of more than twenty degrees. The permittee continued to place material on the downslope after being cited multiple times. The permittee also received numerous violations for failing to follow their mining plan on April 30, 2009 (NOV 24); August 13, 2009 (NOV 29); and December 14, 2009 (NOVs 34 and 35). The permittee received violations on August 19, 2010 (NOV 47); October 27, 2010 (NOV 49); and February 24, 2011 (NOV 50) for dumping garbage on unapproved areas of the permit area.¹²⁹ Despite this egregious pattern of violations, the records do not show WVDEP making a pattern of violations determination and the permittee was never issued a show cause order.

At Toney's Fork #2 Surface Mine, S503395, the permittee received violations on November 17, 2006 (NOV 20); March 9, 2007 (NOV 25); June 13, 2007 (NOV 28), and August 23, 2007 (NOV 30) for placing material on the downslope. The permittee also received violations on September 30, 2008 (NOV 40); December 1, 2008 (NOV 42); February 9, 2009 (NOV 45); August 18, 2009 (NOV 50); and January 13, 2010 (NOV 53) for tracking mud onto Toney's Fork

¹²⁷ W. VA. CODE § 22-3-17(b) (2012).

¹²⁸ 30 C.F.R. § 722.16(c)(3) (2012).

¹²⁹ Frasure Creek Mining, Permit # S-4005-00, *Permit Details*, https://apps.dep.wv.gov/WebApp/_dep/search/Permits/OMR/Permit_details.cfm?permit_id=S400500&dep_office_id=OMR&responsible_party_name=FRASURE%20CREEK%20MINING,%20LLC (last visited Dec. 28, 2012).

Road after repeated warnings.¹³⁰ Once again, the records do not show a pattern of violations determination and the permittee was never issued a show cause order.

At Boone North #2 Surface Mine the permittee received violations on June 23, 2008 (NOV 21); July 22, 2008 (NOV 23); and May 28, 2009 (NOV 37) for failing to construct sediment control structures. No records show a pattern of violations determination for these violations. The permittee was also guilty of a string of blasting violations (NOVs 38, 39, 40, and 45) and contemporaneous reclamation violations (NOVs 10, 11, and 14) but WVDEP somehow determined that no pattern of violations existed.¹³¹ The permittee was never issued a show cause order.

At Spring Fork Surface Mine #1, S502201, the permittee received violations on March 20, 2006 (NOV 17); May 31, 2006 (NOV 18); and September 18, 2006 (NOV 21) for placing material on the downslope. The permittee received violations on October 24, 2007 (NOV 38); April 6, 2008 (NOV 39); and July 2, 2008 (NOV 42) for failing to construct sediment control structures. The permittee received a string of other sediment control violations (NOVs 8, 14 and 16), yet WVDEP decided there was no pattern of violations on May 31, 2006. Immediately following this determination, the permittee received sediment control violations on June 23, 2006 (NOV 19); July 20, 2006 (NOV 20, modified to CO 24); and June 13, 2007 (NOV 32). The determination was not revisited. The permittee was never issued a show cause order.¹³² This is only a small sampling of permits with very similar factual patterns where no show cause order was issued despite the plain appearance of a pattern of violations.

Even when WVDEP does issue a show cause order, it very rarely uses the process to go after active operations and hold violators responsible. According to our analysis of WVDEP's violations database, there have been 137 instances where the show cause process was utilized between January 2005 and June 2011.¹³³ The majority of show cause orders were issued to companies that were likely going bankrupt and stopped responding to communication from WVDEP, resulting in the revocation of eighty-four permits. Ten other show causes orders were

¹³⁰ Cliffs Logan County Coal, Permit # S-5033-95, *Permit Details*, https://apps.dep.wv.gov/WebApp/_dep/search/Permits/OMR/Permit_details.cfm?permit_id=S503395&dep_office_id=OMR&responsible_party_name=CLIFFS%20LOGAN%20COUNTY%20COAL%20LLC (last visited Dec. 28, 2012).

¹³¹ Raven Crest Contracting, Permit # S-5008-03, *Permit Details*, https://apps.dep.wv.gov/WebApp/_dep/search/Permits/OMR/Permit_details.cfm?permit_id=S500803&dep_office_id=OMR&responsible_party_name=RAVEN%20CREST%20CONTRACTING%20LLC (last visited Dec. 28, 2012).

¹³² Frasure Creek Mining, Permit # S-5022-01, *Permit Details*, https://apps.dep.wv.gov/WebApp/_dep/search/Permits/OMR/Permit_details.cfm?permit_id=S502201&dep_office_id=OMR&responsible_party_name=FRASURE%20CREEK%20MINING,%20LLC (last visited Dec. 28, 2012).

¹³³ Note that there may be more show cause because multiple show causes are often issued at similar times and dealt with in the same proceedings, thus our analysis treats those as one single instance of a show cause order being issued.

terminated because of a change of owner or operator, permits getting bond released, or abatement of the violations. Eleven are still active. Of the remaining thirty-two, thirty-one were settled by consent orders. Only one went through to an administrative action after a hearing.

Shockingly, in this six and a half year time period, WVDEP completed only thirty-two show cause proceedings against active operations. Virtually all of these resulted in private settlements with no citizen participation. Additionally, the consent orders that result from settled show cause orders have not proven to very effective in abating of violations. Coal Mountain #1 Surface Mine, S402096, received two show cause orders in 2005, two show cause orders in 2007, and two show cause orders in 2008. The mine has racked up seventy-six violations since its first show cause hearing, more than any other permittee.¹³⁴ WVDEP's consent order did nothing to rein in this mine's pattern of violations.

All of these examples illustrate WVDEP's failure to make effective use of its show cause order authority to move permittees towards compliance, deter violations, and punish serious violations.

ii. WVDEP Issues Fines too Small to Adequately Deter Violations

When WVDEP does issue fines to enforce violations of SMCRA, the fines are too small to effectively deter violations. Section 1268(a) of SMCRA and Section 22-3-17 of SCMRA provide that a violation of a permit condition is subject to a fine of up to \$5,000. In practice, however, WVDEP rarely levies \$5,000 fines. Between 2006 and October 2011, WVDEP issued a total of 5,692 NOVs to coal mines. Of these, 1,481 were assessed no fine at all at the time of data collection.¹³⁵ Of the remaining 4,211 violations, half were fined \$1,000 or less.¹³⁶ Such paltry fines cannot be considered a serious deterrent to a multi-billion dollar industry.

While it can make sense for the agency to issue small fines for minor violation, WVDEP issues small fines even in cases of mines with chronic and serious violations. The Toney Fork Surface #2 mine, S503395, received a staggering fifty-seven violations in a fifty-eight-month study period and was subject to a mere \$75,982 in fines with no enhanced enforcement actions. The Boone Number #2 Surface Mine, S500803, received fifty violations in a fifty-eight-month study period and was subject to only \$61,924 in fines with no enhanced enforcement actions. Even in the case of particularly egregious violations such as Marfork Coal's citation at the Bee Tree Surface Mine, S301004, for highwall mining in an area that was not approved for coal recovery,

¹³⁴ Dynamic Energy, Permit # S-4020-96, *Permit Details*, https://apps.dep.wv.gov/WebApp/_dep/search/Permits/OMR/Permit_details.cfm?permit_id=S402096&dep_office_id=OMR&responsible_party_name=DYNAMIC%20ENERGY,%20INC (last visited Dec. 30, 2012).

¹³⁵ Fine assessment is often significantly delayed from the issuance of a violation at the time of data collection.

¹³⁶ Statistics from raw data taken from the WVDEP website and compiled by Coal River Mountain Watch. W. VA. DEPT. OF ENV'T'L PROT., *Mining Permit Search*, <http://www.dep.wv.gov/insidedep/Pages/miningpermitsearch.aspx> (last visited Dec. 30, 2012).

finer are minor.¹³⁷ There Markfork Coal made several entries with the highwall miner and recovered a significant tonnage of coal illegally. WVDEP assessed only a \$774 fine for this violation.

In addition, WVDEP has failed to adjust penalties for inflation. The rule implementing the Federal Civil Monetary Penalty Inflation Adjustment Act of 1990 explicitly states that Section 518(i) of SMCRA and 30 C.F.R. § 840.13(a) require “that the civil penalty provisions of each State program contain penalties which are ‘no less stringent than’ those set forth in SMCRA.”¹³⁸ This should be read as a mandate for WVDEP to periodically adjust its penalties but WVDEP does not make such adjustments. Its penalties structure fails to adjust for inflation and the current economic reality, making its penalty program ineffective at deterring violations.

The gap between the cost of fines and the cost of compliance is too large to incentivize compliance with permit conditions and the law. By issuing such small fines, WVDEP has sent a message to mining operators that violations will not be taken seriously.

iii. WVDEP Fails to Issue Multiple Day Fines

For many violations, even the maximum fine of \$5,000 would be significantly less than the cost of compliance. Recognizing this, Section 1268(a) of SMCRA and Section 22-3-17(c) of SCMRA expressly provide WVDEP with the authority to count each day of a continuing violation as a separate violation for the purpose of penalty assessments.¹³⁹ A thorough review of WVDEP’s fine records did not yield a single example of WVDEP exercising this authority, but it did yield many examples where the violations are so long term and egregious that it is impossible to comprehend why WVDEP did not issue fines that could have some deterrent effect.

The examples of ongoing violations with miniscule fines are abundant. WVDEP’s records show over 100 violations that extended beyond a ninety-day period.¹⁴⁰ On June 3, 2010, the Twilight Surface Mine, S502396, was cited for serious violations of contemporaneous reclamation standards. The permit was so far behind schedule that the violation was not abated until May 31, 2012—almost two years after the initial citation. WVDEP issued citations to this operation over and over, but ultimately this permittee was fined an utterly insignificant \$1,659 for its substantial

¹³⁷ Markfoal Coal Company, Permit # S-3010-04, *Violation Details*, https://apps.dep.wv.gov/webApp/_DEP/Search/Permits/OMR/Violation_Details.cfm?permit_id=S301004&dep_office_id=OMR&unit_insp_date=09/28/2010%2008:00&viol_num=3 (last visited Dec. 28, 2012).

¹³⁸ Implementation of the Debt Collection Improvement Act of 1996, 30 Fed. Reg. 63,274 (Nov. 28, 1997) (to be codified at 30 C.F.R. pts. 723, 724, 845, and 846).

¹³⁹ 30 U.S.C. § 1268(a) (2012).

¹⁴⁰ This number of protracted violations is staggering, particularly in light of the limited circumstances in which the abatement period for a notice of violation can be extended beyond 90 days. 38 C.S.R. § 2-20.2.e. Whether WVDEP is complying with 38 C.S.R. § 2-20.2.e prior to granting extensions of abatement periods is another area that OSM should investigate in response to this petition.

failures.¹⁴¹ An adjacent mine, Upper Big Branch Surface Mine #1, S301999, was issued a similar citation on June 3, 2010 for a violation that was not abated until May 31, 2012. In that case the fine was even lower—two years of violations cost this permit holder a mere \$1,259.¹⁴²

A CONSOL permit, U503886, was cited on February 23, 2011 for failure to comply with aluminum limits. The violation was not abated until July 11, 2011 when the pond stopped flowing. The cost of this unlawful release of a heavy metal that bioaccumulates and causes significant long term harm to aquatic ecosystems was a mere \$683.¹⁴³ Another example of a long running unabated violation resulting in paltry fines can be seen at the Grapevine South Surface Mine. On October 23, 2009, this mine was cited for failing to construct sediment ditches. Though it took Grapevine almost a full year remedy this problem, WVDEP apparently thought \$1,000 was too hefty a fine for this year of significant violations—Grapevine’s failure to abate the violation resulted in a fine of only \$995.

All of these violations extended for such a long period of time that WVDEP should have considered using its authority to levy fines in order to speed up compliance or deter such future action, yet it actively chose not to. The active permit holders continued to mine coal throughout the period the mines were in violation. Without higher fines for persistent violations or the use of enhanced enforcement actions, the companies have little incentive to come into compliance with the law in a timely fashion. It is so inexpensive to violate a mining permit in West Virginia that thwarting the mandates of SMCRA costs mine operators what amounts to pocket change. WVDEP has failed to adequately utilize its existing mechanisms for deterring unlawful mining. In order to ensure that violators are assessed damages that actually discourage future violations and protect the environment, OSM must assume authority of West Virginia’s program.

c. West Virginia Fails to Enforce Dam Safety

In addition to its failure to enforce permit violations, WVDEP has also failed to enforce dam safety regulations and has subsequently placed nearby communities and the environment at risk of failure. Dam failures such as the disastrous 2000 Martin County coal slurry spill, and the 2012 Robinson Run Slurry Dam Failure that took the life of a coal miner, are all too common in

¹⁴¹ Independence Coal Company, Permit # S-5023-96, *Permit Details*, https://apps.dep.wv.gov/WebApp/_dep/search/Permits/OMR/Permit_details.cfm?permit_id=S502396&dep_office_id=OMR&responsible_party_name=INDEPENDENCE%20COAL%20COMPANY%20INC (last visited Dec. 30, 2012).

¹⁴² Independence Coal Company, Permit # S-3019-99, *Permit Details*, https://apps.dep.wv.gov/WebApp/_dep/search/Permits/OMR/Permit_details.cfm?permit_id=S301999&dep_office_id=OMR&responsible_party_name=INDEPENDENCE%20COAL%20COMPANY%20INC, (last visited Dec. 30, 2012).

¹⁴³ Consol of Kentucky, Permit # U-5038-86, https://apps.dep.wv.gov/WebApp/_dep/search/Permits/OMR/Permit_details.cfm?permit_id=U503886&dep_office_id=OMR&responsible_party_name=CONSOL%20OF%20KENTUCKY%20INC (last visited Dec. 30, 2012).

West Virginia. Despite OSM repeatedly raising concerns about the lack of adequate oversight for these dams, WVDEP's oversight remains lax given the seriousness of the risk of impoundment failure. OSM's most recent Annual Evaluation Report noted "a number of issues identified with regard to maintenance, operation and inspection of these structures."¹⁴⁴ It also noted the need for "additional training or diligence in state inspection of impoundments."¹⁴⁵

In recent months regulators have been forced to take rare and dramatic action on coal slurry dams. On February 14 of this year, the U.S. Department of Labor asked a Federal judge to order the immediate shutdown of the Barbour slurry dam, an impoundment that had not been certified by an engineer for two years, because mine operators were "flouting federal law, ignoring violations and fines, and putting the public at risk."¹⁴⁶ WVDEP had the ability to shut down this impoundment, but it didn't until February 27, 2013.¹⁴⁷ WVDEP only shut down this dangerous operation after another entity took this matter to court over two years after WVDEP issued its most recent show cause order to this repeat offender.¹⁴⁸

Why WVDEP waited so long to address this very dangerous situation remains a mystery. As discussed in the enforcement section of this petition, SMCRA explicitly mandates that State regulatory entities must have a full arsenal of enforcement tools at its disposal, but with impoundments, as elsewhere, WVDEP appears to prefer not to use these tools to protect West Virginia's citizens and environment. WVDEP's failure to act put the residents of Barbour County at risk from an impoundment capable of holding 505 million gallons of coal slurry, a site the Mine Safety and Health Administration (MSHA) labeled "high hazard," because its failure would likely result in casualties.¹⁴⁹ Impoundment failures can and do jeopardize water quality, human safety, and downstream communities. At this point, the best way for OSM to address this problem is to withdraw West Virginia's program and substitute Federal enforcement.

SMCRA regulations and the Coal Mine Safety and Health Act (Coal Act) provide parallel enforcement schemes for impoundments. SMCRA's regulations provide that impoundments covered by both SMCRA and, due to their size or other criteria, the Coal Act "shall comply with

¹⁴⁴ OFFICE OF SURFACE MINING RECLAMATION & ENFORCEMENT, WEST VIRGINIA ANNUAL EVALUATION REPORT 68 (2012), available at <http://odocs.osmre.gov/qdocs.aspx>.

¹⁴⁵ *Id.*

¹⁴⁶ Associated Press, *U.S. Seeks Shutdown of Barbour Slurry Dam*, CHARLESTON GAZETTE, Feb. 15, 2013, <http://www.wvgazette.com/News/201302150017> (Last visited June 1, 2013).

¹⁴⁷ Energy Marketing Company Inc. Permit # 002684, *Permit Details*, https://apps.dep.wv.gov/WebApp/_dep/search/Permits/OMR/Permit_details.cfm?permit_id=O002684&dep_office_id=OMR&responsible_party_name=ENERGY%20MARKETING%20COMPANY%20INC (Last visited May 31, 2013).

¹⁴⁸ Energy Marketing Company Inc., Permit # 0002684, *Violation Details*, https://apps.dep.wv.gov/webApp/_DEP/Search/Permits/OMR/Violation_Details.cfm?permit_id=O002684&dep_office_id=OMR&unit_insp_date=07%2F29%2F2010%2010%3A00&viol_num=27 (last visited May 31, 2013).

¹⁴⁹ Associated Press, *U.S. Seeks Shutdown of Barbour Slurry Dam*, CHARLESTON GAZETTE, Feb. 15, 2013, <http://www.wvgazette.com/News/201302150017> (Last visited June 1, 2013).

the requirements” of the Coal Act as found at 30 C.F.R § 77.216.¹⁵⁰ The Coal Act requires impoundment structures to have design, construction, and maintenance plans approved prior to construction and requires adherence to the approved plan in the design, construction and maintenance of the impounding structure.¹⁵¹ In addition, SMCRA demands detailed plans to be prepared by an authorized professional—such as an engineer or geologist—for impoundments, siltation structures, and refuse piles.¹⁵² Impoundments must also be designed by professionals, meet stability requirements, have adequate freeboard and stable foundations, provide slope protection, and meet many additional requirements.¹⁵³

Despite all of these requirements, WVDEP does not take corrective actions when the rules governing impoundments and impoundment safety are violated. MSHA has repeatedly found impoundments to be in violation of the Coal Act and has issued citations, but WVDEP fails to issue the corresponding citations under SMCRA. The fact that MSHA finds violations at impoundments during their inspections which WVDEP does not find during its routine SMCRA inspections raises serious questions about the thoroughness of WVDEP’s inspections. WVDEP is required to visit these sites more frequently than MSHA and should be noticing these violations.

Examples of WVDEP’s failure to perform meaningful impoundment enforcement are abundant and the following examples detailing events at Brushy Fork Coal Slurry Impoundment, Chess Refuse Impoundment, and Tinsley Branch Impoundment are just a smattering of WVDEP’s failures. In each circumstance, MSHA noted a pattern of serious violations and WVDEP failed to take any corresponding action. The citations below show that WVDEP commonly fails to complete inspections to ensure that impoundments are constructed according to their approved plan. This is in part because WVDEP relies heavily on company produced reports to monitor construction instead of conducting its own investigations into whether an approved plan is being properly followed. Each of the MSHA impoundment citations discussed below should have resulted in a corresponding SMCRA citation issued by the WVDEP. However, in each instance, WVDEP failed to take action to ensure compliance with the law.

The Brushy Fork Coal Slurry Impoundment provides the first example of WVDEP’s failure to properly enforce dam safety in West Virginia. WVDEP conducted monthly and quarterly inspections of this site from 2004 to 2010. During this time, nine citations were issued by MSHA, but these violations—which were also SMCRA violations— were ignored by WVDEP, despite the fact that WVDEP visited the site more frequently than MSHA and thus should have been aware of the violations. WVDEP inspection personnel did not address Marfork Coal’s

¹⁵⁰ 30 C.F.R. § 816.49(a)(2) (2012).

¹⁵¹ *Id.* § 77.216.

¹⁵² *Id.* § 780.25(a)(1)(i).

¹⁵³ *Id.* § 816.49(a).

repeated violations of its permit conditions for several years, despite the fact that MSHA repeatedly cited Marfork Coal for not abiding by 30 C.F.R. § 77.216(d)—the requirement for an operator to abide by its approved plan for the impoundment. Below is the list of citations issued by MSHA at Brushy Fork Coal Slurry Impoundment. In each instance, WVDEP failed to issue a corresponding SMCRA violation.¹⁵⁴

¹⁵⁴ Markfork Processing, Citation # 7234672, *Mine/Citation Order* (July 30, 2009), available at <http://dep-foia.org/ToBePosted/miscellaneous/OSM%20Impoundment%20Reports/MSHA%20Reports/FOIA%20618913%20FY09.pdf#page=36>; Markfork Processing, Citation # 7234671, *Mine/Citation Order* (July 30, 2009), available at <http://dep-foia.org/ToBePosted/miscellaneous/OSM%20Impoundment%20Reports/MSHA%20Reports/FOIA%20618913%20FY09.pdf#page=30>; Markfork Processing, Citation # 7234670, *Mine/Citation Order* (June 30, 2009), available at <http://dep-foia.org/ToBePosted/miscellaneous/OSM%20Impoundment%20Reports/MSHA%20Reports/FOIA%20618913%20FY09.pdf#page=19>; Markfork Processing, Citation # 7234669, *Mine/Citation Order* (June 23, 2009), available at <http://dep-foia.org/ToBePosted/miscellaneous/OSM%20Impoundment%20Reports/MSHA%20Reports/FOIA%20618913%20FY09.pdf>; Markfork Processing, Citation # 7232662, *Mine/Citation Order* (Apr. 21, 2006), available at <http://dep-foia.org/ToBePosted/miscellaneous/OSM%20Impoundment%20Reports/MSHA%20Reports/FOIA%20618913%20FY06.pdf>; Markfork Processing, Citation # 7214978, *Mine/Citation Order* (June 6, 2005), available at <http://dep-foia.org/ToBePosted/miscellaneous/OSM%20Impoundment%20Reports/MSHA%20Reports/FOIA%20618913%20FY05.pdf#page=9>; Markfork Processing, Citation # 7214905, *Mine/Citation Order* (Jan. 9, 2005), available at <http://dep-foia.org/ToBePosted/miscellaneous/OSM%20Impoundment%20Reports/MSHA%20Reports/FOIA%20618913%20FY05.pdf>; Markfork Processing, Citation # 7214862, *Mine/Citation Order* (Mar. 10, 2004), available at <http://dep-foia.org/ToBePosted/miscellaneous/OSM%20Impoundment%20Reports/MSHA%20Reports/FOIA%20618913%20FY04.pdf#page=24>.

Brushy Fork Coal Slurry Impoundment- Markfork Coal Company - O-3010-95

| MSHA Citation Order No. | Date Issued | Date Terminated | Standard | Proposed Fine | Amount Paid | Description | Negligence Level |
|--------------------------------|--------------------|------------------------|-----------------------|----------------------|--------------------|----------------------------------|-------------------------|
| 7234672 | 7/30/09 | 12/2/09 | 30 C.F.R. § 77.216(d) | \$100 | \$100 | Free water against coarse refuse | Moderate |
| 7234671 | 7/30/09 | 1/6/10 | 30 C.F.R. § 77.216(d) | \$100 | \$100 | Exceeded piece-metric surface | Moderate |
| 7234670 | 6/30/09 | 1/6/10 | 30 C.F.R. § 77.216(d) | \$100 | \$100 | Exceeding crest elevation | Moderate |
| 7234669 | 6/23/09 | 7/8/09 | 30 C.F.R. § 77.216(d) | \$100 | | Lifts > 12" | Moderate |
| 7232686 | 5/24/07 | 6/7/07 | 30 C.F.R. § 77.216(d) | \$4,329 | \$1,203 | Fine Refuse Pockets | Moderate |
| 7232662 | 4/21/06 | 4/26/06 | 30 C.F.R. § 77.216(d) | \$305 | \$305 | Push-out @ angle of repose | Moderate |
| 7214978 | 6/5/05 | 6/8/05 | 30 C.F.R. § 77.216(d) | \$723 | \$723 | Compaction | Moderate |
| 7214905 | 1/9/05 | 1/24/05 | 30 C.F.R. § 77.216(d) | \$247 | \$247 | Compaction | Moderate |
| 7214898 | 9/29/04 | 10/28/04 | 30 C.F.R. § 77.216(d) | \$2,000 | \$2,000 | Angle of Repose | High |

A second example is at the Chess Refuse Impoundment. WVDEP conducted the mandated monthly and quarterly inspections at this site but failed to either note or act on the eleven citations MSHA issued. All eleven violations issued by MSHA were also SMCRA violations under 30 C.F.R. § 816.49(a)(2), but WVDEP declined to issue any SMCRA citations during this time. This company violated its permit conditions for several years without WVDEP taking action. The table below outlines MSHA citations issued during this period.¹⁵⁵

¹⁵⁵ Chess Refuse Impoundment, Citation # 8088839, *Mine/Citation Order* (Apr. 9, 2012); Chess Refuse Impoundment, Citation # 8088838, *Mine/Citation Order* (Apr. 9, 2012); Chess Refuse Impoundment, Citation # 8088837, *Mine/Citation Order* (Apr. 5, 2012); Chess Refuse Impoundment, Citation # 8088822, *Mine/Citation Order* (Dec. 1, 2011); Chess Refuse Impoundment, Citation # 8088823, *Mine/Citation Order* (Dec. 1, 2011); Chess Refuse Impoundment, Citation # 8088817, *Mine/Citation Order* (Oct. 25, 2011); Chess Refuse Impoundment, Citation # 8088819, *Mine/Citation Order* (Oct. 25, 2011); Chess Refuse Impoundment, Citation # 8088816, *Mine/Citation Order* (Oct. 25, 2011); Chess Refuse Impoundment, Citation # 8088818, *Mine/Citation Order* (Oct.

Chess Refuse Impoundment - Elk Run Coal Company - O504293

| MSHA Citation Order No. | Date Issued | Date Terminated | Standard | Proposed Fine | Amount Paid |
|--------------------------------|--------------------|------------------------|----------------------------|----------------------|--------------------|
| 8088839 | 4/9/12 | 6/21/12 | 30 C.F.R. § 77.216-4(a)(7) | \$100 | \$100 |
| 8088838 | 4/9/12 | 6/28/12 | 30 C.F.R. § 77.216-4(a)(7) | \$100 | \$100 |
| 8088837 | 4/5/12 | 6/21/12 | 30 C.F.R. § 77.216(d) | \$425 | \$25 |
| 8088822 | 12/1/11 | 2/22/12 | 30 C.F.R. § 77.216(d) | \$100 | \$100 |
| 8088823 | 12/1/11 | 2/22/12 | 30 C.F.R. § 77.216(d) | \$100 | \$100 |
| 8088817 | 10/25/11 | 1/18/12 | 30 C.F.R. § 77.216(d) | \$100 | \$100 |
| 8088819 | 10/25/11 | 1/18/12 | 30 C.F.R. § 77.216-4(a) | \$100 | \$100 |
| 8088816 | 10/25/11 | 1/18/12 | 30 C.F.R. § 77.216(d) | \$100 | \$100 |
| 8088818 | 10/25/11 | 1/18/12 | 30 C.F.R. § 77.216(d) | \$100 | \$100 |
| 8088815 | 10/25/11 | 1/18/12 | 30 C.F.R. § 77.216(d) | \$100 | \$100 |
| 8082380 | 3/8/11 | 4/7/12 | 30 C.F.R. § 77.216(d) | \$334 | \$334 |

Similarly, at the Tinsley Branch Impoundment, MSHA issued citations for several violations under the Coal Act. Again, these violations were also SMCRA violations but WVDEP did not note these violations in its monthly or quarterly inspections, nor did it issue any citations. The citations are listed in the table below.¹⁵⁶

25, 2011); Chess Refuse Impoundment, Citation # 8088815, *Mine/Citation Order* (Oct. 25, 2011); Chess Refuse Impoundment, Citation # 8082380, *Mine/Citation Order* (Mar. 8, 2011).

¹⁵⁶ Tinsley Branch Impoundment, Citation # 8113143, *Mine/Citation Order* (Oct. 19, 2011); Tinsley Branch Impoundment, Citation # 8113135, *Mine/Citation Order* (Sept. 19, 2011); Tinsley Branch Impoundment, Citation # 8113136, *Mine/Citation Order* (Sept. 19, 2011); Tinsley Branch Impoundment, Citation # 8082384, *Mine/Citation Order* (June 8, 2011); Tinsley Branch Impoundment, Citation # 8082385, *Mine/Citation Order* (June 1, 2011); Tinsley Branch Impoundment, Citation # 8082374, *Mine/Citation Order* (Jan. 31, 2011).

Tinsley Branch Impoundment - O503299

| MSHA Citation Order No. | Date Issued | Date Terminated | Standard | Proposed Fine | Amount Paid |
|-------------------------|-------------|-----------------|-------------------------|---------------|-------------|
| 8113143 | 10/19/11 | 10/28/11 | 30 C.F.R. § 77.216(d) | \$745 | \$745 |
| 8113135 | 9/19/11 | 7/12/12 | 30 C.F.R. § 77.216-4(a) | \$100 | \$100 |
| 8113136 | 9/19/11 | 3/21/12 | 30 C.F.R. § 77.216(d) | \$308 | \$308 |
| 8082384 | 6/1/11 | 6/8/11 | 30 C.F.R. § 77.216(d) | \$100 | \$100 |
| 8082385 | 6/1/11 | 10/19/11 | 30 C.F.R. § 77.216(d) | \$100 | \$100 |
| 8082374 | 1/31/11 | 2/7/11 | 30 C.F.R. § 77.216(d) | \$100 | \$100 |

These examples demonstrate that WVDEP has ignored a plain pattern of violations that have occurred repeatedly for the last eight years and are still happening today. At the Brushy Fork Coal Slurry Impoundment, for example, nine violations were issued by MSHA. Despite the fact that these violations occurred under WVDEP's watch from 2004 to 2010, WVDEP took no corresponding enforcement action under SMCRA. The abundance of recent violations at the Chess Refuge and Tinsley Impoundments indicate that these enforcement failures are ongoing. This pattern of inaction is unacceptable—it is placing both people and natural resources at risk.

WVDEP's inaction has serious consequences. The failure of the Nolan's Run impoundment in December of 2012 resulted in the death of a coal miner who was operating a dozer on the upstream portion of a saddle dike crest of the coal slurry pond. In West Virginia, coal impoundment permits must meet an upstream slope rapid drawdown safety factor of 1.2.¹⁵⁷ WVDEP's impoundment permitting engineer wrote a letter on May of 2012 recommending approval of the saddle dike revision to the impoundment.¹⁵⁸ This letter lists three safety factor figures when four are required, and WVDEP failed to include a calculated safety factor figure for the upstream portion of the saddle dike.¹⁵⁹ These kinds of oversights are unfortunately all too common. It is critical that OSM step in and take control of West Virginia's surface mining program to ensure that impoundments are safe and impoundment violations are corrected before the next catastrophic failure.

¹⁵⁷ W. VA. CODE. R. § 47-34-7.4.b.1.D.1(d). (2012)

¹⁵⁸ See Letter from Clarence E. Wright, WVDEP, to Randy Moore, WVDEP (May 24, 2012) (enclosed as Appendix C).

¹⁵⁹ *Id.*

V. WVDEP HAS FAILED TO PROTECT WATER QUALITY AND QUANTITY

a. Overview of SMCRA's Requirements to Protect Water Quality and Hydrologic Balance

One of the central mandates of SMCRA is that surface mining operations should be conducted in an environmentally protective manner.¹⁶⁰ To protect the Nation's waters from further mining-related damage, Congress and West Virginia's Legislature mandated that each surface coal mining operation be designed to prevent material damage to the hydrologic balance outside the permit area and conducted so as to minimize damage within the mine site and associated off-site areas.¹⁶¹ SMCRA defines the term "hydrologic balance" as:

the relationship between the quality and quantity of water inflow to, water outflow from, and water storage in a hydrologic unit such as a drainage basin, aquifer, soil zone, lake, or reservoir. It encompasses the dynamic relationships among precipitation, runoff, evaporation, and changes in ground and surface water storage.¹⁶²

SMCRA's emphasis on protecting hydrologic balance shows Congress' recognition of the importance of protecting water quality, quantity, and the dynamic relationships that encompass the hydrologic cycle from surface mining damage.

The phrase "material damage to the hydrologic balance outside the permit area" means "any long term or permanent change in the hydrologic balance caused by surface mining operation(s) which has a significant adverse impact on the capability of the affected water source(s) to support existing conditions and uses."¹⁶³ OSM's regulations require permittees to design their operations to prevent material damage outside of the permit area at every stage of operations.¹⁶⁴ SMCRA further requires that all surface mining operations must, "at a minimum . . . minimize the disturbances to the prevailing hydrologic balance at the mine site and in associated off-site areas and to the quality and quantity of water in surface and groundwater systems both during and after surface mining operations and during reclamation. . . ."¹⁶⁵ West Virginia's regulations elaborate on this mandate, requiring that:

[a]ll surface mining and reclamation activities shall be conducted to minimize the disturbance to the hydrologic balance within the permit and adjacent areas, to prevent material damage to the

¹⁶⁰ 30 U.S.C. § 1202(d) (2012).

¹⁶¹ *Id.* §§ 1260(b)(3), 1265(b)(10) (2012); *see also* W.VA. CODE § 22-3-13(b)(10).

¹⁶² 30 C.F.R. § 701.5 (2012).

¹⁶³ W. VA. CODE R. § 38-2-3.22.e (2012).

¹⁶⁴ 30 C.F.R. §§ 816.41(a), 817.41(a) (2012).

¹⁶⁵ W. VA. CODE § 22-3-13(b)(10).

hydrologic balance outside the permit area, to assure the protection or replacement of water supplies, and to support the approved post mining land use.¹⁶⁶

In addition, both SMCRA and SCMRA mandate compliance with the CWA, including effluent limitations and water quality standards. To protect water quality, SMCRA mandates that “[n]othing in [the Act] shall be construed as superseding, amending, modifying, or repealing” the CWA,¹⁶⁷ “the State laws enacted pursuant thereto, or other Federal laws relating to the preservation of water quality.”¹⁶⁸ West Virginia has explicitly declared that “[d]ischarge from areas disturbed by . . . mining shall not violate effluent limitations or cause a violation of applicable water quality standards.”¹⁶⁹ Therefore, violations of the CWA are also violations of both SMCRA and SCMRA.

Surface mining laws make adherence to water quality concerns integral to the permitting process. SMCRA requires that each permit application “include a description of the existing, premining environmental resources within the proposed permit area and adjacent areas that may be affected or impacted by the proposed surface mining activities.”¹⁷⁰ In their permit application, operators must determine the “probable hydrologic consequences (PHC) of the proposed operation upon the quality and quantity of surface and ground water under seasonal flow conditions for the proposed permit and adjacent areas.”¹⁷¹ The regulatory authority must then “provide an assessment of the probable cumulative hydrologic impacts (CHIA) of the proposed operation and all anticipated mining upon surface- and ground-water systems in the cumulative impact area” to determine “whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.”¹⁷²

The law of the land in West Virginia is that “[n]o significant adverse impact to the chemical, physical, hydrologic, or biological components of aquatic ecosystems shall be allowed.”¹⁷³ Unfortunately, WVDEP has failed to comply with its requirements to protect water quality by complying with the CWA, water quality standards, and its mandate to protect the hydrologic balance. The failure to enforce those CWA requirements constitutes an express failure “to implement, administer, maintain or enforce effectively . . . part of [WV’s] approved State [SMCRA] program” under 30 C.F.R. § 733.12. As detailed below, mining sites in the West Virginia are routinely polluting waterways and dramatically upsetting the hydrologic balance. The result has been severely degraded watersheds, harm to fish and wildlife, flooding and washout events, and the burial of many waterways. Section 733 is explicit that when the failure

¹⁶⁶ W. VA. CODE R. § 38-2-14.5 (2012).

¹⁶⁷ 33 U.S.C. §§ 1151–1175 (2012).

¹⁶⁸ 30 U.S.C. § 1292(a)(3) (2012).

¹⁶⁹ W. VA. CODE R. § 38-2-14.5.b.

¹⁷⁰ 30 C.F.R. § 779.11 (2012).

¹⁷¹ *Id.* § 780.21(f)(1).

¹⁷² *Id.* § 780.21(g)(1).

¹⁷³ W. VA. CODE. R. § 47-2-3.2.i (2012).

to properly implement a State program rises to the level of WVDEP's failures, OSM needs to step in to implement the rule of law. West Virginia's watersheds are at risk of permanent degradation. Over its thirty-year history administering SMCRA, the State of West Virginia has shown that it is not capable of living up to its charge to protect the State's waters. Now it is time for OSM to step in and do so.

b. Flooding Remains a Significant Problem in West Virginia

WVDEP's failure to ensure that surface mine operators minimize disturbance to the hydrologic balance within permit areas and prevent material damage to the hydrologic balance outside permit areas¹⁷⁴ is not a mere statutory failure. Southern West Virginia has experienced at least eight periods of extreme flooding since 2001 that can be directly attributed to runoff from surface mining operations.¹⁷⁵ Major flooding events occurred in 2001, 2002, 2003, and 2009. These flooding events were greatly aggravated by imbalances in the hydrologic balance resulting from WVDEP's failure to regulate surface mining in accordance with its mandates. Studies have documented the connection between surface mines and valley fills to peak discharges and subsequent flooding, and found that there are numerous ways that these activities can alter the hydrologic balance:

Surface mines and valley fills can influence peak discharge in a number of ways, including: altering surface slopes, changing surface permeability, reducing forest cover, changing flora species and intrusion of sediments ponds. Valley fills change the landscape in ways that theoretically would result in both increases and decreases in overall permeability. The dramatic range in estimated flood recurrence intervals speaks to the significant alteration occurring in the landscape and seems to suggest that during active mining there is particular concern for increased flooding probability.¹⁷⁶

WVDEP has watched these events occur over and over again. These floods reflect the human cost of WVDEP's failures. These dramatic flooding events have destroyed hundreds of homes and, in some instances, taken the lives of citizens. Fourteen people drowned in floods and mudslides attributed to mountaintop removal coal mining in West Virginia between 2003 and 2006.¹⁷⁷

The following sections discuss WVDEP's Storm Water Runoff Analysis (SWROAs) requirements, OSM and independent engineer reports detailing WVDEP's failure to properly utilize SWROAs, OSM and the U.S. Army Corp of Engineer reports looking at increases in

¹⁷⁴ W. VA. CODE R. § 38-2-14.5 (2012).

¹⁷⁵ Data on flooding compiled by surface mining expert Jack Spadero sent via personal communication.

¹⁷⁶ L. Delta Merner, Review of July 8, 2012 MCC Storm Event and Resulting Impacts in Southern West Virginia I (Dec. 14, 2014) (unpublished Ph.D. dissertation, University of Maryland) (on file with author).

¹⁷⁷ Erik Reese, *Moving Mountains*, ORION MAGAZINE, Sept. 2008, <http://www.grist.org/news/maindish/2006/02/16/reece/> (last visited Dec. 27, 2012).

discharges resulting from specific mines, and how specific flooding events resulted from WVDEP's failure to properly enforce permits and surface mining laws.

i. WVDEP's Failure to Address Potential Flooding Impacts in the Permitting Process with SWROAs

Under SMCRA, all surface mining and reclamation activities must to be conducted to minimize disturbance and prevent damage to the hydrologic balance both within the permit area and in the adjacent areas,¹⁷⁸ yet flooding resulting from disturbances to the hydrologic balance continues to be a significant issue in West Virginia. Recognizing that conditions differ from State to State, SMCRA permits regulatory entities to impose supplemental requirements to ensure prevention of damage to the hydrologic balance. As a result of numerous significant flooding events making plain that additional action was needed in West Virginia, the State made revisions to its contemporaneous reclamation and excess spoil fill construction rules in 2003. These revisions require all surface mining permit applications to contain a Storm Water Runoff Analysis (SWROA).¹⁷⁹ This imposes a requirement that controls be established so mining operations cause no net increase from surface water runoff when compared to pre-mining conditions.¹⁸⁰ OSM has approved the revisions as an elaboration on West Virginia's obligation to prevent material damage to the hydrologic balance.¹⁸¹

Unfortunately, WVDEP's failure to prevent material damage to the hydrologic balance has not been remedied by the institution of SWROA requirements. As discussed in greater detail below, WVDEP fails to utilize adequate engineering guidelines regarding the potential for flooding. In addition, WVDEP's SWROA reviewers are not qualified by training or experience to evaluate the complex conditions discussed in these documents. Perhaps as a result of the inability of its staff to adequately review these materials, WVDEP relies on permit designers for data and analysis and does not conduct its own independent analysis to ensure that the information provided in the SWROAs is accurate. Additionally, WVDEP does not utilize the recommended watershed modeling methods developed by the U.S. Army Corps of Engineers to accurately model mine site conditions. Finally, WVDEP does not regularly evaluate its program to ensure its efficacy: no independent engineering or scientific evaluations have been performed by WVDEP since the 2002 Flood Analysis Technical Team (FATT) Report, discussed below. All of these failures add up to a dire situation on the ground, causing significant harm to communities. OSM must step in and remedy this situation by seizing control of the surface mining program in West Virginia.

¹⁷⁸ 30 C.F.R. § 816.41(a) (2012).

¹⁷⁹ W. VA. CODE R. § 38-2-5.6(a) (2012)

¹⁸⁰ OFFICE OF SURFACE MINING, SUMMARY OF SWROA OFF-SITE INVESTIGATIONS 1 (2010), *available at* <http://www.arcc.osmre.gov/FOs/CHFO/WV/TS/EY2011-WV-TS-FI-SWROA%20Offsite%20Investigations.pdf>.

¹⁸¹ *See* W. VA. CODE R. § 38-2-5.6(a) (2012). Case by case exceptions may be granted for operations less than fifty acres. *Id.*

I. SWROAs Generally

A SWROA is a plan that each mining operator must develop and implement to limit storm water runoff and prevent off site damage from flooding during certain size storm events.¹⁸² Using standard engineering and hydrologic practices, a SWROA is created by a series of analyses that show the changes in storm runoff caused by the proposed operation, an evaluation of pre-mining, post-mining and worst case scenario conditions, and evaluations of worst case storm scenarios demonstrating that there will be no net increase in peak runoff during and after mining compared to the pre-mining conditions.¹⁸³

Each permit application must contain a runoff monitoring plan that is specific to local conditions and that requires the installation and maintenance of rain gauges.¹⁸⁴ Operators are also required to keep a daily precipitation and monitoring log.¹⁸⁵ Monitoring results must be reported on a monthly basis for any one year. In addition, twenty-four hour storm events that exceed the twenty-five year storm event baseline must be reported within forty-eight hours and must include the results of a permit wide drainage system inspection.¹⁸⁶ The final requirement of a SWROA is a sediment retention plan that minimizes downstream sediment deposition during storms.¹⁸⁷ Sediment retention plans can include “decant ponds, secondary control structures, increased frequency for cleaning control structures, or any other method approved by the Secretary.”¹⁸⁸ In the words of OSM, a SWROA is “both a permit design requirement and a field implementation requirement with the goal of preventing additional flood damage resulting from mining activity.”¹⁸⁹ Both the design and implementation aspects are critical to ensure that flood damage from mining activity is abated.

II. OSM’s Conclusions Regarding WVDEP’s SWROA Failures

In 2009, OSM conducted an oversight report on WVDEP’s SWROA process.¹⁹⁰ The report affirmed that the SWROA concept is valid, but OSM found many errors with the State’s recording and monitoring process.¹⁹¹ OSM found glaring errors that it attributed to poor staff

¹⁸² OFFICE OF SURFACE MINING, SUMMARY OF SWROA OFF-SITE INVESTIGATIONS 1 (2010), *available at* <http://www.arcc.osmre.gov/FOs/CHFO/WV/TS/EY2011-WV-TS-FI-SWROA%20Offsite%20Investigations.pdf>.

¹⁸³ W. VA. CODE R. § 38-2-5.6(a) (2012).

¹⁸⁴ *Id.* § 38-2-5.6(b).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* § 38-2-5.6(c).

¹⁸⁸ *Id.*

¹⁸⁹ OFFICE OF SURFACE MINING, OVERSIGHT REPORT SURFACE WATER RUNOFF ANALYSIS EFFECTIVENESS 3 (2009), *available at* <http://wvgazette.com/static/coal%20tattoo/SWORA2008.pdf>.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

assumptions, modeling mistakes, and omissions of critical information.¹⁹² Regarding computer modeling, OSM found that the computer modeling was lacking in detail, that it contained unjustified assumptions such as inappropriate runoff values, that it failed to include initial denuding of fill areas and that it did not consider final breakdown of fill slopes.¹⁹³ Regarding flowed monitoring and assumptions, the report found that worst case scenarios did not take into account what occurs when a site is denuded and dumping begins, and also noted one instance where the designer assumed a basin was dry when a precipitation event occurred while a safer approach is to assume all structures are full when an event begins.¹⁹⁴ OSM also found that the effectiveness of SWROAs couldn't be properly analyzed because adequate monitoring of storm water runoff discharges is not required under the existing State regulations.¹⁹⁵

OSM conducted a follow-up report in 2010 and found that similar errors continued to occur.¹⁹⁶ For the follow-up report, OSM conducted eight on-site inspections to analyze the effectiveness of the SWROA process. The report noted that although the State had made certain improvements, significant problems still exist.¹⁹⁷ Specifically, WVDEP failed to conduct the trainings it had proposed in response to the 2009 report, failed to follow through with its proposal to independently review its violations for SWROA trends, and failed to consistently request revisions of a SWROA when mine plans changed or off-site damage actually occurred.¹⁹⁸ Other shortcomings which resulted in significant off-site damages included failures to consider the worst case during-mining scenario for a significant portion of the permitted area, a sediment pond intended to store runoff that did not meet minimum requirements for a normal sediment control structure, actual field conditions did not match conditions modeled in the SWROA, and a SWROA that was not revised to reflect changes in the mining plan or re-designed storm water management structures. OSM's study also found that State violations requiring corrective action failed to address the need for SWROA revisions despite WVDEP's prior agreement to revise assumptions in the SWROA model when necessary.¹⁹⁹ OSM concluded that "occasional deficiencies in the process can contribute to significant off-site damage."²⁰⁰

OSM's reports have uncovered a pattern of failure by WVDEP to effectively administer the SWROA program and to follow through with the corrective actions it promised to OSM. WVDEP's SMROA failures, which OSM concluded can contribute to significant off-site damage, provide good reason for OSM to assume control of the State's surface mining program.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 5.

¹⁹⁵ *Id.* at 3.

¹⁹⁶ *Id.* at 5.

¹⁹⁷ *Id.* at 1.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 11.

²⁰⁰ *Id.*

III. Independent Studies Confirm WVDEP's SWROA Failures

For this petition, a team of expert hydrologists from the Bioengineering Group conducted a comprehensive review of sixteen SWROAs associated with a diverse group of permits in multiple watersheds.²⁰¹ This review provides excellent insight into the state of SWROAs, as well as WVDEP's failure to protect the people and the environment from material damage to the hydrologic balance resulting from improperly implemented SWROAs.

The report reviews the Buffalo Mountain Surface Mine SWROA, permit S-5018-07, approved by WVDEP on November 22, 2011. It notes substantial problems with this SWROA and the credibility of the data upon which it is premised.

Data in the Buffalo Mountain Surface Mine SWROA indicating that largely disturbed landscape of exposed rock or rock with minimal surfacing of replaced topsoil and vegetation is more efficient than natural forest cover at processing storm water in terms of downstream runoff does not appear to be credible.²⁰²

The report concludes that a finding of a decrease in runoff for all watercourses between pre- and post-conditions is “questionable from a scientific standpoint,”²⁰³ and also finds that the pre-mining curve number (CN) used in this SWROA was incorrect.²⁰⁴ The CN is the one value unique to pre and post mining runoff evaluations and is based on three features—hydrologic soil group (HSG), land use, and land cover condition.²⁰⁵ The HSG classification here was based on one soil type—HSG C—despite the fact that fifty percent of the relevant soil association is HSG B, which has considerably more infiltration capacity.²⁰⁶ This results in an approximate thirty-five percent decrease in pre-mining discharge just by factoring the correct soil type. Correcting for this error yields a twenty-two percent increase in discharge from pre-mining to post-mining disturbance conditions and a twenty-nine percent increase during mining operations compared to pre-mining conditions.²⁰⁷ The use of inaccurate data as a baseline for the SWROA resulted in a substantially flawed analysis for the Buffalo Mountain Surface Mine permit.

The Bioengineering Group reviewed another fifteen SWROAs for permitted surface mines in West Virginia. In each case, they used the weighted average of the different soil types—the accurate method—to determine the HSG. Using this proper baseline, this independent team of

²⁰¹ See BIOENGINEERING GROUP, A REVIEW OF PRE-MINING CURVE NUMBERS USED IN THE SURFACE WATER RUNOFF ANALYSIS FOR SIXTEEN SURFACE MINES IN WEST VIRGINIA tbl.1 (2012) (Report enclosed as Appendix D).

²⁰² *Id.* at 1.

²⁰³ *Id.*

²⁰⁴ *Id.* at 2.

²⁰⁵ *Id.* at 1.

²⁰⁶ *Id.* at 3.

²⁰⁷ *Id.* at 4.

experts then calculated accurate CNs. In every SWROA the team investigated, a weighted pre-mining CN was lower than the CN used in the SWROA.²⁰⁸ This inaccuracy in West Virginia's SWROAs is hugely problematic given that West Virginia added SWROAs to its regulations for the very purpose of ensuring no net increase in surface water runoff due to surface mining operations. A lower pre-mining CN reduces the amount runoff allowed and requires a substantial increase in drainage controls to maintain the required no net increase standard for peak discharges.²⁰⁹

The Bioengineering Group study concludes:

These results clearly illustrate that a rigorous review of the curve numbers used in SWROA modeling efforts is essential to accurately determine the difference between pre-mining and post-mining runoff and discharge conditions, and the need to put in place adequate controls to avoid unnecessary flooding and repetitive damage to aquatic and riparian ecosystems.²¹⁰

Both OSM and the Bioengineering Group have found significant deficiencies in WVDEP's SWROA methods. This pattern of deficiency is not merely a problem on paper, but can also have terrible consequences for residents living downstream of mines, including the severe flooding events which have continued to occur with regularity even since the addition of SWROA requirements to West Virginia's program.



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²⁰⁸ *Id.* at 5.

²⁰⁹ In addition to the no net increase standard, when WVDEP approves the removal of drainage structures in conjunction with final bond release approval, the standard for the condition of the land post bond release must resemble a CN comparable to the appropriate pre-mining curve number. WVDEP must also ensure that the standards it enforces include the requirement to clean out and maintain drainage structures from initial disturbance consistently through final bond release. Unfortunately, the Bioengineering group found it is not achieving those requirements either.

²¹⁰ BIOENGINEERING GROUP, A REVIEW OF PRE-MINING CURVE NUMBERS USED IN THE SURFACE WATER RUNOFF ANALYSIS FOR SIXTEEN SURFACE MINES IN WEST VIRGINIA 7 (2012) (Report enclosed as Appendix C).

²¹¹ Photo shows flood damage in Bulgar Hollow, W.V. caused by mountaintop removal mining. Photo credit Vivian Stockman, Ohio Valley Environmental Coalition.

SMCRA requires the prevention of damage to the hydrologic balance both inside and outside the mining area. WVDEP has failed to prevent such damage, even with SWROAs, thus OSM should assume control of West Virginia's surface mining program.

ii. Studies by OSM and the U.S. Army Corps of Engineers have Found Significant Watershed Impacts Caused by Surface Mining Operations

In 2000 OSM and the U.S. Army Corps of Engineers (ACE) released a series of studies looking at impacts from specific mine sites. A sampling of results from some of these studies is featured below to illustrate the significance of the impacts caused by these mine sites.

The report on the Hobet Mine Westridge Valley Fill site found a "42% (10-100 YR) increase in discharge from premining conditions after the valley fill area is reclaimed in the post mining conditions."²¹² The study on Samples Mine Valley Fill #1 showed:

that an ongoing valley fill operation will increase the discharge from 25-59% (10-100 YR) from premining conditions; this decreases to about 13% after the area is reclaimed in the post mining conditions The AOC+ conditions would cause a 31-26% (10-100 YR) increase in discharge and a 0.4-0.6' increase in stage from premining conditions. The future forested conditions would cause a 25-22% (10-100 YR) decrease in discharge and a 0.5' decrease in stage from the premining conditions.²¹³

The Samples Mine Valley Fill report found a "3-1% (10-100 YR) increase in discharge from premining conditions after the area is reclaimed in the post mining conditions."²¹⁴ These reports illustrate just a few of the significant changes in discharges that are the result of surface mining operations in West Virginia. These substantial changes are the direct result of upsets to the hydrologic balance caused by surface mining activities. These reports make plain that WVDEP has failed to use its authority to ensure the prevention of material damage to the hydrologic balance in these watersheds.

iii. Flooding Events

WVDEP's failure to minimize disturbance to the hydrologic balance from mining operations has resulted in massive floods and sediment loading or, in other words, material damage to West Virginia's streams. Major flooding events have resulted in extensive documentation of WVDEP's failure to protect the hydrologic balance by ensuring that permittees comply with SMCRA and SCMRA. Southern West Virginia saw major flash flooding incidents on July 8, 26, 28, and 29, 2001, again on May 2 and July 19, 2002, and again on June 16, 2003.²¹⁵ Six years

²¹² See U.S. ENVTL. PROT. AGENCY, REGION 3, MOUNTAINTOP MINING/VALLEY FILLS IN APPALACHIA DRAFT PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT 20 (2002).

²¹³ *Id.* at 12.

²¹⁴ *Id.* at 13.

²¹⁵ Data on flooding compiled by surface mining expert Jack Spadaro.

later, severe flooding occurred on May 9, 2009, in Mingo County, where approximately 250 homes were destroyed or severely damaged by runoff from mountaintop removal coal mining operations. The following section discusses some of these specific events, how watershed disturbance contributed to them, and how WVDEP's ongoing failure to enforce SMCRA and the requirements of the permits it issues allows surface mining operations to damage the hydrologic balance in a manner that results in catastrophic flooding events.

A thunderstorm on July 8, 2001 led to four-six hours of precipitation with three-eight inches of rain accumulation in six major watersheds and fifty-one sub-watersheds in a seven-county area.²¹⁶ An estimated 1,500 homes were destroyed and another 1,500 were damaged. The Federal Emergency Management Agency was called on to distribute over \$143 million dollars in disaster assistance for affected residents.²¹⁷ Tragically, one person died in this flood.²¹⁸ Its severity is difficult to overstate. Long-time residents immediately pointed to area coal mining operations as a culprit. One resident of Wyoming County, home to numerous surface mining operations, stated "I've been here all my life and never saw anything like this. We've had rains before, but they never hurt us like this. The creek stayed open before. This time it was full of big rocks from that mountain up there. The water had nowhere to go but down here on me."²¹⁹ A Fayette County resident was even more explicit in pointing a finger at mining operators taking advantage of weak regulatory oversight on hydrologic issues in the surface mining program stating, "I can tell you without a doubt what has been causing the flooding – it's the mine companies back there [W]e've got seven tributaries back there, but they come back there moving the earth around. We're flooding because of the mining and cause of a lack of regulator enforcement."²²⁰

Following the 2001 floods, families in Fayette County who were scared by severity of flooding caused by mining sold their homes and left Fayette County when additional mining permits were accepted there.²²¹ Also in the aftermath of the 2001 floods, West Virginia's governor issued Executive Order No. 16-01, setting the wheels in motion for a FATT, in conjunction with a Flood Investigative Advisory Committee, to evaluate the possible flooding impacts from mining and logging. Looking at two watersheds with mining and one watershed without, the FATT report concluded that Seng Creek had mining impacts ranging from -.2 -3 percent, Scrabble Creek had mining impacts ranging from 9.3-21 percent, and control watershed Sycamore Creek, which has not seen significant mining activity, merely went out of bank when exposed to

²¹⁶ L. Delta Merner, Review of July 8, 2012 MCC Storm Event and Resulting Impacts in Southern West Virginia 1 (Dec. 14, 2014) (unpublished Ph.D. dissertation, University of Maryland) (on file with author).

²¹⁷ *Id.* at 10.

²¹⁸ *Id.*

²¹⁹ *Id.* at 14.

²²⁰ *Id.*

²²¹ *Id.*

extensive surface water impacts.²²² This plainly indicates the significant role of surface mining in the 2001 floods.

West Virginia's Mingo County was hit with severe flooding following a May 9, 2009 storm. Mine safety expert Jack Spadaro compiled two detailed expert witness reports that conclusively show how the severity of this flood was the result of surface mining activity and WVDEP's failure to ensure that surface mining operations comply with the law.²²³ To evaluate impacts on Pigeon and Mate Creeks, Mr. Spadaro conducted an aerial investigation, on-site investigation, and record investigation. During the aerial investigation he concluded that the "landslides, mud, and debris flows originated at the upper elevations of the mountaintop removal operations, road cuts, and valley fills where surface mining was being conducted by Alpha Natural Resources and associated companies,"²²⁴ and that it:

was apparent during the May 20, 2009 overflight that the primary cause of the flood damage in the Pigeon Creek and Mate Creek watersheds was the significant amount of runoff from the surface disturbances on the surface mining operations associated with the King Coal Highway project and the White Flame Energy mountaintop removal operations.²²⁵

He also noted that White Flame Energy, Inc., was frequently in violation of the following sections of SCMRA: Section 38-2-14.8(a)(1), dumping soil on the downslope outside the permit area; Section 38-2-14.14(g)(2)(B)(2), causing water to be discharged over the faces of valley fills while the fills are under construction; and Section 38-2-14.5, failure to protect the hydrologic balance.²²⁶ WVDEP had issued fifty-five NOVs to White Flame, but did not escalate enforcement action to ensure effective abatement of violations.

Regarding impacts to the Gilbert Creek Watershed, Mr. Spadaro found that "[v]iolations of the W. Va. Surface Mining Coal and Reclamation Act . . . contributed significantly to the May 9, 2009 flood."²²⁷ He noted that the total rainfall was a mere 2.24-3.44 inches throughout the watershed, which is "considerably less than the 4.69 inches established as the twenty-five-year frequency storm for the area. Therefore, the record establishes that the primary causes of flooding were the unstable land surfaces and other violations of the reclamation standards of the .

²²² U.S. ENVTL. PROT. AGENCY, FLOOD ADVISORY TECHNICAL TASKFORCE exec. summary (2002).

²²³ See Expert Witness Report of Jack Spadaro, Dec. 5, 2010, Prepared for Danny and Lettie Hylton, Bert Gibson, et. al. v. Alpha Natural Res. et. al, Pigeon Creek and Mate Creek Flooding May 9, 2009 Mingo County, W. Va. See also, Expert Witness Report of Jack Spadaro, Nov. 5, 2012, Prepared for Curtis and Sue Blankenship et al., v. Alpha Natural Res., Consolidated Civil Action No. 11-C-235 [Gilbert Creek Watershed] Mingo County Circuit Court, Williamson, W. Va.

²²⁴ Expert Witness Report of Jack Spadaro at 1, Dec. 5, 2010, Prepared for Danny and Lettie Hylton, Bert Gibson, et. al. v. Alpha Natural Res. et. al, Pigeon Creek and Mate Creek Flooding May 9, 2009 Mingo County, W. Va.

²²⁵ *Id.* at 2.

²²⁶ *Id.* at 3.

²²⁷ Expert Witness Report of Jack Spadaro at 2, Nov. 5, 2012, Prepared for Curtis and Sue Blankenship et al., v. Alpha Natural Res., Consolidated Civil Action No. 11-C-235 [Gilbert Creek Watershed] Mingo County Circuit Court, Williamson, W. Va.

.. surface mined areas.”²²⁸ WVDEP issued fifty-one NOVs to Frasure Creek Mining in the five years prior to this flood. They violated the following sections of SCMRA: Section 38-2-14.5, failure to protect the hydrologic balance; Section 38-2-14.8(a)(1), placing spoil on the downslope outside the permit area; Section 38-2-14.14(g)(2)(B)(2), discharging water over the faces of valley fills; Section 38-2-14.02, failure to meet contemporaneous reclamation standards; and Section 39-2-9, failure to establish diverse, effective and permanent vegetative cover.²²⁹ These violations significantly contributed to the May 9, 2009 flood.²³⁰

WVDEP also issued eighty-nine NOVs to Premium Energy for their two permitted surface mining operations in the Gilbert Creek Watershed. These violations included failures to stay within the confines of the bonded area, downslope spoil placement, failure to construct durable rock fills in accordance to the design standards of their approved plan, failure to construct and certify drainage system prior to commencement of surface mining, failure to keep operation current with the approved mining plan, and failure to prevent off-site areas from danger. Some of the violations that most directly contributed to the flooding resulted in numerous NOVs, including nine NOVs for placement of mine spoil on the downslope outside the permit area, twenty NOVs for failure to maintain sediment control systems and failure to minimize disturbances to the prevailing hydrologic balance at the mine site and associated off-site areas, and eighteen NOVs and one cessation order for failure to regrade, protect, and stabilize all disturbed areas in a manner which effectively controls erosion and failure to keep operation current and follow the approved mining plan.²³¹ These repeat violations demonstrate a serious pattern of violations, but even when it was clear these violations were not being expeditiously abated, WVDEP did not escalate its enforcement tactics to ensure the abatement of violations.

All told, WVDEP issued 140 NOVs for SCMRA violations that caused or contributed to the severity of the May 9, 2009 flood in Gilbert, West Virginia. WVDEP was plainly well aware that these operations were violating their permits and that, in some instances, a pattern of violations had been established. Yet instead of issuing significant fines, WVDEP simply issued more notices of violations and never took serious action to rein in the permit violations that eventually led to catastrophic flooding following a fairly routine rain storm. As discussed in Section IV, WVDEP has failed to utilize its full range of enforcement options. It has not issued show cause orders where they are plainly warranted and has failed to issue multiple day fines that could actually deter these kinds of violations. By simply sitting back and issuing one NOV after another, WVDEP has abrogated its responsibility to ensure that West Virginia’s mining operations are in compliance with their permits and the law, essentially watching the degradation that lead to catastrophic flooding to continue unabated. This has gone on for far too long. OSM

²²⁸ *Id.*

²²⁹ *Id.* at 4–5.

²³⁰ *Id.* at 5.

²³¹ *Id.* at 5–6.

must step in to effectively manage mining operations in West Virginia so that its residents are protected from flooding before the next major flood is unleashed on another West Virginia community.

c. WVDEP is Allowing for Watershed Disturbance on a Scale that Guarantees Impairment and is Therefore Failing to Ensure Mining Operations Comply with Water Quality Standards

The scale of surface mining projects in West Virginia is massive and has extreme impacts on watershed health. Surface mining is the dominant driver of land use change in all of Central Appalachia.²³² These impacts are so significant that they essentially result in a guarantee of impairment to water quality, despite the fact that West Virginia law states that “[n]o significant adverse impact to the chemical, physical, hydrologic, or biological components of aquatic ecosystems shall be allowed.”²³³ OSM must take control of West Virginia’s surface mining program to ensure that further degradation to West Virginia’s waters does not occur.

As stated above, discharges from surface mining operations must comply with State and Federal water quality standards (WQS).²³⁴ A violation of a narrative standard prohibiting biological impairment is a violation of the CWA.²³⁵ Scientific studies, including a 2008 study by EPA, show that valley fills and mining disturbances are causing or contributing to biological impairment in *ninety percent* of the areas downstream from these activities.²³⁶ The massive scale of the mine disturbances on West Virginia’s landscape prevents streams from functioning in a manner that preserves water quality and properly supports aquatic life. WVDEP’s practice of allowing valley fills and mining on such a large scale assures degradation, aggravating existing CWA violations and creating new ones. Studies show that accelerated degradation occurs in watersheds where ten percent or more of the watershed is impacted by development, meaning that such a degree of impact virtually guarantees water quality impairment.²³⁷ WVDEP issues

²³² E.S. Bernhardt *et al.*, *How Many Mountains can we Mine? Assessing the Regional Degradation of Central Appalachian Rivers by Surface Coal Mining*, 46 ENVTL. SCI. & TECH. 8115 (2012).

²³³ W. VA. CODE. R. § 47-2-3.2.i (2012).

²³⁴ 30 C.F.R. § 816.42 (2012).

²³⁵ 40 C.F.R. §§ 122.44(d)(1), 230.10(b)(1) (2012).

²³⁶ See Letter from William C. Early, Acting Reg’l Adm’r, U.S. Env’tl. Prot. Agency, to Colonel Robert D. Peterson, Dist. Eng’r, U.S. Army Corps of Eng’rs, Huntington Dist. (Oct. 16, 2009), *available at* <http://wvgazette.com/static/coal%20tattoo/sprucepaletter.pdf>.

²³⁷ The recent Bernhardt and Palmer paper states that “the single best predictor of stream water quality to date is what fraction of a watershed is impacted” and that “[m]any studies to date have shown that when impacts to watersheds exceed about 10% of the watershed area, there can be dramatic declines in aquatic biodiversity and water quality.” MARGARET A. PALMER & EMILY S. BERNHARDT, MOUNTAINTOP MINING VALLEY FILLS AND AQUATIC ECOSYSTEMS: A SCIENTIFIC PRIMER ON IMPACTS AND MITIGATION APPROACHES 6 (2011), *available at* <http://wvgazette.com/static/mtrwhitepaper.pdf>. These studies were based on activities generally causing less severe water quality impacts than large scale surface mining. Sometimes the percentage of disturbance leading to degradation can be much less than 10 percent. *Id.*

permits in a manner that routinely allows for more than ten percent of watersheds to be disturbed. The sheer amount of activity on the watershed makes degradation virtually unavoidable.

The extent of disturbance to watersheds allowed by WVDEP is well-documented. In response to litigation, the U.S. Army Corps of Engineers analyzes the percentage of streams buried and watersheds impacted by valley fills. The results are disturbing. The total past, present, and future impacts from watershed disturbance for many individual permits in West Virginia exceed ten percent, and several approach or exceed fifty percent, as shown in the following table.²³⁸

²³⁸ Statistics compiled from an analysis by Coal River Mountain Watch of permits issued by U.S. Army Corps of Engineers.

| Mine | Watershed | Watershed Acreage | Cum. % Disturbance | Decision Document page |
|-------------------|--|------------------------------|-------------------------------|-----------------------------------|
| Alex Energy South | Whitman Creek, WV | 8,040 | 51% | 72 |
| Black Castle | Laurel Creek, WV | 31,159 | 30.2% | 43, 51 |
| Callisto | Pond Fork, WV | 65,876 | 13.9% | 30 |
| Camp Branch | Dingess Run, WV | 20,208 | 45.4% | 24, 28-29 |
| Falcon | Pond Fork, WV | 88,230 | 17% | 21 |
| Fola Ike Fork | Lilly Fork, WV | 18,438 | 66.8% | 84, 107 |
| Laxare East | Laurel Creek, WV | 31,159 | 30.2% | 53-54 |
| Loadout Nellis | Fork Creek, WV | 8,861 | 17.2% | 66 |
| Phoenix No. 5 | Island Creek, WV Pigeon Creek, WV | 67,342 91,037 | 21.9% 19.0% | 37 |
| Republic No. 2 | Upper Cabin Creek, WV | 22,518 | 25% | 23-26 |
| Spruce No. 1 | Spruce Headwaters Spruce Fork, WV Coal River, WV | 32,594 80,719 570,726 | 40.6% 26.25% 12.8% | C6-7, C14 |
| Twilight | West Fork of Pond Fork, WV | 27,389 | 24.4% | 100, 105 |
| Tyler Morgan | Fourmile Fork, WV Paint Creek, WV | 2,734 78,580 | 56.7% 19.3% | 51 |

These disturbances are plainly substantial. In the Spruce Fork watershed, for example, over twenty-six percent of the watershed has been disturbed. In the massive Coal River watershed, which contains Spruce Fork, disturbance exceeds twelve percent. Aquatic ecologist Dr. Bruce Wallace testified that the impacts of this magnitude were “astounding,” a “danger signal,” and meant lost headwater stream functions in these areas.²³⁹ Stream restoration expert, Dr. Margaret

²³⁹ Transcript of Wallace Testimony, Ohio Valley Env'tl. Coal. v. Army Corps of Engineers, Civil Action 3:05-0784 (Oct. 4, 2006) (Vol. II-34) (on file with author).

Palmer, has similarly testified that a loss of twenty-nine percent of the watershed was “incredibly significant”²⁴⁰ and that such a loss is so huge that it is questionable whether the stream could ever be restored to health.²⁴¹

West Virginia has repeatedly allowed for cumulative watershed impacts that exceed the ten percent disturbance threshold, undermining SMCRA’s purpose to protect these watersheds and ensure water quality is not sacrificed to surface mining operations. By permitting destruction on a scale that guarantees severe degradation of watersheds, WVDEP violate SMCRA’s requirement that mining operations may not result in material damage to the hydrologic balance,²⁴² and that discharges from surface mining operations comply with State and Federal water quality standards.²⁴³

d. WVDEP is Failing to Issue SMCRA Violations where NPDES Violations Exist

West Virginia obtained primacy of its NPDES program its 1982. Polluters have been cited for 32,071 violations of NPDES permits in West Virginia since 2006,²⁴⁴ but many more violations have gone unenforced. When OSM has reason to believe a NPDES violation has occurred, OSM has a duty to issue a NOV to the State with respect to the permittees in violation.²⁴⁵ Despite the requirement for SMCRA permits to comply with the CWA,²⁴⁶ WVDEP almost never issues a SMCRA violation when a mine violates its NPDES permit. Between January 1, 2006 and June 30, 2011, WVDEP issued 761 Effluent Limit violations for all SMCRA permits issued in the State of West Virginia. During the same period, Quarterly Noncompliance Reports recorded a staggering 7,195 sampling events where a surface mining permittee violated its NPDES permit. Each of the 7,195 events represents a month of sampling in which an NPDES permit limitation was violated. By failing to issue SMCRA violations when a mine violates its NPDES permit, WVDEP is failing to ensure that permittees comply with the CWA and is potentially allowing for improper permitting or bond release.

For example, the Upper Kanawha Valley Development Corp. was not issued an Effluent Limit citation when the Quarterly Noncompliance Report showed that the company had discharged

²⁴⁰ Transcript of Palmer Testimony, Ohio Valley Env'tl. Coal. v. Army Corps of Engineers, Civil Action 2:134 (Oct. 4, 2006) (Vol. II-34) (on file with author).

²⁴¹ *Id.* at 2:135-36.

²⁴² 30 U.S.C. § 1265(b)(3) (2012).

²⁴³ 30 C.F.R. § 816.42 (2012).

²⁴⁴ Statistics from an analysis of the Quarterly Noncompliance Reports database by Coal River Mountain Watch. W. VA. DEPT. ENVTL. PROT., *Quarterly Noncompliance Reports*.

²⁴⁵ *See* W. Va. Highlands Conservancy et al., 152 IBLA 158 (2000).

²⁴⁶ “Discharge from areas disturbed by . . . mining shall not violate effluent limitations or cause a violation of applicable water quality standards.” W. VA. CODE R. § 38-2-14.5.b (2012). Also, applicable performance standards are incorporated as a condition of all mining permits. *Id.* § 38-2-3.33c.

manganese at an amount five times higher than allowed by the NPDES permit.²⁴⁷ In January of 2011, Dynamic Energy released five times the amount of aluminum and four times the amount of iron allowed on its NPDES permit and still was not issued a corresponding citation under SCMRA.²⁴⁸ The chart below provides information regarding multiple NPDES permit violations reported at several facilities and WVDEP's utter failure to issue a single citation for violating SCMRA.

| NPDES versus SCMRA Citations from January, 2006 through June, 2011 | | | | | |
|---|---------------------------------|---|----------------------------|--|---|
| (66 months) | | | | | |
| Subsidiary Name | Facility Name | SCMRA Permit Number(s) | NPDES Permit Number | Number of Months in Violation of NPDES Permit | Number of Effluent Limit Citations under SCMRA |
| Upper Kanawha Valley Development Corp | No. 1 Mine | S301501 | WV10196 60 | 49 | 0 |
| Fola Coal Co. | SURFACE MINE #2 | S201293 S201496 | WV10138 40 | 38 | 0 |
| Fola Coal Co. | Bullpen Surface Mine | S200798 | WV10179 34 | 37 | 0 |
| Dynamic Energy, Inc. | Coal Mountain No.1 Surface Mine | S402096 | WV10165 39 | 37 | 0 |
| Island Creek Coal Co. | Alpine Complex | I070000 O013083 O103990 P067400 U003000 | WV00055 41 | 38 | 0 |
| Bluestone Coal Co. | Payne Branch Surface Mine | S400399 | WV10187 36 | 36 | 0 |

WVDEP has shown a significant pattern of failing to meet its responsibility to protect water quality by ensuring surface mining permittees comply with all environmental laws. Despite repeated reports of pollution events resulting in NPDES violations at surface mining facilities,

²⁴⁷ Statistics from an analysis of the Quarterly Noncompliance Reports database by Coal River Mountain Watch. W. VA. DEPT. ENVTL. PROT., *Quarterly Noncompliance Reports*.

²⁴⁸ *Id.*

WVDEP has chosen not to act. Such inaction has put West Virginia's waters at risk and demonstrates WVDEP's failure to properly implement SMCRA.

e. WVDEP has Impermissibly Suspended the State's Narrative Water Quality Criterion

WVDEP is utilizing recent action by the West Virginia legislature to attempt to suspend existing narrative criteria used to identify biologically impaired streams and to unlawfully avoid adding impaired streams to the State's 303(d) list. Section 303(d) of the CWA requires States to develop lists of impaired waters.²⁴⁹ A State is expected to update its 303(d) list every other year to ensure that the list contains all waters where standard pollution controls are insufficient to achieve water quality standards.²⁵⁰ This failure to update its list for biologically impaired streams will result in violations of water quality standards,²⁵¹ which as discussed *infra*, violates both SMCRA and SCMRA.

Biological impairment is a significant problem affecting West Virginia's waters. Responding to WVDEP's 2011 call for listing data, Appalachian Mountain Advocates (AMA) submitted data, compiled utilizing the methodology recommended by EPA, showing that 546 previously unlisted streams were biologically impaired and should be placed on the 303(d) list for 2012.²⁵² In 2012, West Virginia's legislature passed Senate Bill 562, requiring WVDEP to develop and secure legislative approval of new rules to interpret the narrative criterion for biological impairment.²⁵³ Senate Bill 562 therefore effectively amended West Virginia's narrative water quality standards. Instead of continuing with the existing, EPA approved, methodology for interpreting the narrative standard until new rules could be promulgated, WVDEP added no new streams to the 303(d) list for biological impairment, using S.B. 562 as its justification.²⁵⁴

Passage of Senate Bill 562 in the 2012 regular legislative session requires DEP to develop and secure legislative approval of new rules to interpret the narrative criterion for biological

²⁴⁹ 33 U.S.C. § 1313(d) (2012).

²⁵⁰ U.S. ENVTL. PROT. AGENCY, FACT SHEET: INTRODUCTION TO CLEAN WATER ACT (CWA) SECTION 303(D)IMPAIRED WATERS LISTS (2009), *available at* http://www.epa.gov/owow/tmdl/results/pdf/aug_7_introduction_to_clean.pdf.

²⁵¹ The State has also failed to comply with EPA's mandate to use a more stringent assessment methodology. *See* Letter from Jon M. Capacassa, Dir., Water Prot. Div., U.S. Env'tl. Prot. Agency, to Scott Mandirola, Dir., Div. of Water & Waste Mgmt., W. Va. Dept. of Env'tl. Prot. 7 (Feb. 9, 2011).

²⁵² Letter from Amy G. Dawson, Appalachian Mountain Advocates, to Steve Young, Dept. of Env'tl. Prot., Div. of Waste & Water Mgmt., Re: Comments on the West Virginia Draft 2012 Section 303(d) List (June 8, 2012), *available at* [http://www.dep.wv.gov/WWE/watershed/IR/Documents/IR_2012_DraftSection303\(d\)ListCommentsFinal.pdf](http://www.dep.wv.gov/WWE/watershed/IR/Documents/IR_2012_DraftSection303(d)ListCommentsFinal.pdf).

²⁵³ W. VA. DEPT. OF ENVTL. PROT., WEST VIRGINIA 2012 DRAFT SECTION 303(D) LIST 9 (2012), *available at* http://www.dep.wv.gov/WWE/watershed/IR/Documents/2012_Draft_303%28d%29_Documents/2012_303%28d%29_Complete_Document_M112012.pdf.

²⁵⁴ The agency did retain streams listed as biologically impaired prior to 2012 on the 303(d) list. *Id.*

impairment found in 47 CSR 2-3.2.i.... In response to the legislation, DEP is not adding new biological impairments to the 2012 Section 303(d) list.²⁵⁵

WVDEP's decision to add no new streams to its 303(d) list is unlawful. EPA promptly informed WVDEP that its interpretation of the legislation and decision not to list new streams for biological impairment was improper. EPA's comments on the draft 2012 list stated:

The language of SB562 does not appear to preclude use of existing and readily available data and methodologies in the interim while WVDEP develops and secures legislative approval of new assessment methodologies. Accordingly, WVDEP's basis is unclear for not utilizing existing and readily available data – specifically, approximately 12 years of benthic macroinvertebrate monitoring data – in compiling its draft 2012 Section 303(d) list. Moreover, it is not clear that any new methodology would be ready for use in time for the 20147 Section 303(d) list. Accordingly, EPA recommends that WVDEP continue to add waters to the Section 303(d) list based upon macroinvertebrate data using existing methodologies until such time as new methodologies have been developed or provide better explanation as to how WVDEP believes Senate Bill 562 precludes it from doing so.²⁵⁶

Under the CWA, the EPA “has a mandatory duty to review any new or revised state water quality standards.”²⁵⁷ “Even if a state fails to submit new or revised standards, a change in state water quality standards could invoke the mandatory duty imposed on the Administrator to review new or revised standards.”²⁵⁸ As the Eleventh Circuit has explained, if “waterbodies that under pre-existing testing methodologies would have been included on the [impaired waters] list were left off the list because of [the new regulation], then in effect the Rule would have created new or revised water quality standards”²⁵⁹

Records obtained from WVDEP under the West Virginia Freedom of Information Act confirm that, because of S.B. 562, WVDEP has failed to list at least 173 streams as biologically impaired that would have been listed under previous listing protocols.²⁶⁰ WVDEP's actions make plain that they interpret Senate Bill 562 to constitute a change in the State water quality standards—a change which then must be submitted to the EPA for review under 40 C.F.R. §§ 131.21(c), (e) and *Florida Public Interest Research Group Citizen Lobby*. Senate Bill 562 is a new or revised water quality standard being implemented prior to EPA approval in violation of the rule that a

²⁵⁵ *Id.*

²⁵⁶ U.S. ENVTL. PROT. AGENCY, EPA COMMENTS ON WEST VIRGINIA'S 2012 DRAFT SECTION 303(D) LIST 2 (2012), available at http://www.dep.wv.gov/WWE/watershed/IR/Documents/IR_2012_Documents/Public%20Comments/EPAComments.pdf.

²⁵⁷ *Miccosukee Tribe of Indians of Fla. v. U.S. Env'tl. Prot. Agency*, 105 F.3d 599, 602 (11th Cir. 1997).

²⁵⁸ *Id.* at 602.

²⁵⁹ *Fla. Pub. Interest Research Group Citizen Lobby, Inc. v. U.S. Env'tl. Prot. Agency*, 386 F.3d 1070, 1090 (11th Cir. 2004).

²⁶⁰ See Email from John C. Wirts, Assistant Dir., Watershed Assessment Branch, WVDEP Div. of Water & Waste Mgmt., to Margaret Janes, APPALMAD (May 18, 2012) (on file with author) (containing the list of streams that had benthic samples with WVSCI scores would have indicated biological impairment according to previous assessment protocol).

State can't implement new standards until they have been reviewed and approved by EPA.²⁶¹ WVDEP has acted unlawfully by implementing new water quality standards without EPA's approval.

f. WVDEP's Failure to Regulate Selenium Pollution Compels Action from OSM

SMCRA mandates compliance with the CWA—and therefore CWA violations are essentially also SMCRA violations. Under SMCRA “[n]othing in [the Act] shall be construed as superseding, amending, modifying, or repealing” the CWA,²⁶² “the State laws enacted pursuant thereto, or other Federal laws relating to the preservation of water quality.”²⁶³ West Virginia has explicitly declared that “[d]ischarge from areas disturbed by . . . mining shall not violate effluent limitations or cause a violation of applicable water quality standards.”²⁶⁴ Thus, SMCRA compels State SMCRA authorities to protect water quality in the absence of properly protective measures from the State CWA authority. Selenium from surface mining is a major problem in West Virginia's streams and, as discussed in great detail below, WVDEP is failing to adequately regulate it. These CWA violations are also SMCRA violations and OSM's intervention is needed to immediately address the problem of selenium pollution in West Virginia.

i. Selenium Pollution Generally

Selenium is a designated toxic pollutant²⁶⁵ that is especially dangerous because when it is released into the aquatic environment it can rapidly reach levels that are toxic to fish and wildlife.²⁶⁶ Selenium bioaccumulates in aquatic systems. Its toxic effects include impacting the growth and survival of juvenile fish, reducing the survival of larval offspring, and causing skeletal deformities.²⁶⁷ These impacts have been recognized by both scientists and courts. Selenium “impacts the reproductive cycle of many aquatic species, can impair the development and survival of fish, and can even damage gills or other organs of aquatic organisms” when it rises to particular concentrations.²⁶⁸ The damage to aquatic and avian life is not caused by exposure to selenium-tainted water itself but to plant life, invertebrate insects, and other parts of

²⁶¹ 40 C.F.R. § 131.21(c), (e) (2012).

²⁶² 33 U.S.C. §§ 1151–1175 (2012).

²⁶³ 30 U.S.C. § 1292(a)(3) (2012).

²⁶⁴ W. VA. CODE R. § 38-2-14.5.b.

²⁶⁵ *Id.* § 401.15 (2012).

²⁶⁶ A. DENNIS LEMLY, AQUATIC HAZARD OF SELENIUM POLLUTION FROM MOUNTAINTOP REMOVAL COAL MINING 2 (2009), available at http://www.filonverde.org/images/informe_selenio_en_minas_a_cielo_abierto.pdf.

²⁶⁷ U.S. Env'tl. Prot. Agency, *Aquatic Life Criteria for Selenium*, <http://water.epa.gov/scitech/swguidance/standards/criteria/aqlife/pollutants/selenium/questions.cfm> (last visited Dec. 25, 2012).

²⁶⁸ *Ohio Valley Env'tl. Coal. v. Hobet Mining*, 723 F. Supp. 2d 886, 900 (S.D. W. Va. 2010).

the food chain that absorb and collect the toxin. This impacts the entire ecosystem and its effects can be felt far downstream from the site of contamination.

The connection between coal mining and selenium discharges is well established—coal mining is one of the leading causes of selenium pollution.²⁶⁹ EPA’s experts have stated that “[t]he most widespread human-caused sources of selenium mobilization and introduction into aquatic ecosystems in the U.S. today are the extraction and utilization of coal for generation of electric power and the irrigation of high-selenium soils for agricultural production.”²⁷⁰ Coal mining can lead to massive exceedances of allowable selenium levels.

In the region of MTM/VF mining, the coals can contain an average of 4 ppm of selenium, normal soils can average 0.2 ppm, and the allowable limits in the streams are 5 ug/L (0.005 ppm). Disturbing coal and soils during MTM/VF mining could be expected to result in violations of the stream limit for selenium.²⁷¹

Selenium is extremely expensive to treat and there is reason to believe that once selenium is exposed by mining it will remain a perpetual problem. Studies show that mining operations are causing serious, persistent, and unmitigated harm in violation of the CWA and SMCRA due to persistent discharges of selenium in downstream waters.²⁷²

ii. Selenium Pollution is a Significant Problem in West Virginia

WVDEP has not addressed the severe problem of selenium discharges that is pervasive in mountaintop removal and valley fill operations that violate WQS established under the CWA and the terms of SMCRA permits issued to mining operators. Discharges of selenium resulting from coal mining are causing severe threats to the biota in West Virginia’s streams and, if not treated and prevented, will effectively poison many streams for wildlife for generations to come. The destructive impact of selenium pollution on West Virginia’s natural resources cannot be overstated.

Selenium associated with surface coal mining has been detected at elevated levels in many of West Virginia’s streams. In February of 2009, WVDEP released a study on the impacts of

²⁶⁹ See generally A. DENNIS LEMLY, AQUATIC HAZARD OF SELENIUM POLLUTION FROM MOUNTAINTOP REMOVAL COAL MINING 7 (2009), available at http://www.filonverde.org/images/informe_selenio_en_minas_a_cielo_abierto.pdf.

²⁷⁰ GARY BRYANT ET AL., A SURVEY OF THE WATER QUALITY OF STREAMS IN THE PRIMARY REGION OF MOUNTAINTOP / VALLEY FILL COAL MINING 73–74 (2002), available at <http://www.cet.edu/pdf/mtmvfchemistry.pdf>.

²⁷¹ *Id.* at 74.

²⁷² See generally W. VA. HIGHLANDS CONSERVANCY & OHIO VALLEY ENVTL. COAL., COMMENTS OF WEST VIRGINIA HIGHLANDS CONSERVANCY AND OHIO VALLEY ENVIRONMENTAL COALITION ON THE DRAFT PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT ON MOUNTAINTOP REMOVAL MINING/VALLEY FILL ACTIVITIES IN APPALACHIA (2004), available at http://www.ohvec.org/issues/mountaintop_removal/articles/EIS_wvhc_ovec.pdf.

selenium downstream from coal mines in seams high in selenium.²⁷³ WVDEP’s study found accumulation of selenium in fish tissue at levels that exceed the level at which toxic effects occur.²⁷⁴

| Stream | Location | Avg. Water Column Se (ppb) | Level of Se in Fish Tissue Beyond which Toxic Effects Occur (ppm) | Average Fish Tissue Se (ppm) |
|-----------------|--------------------|-----------------------------------|--|-------------------------------------|
| Beech Creek | Logan County, WV | 12.3 | 4 | 7.55 |
| White Oak Creek | Near Orgas, WV | 15.8 | 4 | 6.77 |
| Seng Creek | Garrison, WV | 27.2 | 4 | 8.16 |
| Hughes Fork | Near Dixie, WV | 5.30 | 4 | 7.97 |
| Pinnacle Creek | | 2.5 | 4 | 6.02 |
| Mud River | Lincoln County, WV | 8.0 | 4 | 6.89 |

As seen in the chart above, WVDEP found the level of selenium in fish tissue at Seng Creek to be more than twice the acceptable 4 ppm concentration. Selenium discharged from mining operations have been “sufficient to pollute the Mud River and a downstream reservoir, substantially elevate selenium levels in fish tissues, and cause teratogenic deformities and other toxic effects in their offspring If waterborne selenium concentrations are not reduced, reproductive toxicity will spiral out of control and fish populations will collapse.”²⁷⁵ Indeed, severe fish deformities, including the frightening appearance of a two-headed trout, have been documented near mine sites in Idaho where high levels of selenium exist.²⁷⁶

²⁷³ W. VA. DEP’T OF ENVTL. PROT., SELENIUM BIOACCUMULATION AMONG SELECT STREAM AND LAKE FISHES IN WEST VIRGINIA (2009), available at http://www.dep.wv.gov/WWE/watershed/wqmonitoring/Documents/Selenium/Se_Fish_Tissue_Summary_Paper_final_Feb09.pdf.

²⁷⁴ *Id.* at 6.

²⁷⁵ A. DENNIS LEMLY, AQUATIC HAZARD OF SELENIUM POLLUTION FROM MOUNTAINTOP REMOVAL COAL MINING 7 (2009), available at http://www.filonverde.org/images/informe_selenio_en_minas_a_cielo_abierto.pdf.

²⁷⁶ Leslie Kaufmann, *Mutated Trout Raise Concerns at Mine Sites*, N.Y. TIMES, Feb. 22, 2012, http://www.nytimes.com/2012/02/23/science/earth/mutated-trout-raise-new-concerns-over-selenium.html?_r=2&ref=science.



The risk of significant ecological harm from selenium contamination in the West Virginia coal fields has been confirmed by studies conducted by the U.S. Fish and Wildlife Service (FWS). FWS found that selenium pollution could harm both birds and fish due to bioaccumulation.

Our results show that selenium present in surface waters in southern West Virginia is bioavailable, and that violations of the EPA selenium water quality criterion may result in selenium concentrations in fish that could adversely affect fish reproduction. In some cases fish tissue concentrations were near levels believed to pose a risk to fish-eating birds.²⁷⁷

Selenium pollution is difficult to avoid in selenium rich areas, and an agency committed to addressing this problem might consider significantly limiting or even prohibiting coal mining in selenium rich areas. WVDEP, however, has continued to allow surface mining in selenium seams. FWS stated in its comment letter on a project on Hollow Mountain its belief “that it is unlikely that toxic materials can be isolated indefinitely from weathering and in the long-term

²⁷⁷ “Effects of selenium toxicity on two species of fish. (*Upper*) One of two *Lepomis* sp. hybrids caught at site 7 showing cranial-facial deformities typical of selenium toxicity. (*Lower*) Female creek chub (*Semolilus atromaculatus*) from site 10 with lordosis deformity typical of selenium toxicity.” T. Ty Lindberg et al., *Cumulative impacts of mountaintop mining on an Appalachian watershed*, 108 PROC. OF THE NATL. ACAD. SCI. fig.4 (2011), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3248525/>.

²⁷⁸ See A. DENNIS LEMLY, RECOMMENDATIONS FOR PRE-MINE ASSESSMENT OF SELENIUM HAZARDS ASSOCIATED WITH COAL MINING IN WEST VIRGINIA 2–3 (2004), available at http://www.ohvec.org/issues/mountaintop_removal/articles/EIS_lemly%20.pdf.

there will likely be leaching of toxic materials.”²⁷⁹ WVDEP’s decision to allow surface mining operations in such areas indicates that it is more interested in allowing mining operations to move forward than protecting the environment.

iii. WVDEP has Failed to Regulate Selenium Pollution

WVDEP’s implementation of its surface mining program has not just failed to curtail the serious harm resulting from selenium pollution, it has also enabled these harms to occur on a massive scale. WVDEP’s Handbook for Permitting states that “activities deemed to have reasonable potential to violate selenium WQC will be required to develop an effective mechanism for preventing/minimizing the weathering of and leaching of selenium”²⁸⁰ The Handbook continues, “SMCRA and NPDES permits issued for such activities will contain operating requirements for the control of selenium require baseline water quality monitoring, contain selenium effluent limitations and self-monitoring requirements, as appropriate.”²⁸¹ WVDEP even provides a process for permit applicants who do not want to adhere to these processes:

Applicants not wishing to implement the described procedures must provide additional testing of materials, alternative handling procedures, historical water quality or other data that demonstrates there is no reasonable potential to violate the selenium WQC.²⁸²

In existing operations, where selenium water pollution is identified after mining operations have begun, operators are not required to sample the remaining undisturbed strata for selenium at all. Instead, WVDEP relies on the false premise that high selenium overburden is restricted to the dark shales adjacent to coal intervals and requires special handling of that material.²⁸³

WVDEP has failed to adhere to its own guidance for selenium management and its mismanagement of its permitting program has allowed for selenium to continue contaminating once pristine waterways. OSM should step in to ensure compliance with the law and to cease this current allowance of this perpetual pollution before more damage is done.

²⁷⁹ Letter from U.S. Fish & Wildlife Serv., to U.S. Army Corps of Eng’rs, 3 (July 9, 2004) (on file with author).

²⁸⁰ W. VA. DEP’T OF ENVTL. PROT., PERMIT HANDBOOK 32-7 (1999), *available at* <http://www.dep.wv.gov/dmr/handbooks/Documents/Permitting%20Handbook/sect32.pdf> [hereinafter PERMIT HANDBOOK].

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *See* PERMIT HANDBOOK 32-19 (1999), *available at*

<http://www.dep.wv.gov/dmr/handbooks/Documents/Permitting%20Handbook/sect32.pdf>; SANDRA G. NEUZIL ET AL., U.S. GEOLOGICAL SURVEY, SELENIUM CONCENTRATIONS IN MIDDLE PENNSYLVANIAN COAL-BEARING STRATA IN THE CENTRAL APPALACHIAN BASIN 2, 8 (2007), *available at* <http://pubs.usgs.gov/of/2007/1090/ofr2007-1090.pdf>.

I. Examples of WVDEP Failure to Prevent Selenium from Causing Material Damage to the Hydrologic Balance

SMCRA requires the prevention of material damage to the hydrologic balance outside the permit area.²⁸⁴ WVDEP has failed to utilize its authority to prevent selenium pollution from causing material damage to the hydrologic balance. By failing to ensure compliance with State WQS, WVDEP is violating both SMCRA and SCMRA.

An example of this failure can be found at Colony Bay, S001581/W0057126. The Colony Bay mine discharged to Cazy Creek of Pond Fork, Beaver Pond Branch of Pond Fork and Pond Fork.²⁸⁵ In 2004, both Beaver Pond Branch and Cazy Creek were placed on the West Virginia 303(d) list due to selenium impairment.²⁸⁶ In September 2006, EPA approved the final TMDL for the Coal River, including Cazy Creek and Beaver Pond Branch.²⁸⁷ The TMDL assigned end of pipe selenium waste load allocations (WLA) for WV0057126 outfalls discharging to the impaired streams.²⁸⁸ Despite the EPA approved WLAs, WVDEP did not assign selenium permit limits to WV0057126 issued in August 2007, or at any later time. In fact, in August 2012, WVDEP released the final bond of S001581 and in October 2012 released the NPDES permit for the site without any consideration of the amount of selenium discharged at the site.²⁸⁹ In addition to CWA problems, this failure to manage a known selenium problem violates SMCRA because it results in material damage to the hydrologic balance.

²⁸⁴ 30 C.F.R. § 780.22(a) (2012).

²⁸⁵ Colony Bay Coal Co, NPDES Permit # WV1020102, Permit Application (2007) (on file with author).

²⁸⁶ See W. VA. DEP'T OF ENVTL. PROT., DIV. OF WATER & WASTE MGMT., 2010 WEST VIRGINIA INTEGRATED WATER QUALITY MONITORING AND ASSESSMENT REPORT LIST 20 (2010), *available at* http://www.dep.wv.gov/WWE/watershed/IR/Documents/IR_2010_Documents/2010IR_EPA_Approved_Full_Version.pdf. Note Cazy Creek is interchangeably referred to as Casey Creek, as is the case in this listing.

²⁸⁷ See Letter from Jon M. Capacasa, Dir., Water Prot. Div., Reg. 3, U.S. Env'tl. Prot. Agency, to Lisa A. McClung, Dir., Div. of Water & Waste Mgmt., W. Va. Dep't of Env'tl. Prot. (Sept. 26, 2006), *available at* http://www.dep.wv.gov/WWE/watershed/TMDL/grpb/Documents/Coal%202008/Coal_River_TMDL_EPA_Approval_Letter.pdf.

²⁸⁸ U.S. ENVTL. PROT. AGENCY REG. 3, COAL METALS TMDL ALLOCATIONS *Spreadsheet* at Selenium Tab (2006) (on file with author).

²⁸⁹ See Colony Bay Coal Co., Permit # S-0015-81, Permit Details, https://apps.dep.wv.gov/WebApp/_dep/search/Permits/OMR/Permit_details.cfm?permit_id=S001581&dep_office_id=OMR&responsible_party_name=COLONY%20BAY%20COAL%20CO (last visited Dec. 29, 2012); Colony Bay Coal Co., NPDES Permit # WV0057126, Permit Details, https://apps.dep.wv.gov/WebApp/_dep/search/Permits/HPU/HPU_Permit_details.cfm?permit_id=WV0057126&dep_office_id=HPU&responsible_party_name=COLONY%20BAY%20COAL%20CO (last visited Dec. 29, 2012).

II. WVDEP Approves New Permits that Fail to Adequately Guard Against Selenium Pollution Because it Relies on Inadequate Background Data

WVDEP does not adequately assess the potential for new operations to cause selenium pollution in direct contravention of its own guidance. “Using pre-mine evaluation can safeguard natural resources by allowing site-specific risk assessment and risk management to take place. This is the prudent, environmentally responsible course of action.”²⁹⁰ Reliance on an inadequate baseline assessment is the most fundamental error in preventing selenium pollution. WVDEP routinely fails to require adequate core sampling for new operations, resulting in reliance on an inadequate baseline.

Selenium is well known to vary vertically depending on the strata to be mined.²⁹¹ Selenium also varies laterally even within seams known to be high in selenium.²⁹² However, WVDEP only requires cores to be taken at approximately 2,000 foot spacing prior to the onset of mining.²⁹³ This means that even at large mine sites only a few core sample must be taken. Dennis Lemly, one of the world’s leading experts on selenium pollution associated with coal mining, recommends that cores be taken every five acres for pre-mining assessments.²⁹⁴ Other experts recommend additional sampling be taken “on the run” at mine sites with frequent additional sampling during active mining operations.²⁹⁵

In some instances, WVDEP does not even implement its own requirement for operators to sample target coal seams for selenium.²⁹⁶ For example, at the Alex Energy site in Nicholas County, Permit # S300811/WV1024809, mining was proposed along notoriously high selenium seams and yet Alex Energy was issued a NPDES permit without selenium restrictions in August

²⁹⁰ A. DENNIS LEMLY, RECOMMENDATIONS FOR PRE-MINE ASSESSMENT OF SELENIUM HAZARDS ASSOCIATED WITH COAL MINING IN WEST VIRGINIA 2–3 (2004), *available at* http://www.ohvec.org/issues/mountaintop_removal/articles/EIS_lemly%20.pdf.

²⁹¹ W. Va. Geological & Econ. Survey, *Trace Elements in West Virginia Coals*, <http://www.wvgs.wvnet.edu/www/datastat/te/index.htm> (last visited Dec. 26, 2012).

²⁹² *Id.*; A. DENNIS LEMLY, RECOMMENDATIONS FOR PRE-MINE ASSESSMENT OF SELENIUM HAZARDS ASSOCIATED WITH COAL MINING IN WEST VIRGINIA 3 (2004), *available at* http://www.ohvec.org/issues/mountaintop_removal/articles/EIS_lemly%20.pdf.

²⁹³ PERMIT HANDBOOK 32-18, 32-19 (1999), *available at* <http://www.dep.wv.gov/dmr/handbooks/Documents/Permitting%20Handbook/sect32.pdf>.

²⁹⁴ A. DENNIS LEMLY, RECOMMENDATIONS FOR PRE-MINE ASSESSMENT OF SELENIUM HAZARDS ASSOCIATED WITH COAL MINING IN WEST VIRGINIA 3 (2004), *available at* http://www.ohvec.org/issues/mountaintop_removal/articles/EIS_lemly%20.pdf.

²⁹⁵ Personal Communication between Margaret Janes, Senior Policy Analyst, Appalachian Mountain Advocates & Dr. George Vance, Professor Emeritus, Univ. of Wyo.

²⁹⁶ *See* PERMIT HANDBOOK 32-18, 32-19 (1999), *available at* <http://www.dep.wv.gov/dmr/handbooks/Documents/Permitting%20Handbook/sect32.pdf>.

of 2012.²⁹⁷ The cores submitted with the application showed high selenium values in thin seams of coal. Thicker seams were not tested for selenium at all but were removed for “quality analysis.”²⁹⁸ Despite WVDEP’s own presumption that seams in this interval cause selenium pollution unless cores show low selenium levels, the agency failed to place selenium limitations in the NPDES permit. The failure to collect adequate background information or impose any selenium limitations even in notorious selenium seams is indicative of WVDEP’s relaxed attitude on this serious problem.

III. WVDEP Fails to Require Selenium Removal Facilities, Adequate Monitoring, or Require Testing for Discharges

At new mine sites where cores show high selenium values and NPDES permit limitations for selenium are in place, WVDEP does not require the construction of selenium removal facilities prior to the onset of mining but instead acts as though selenium pollution is merely speculative. Thus, at these sites selenium pollution will undoubtedly occur unabated until treatment facilities are built at some unknown date in the future. This failure can be seen at the Central Appalachian Mine, WV1020595/ S502508.

WVDEP also fails to require adequate monitoring at sites in phases of release where selenium has not been detected. Older sites only sample once every five years for priority pollutants and then go into the phased bond release period where they sometimes take no selenium samples at all. Hydrologic reclamation plans are required to contain steps to meet water quality standards and avoid toxic drainage,²⁹⁹ but WVDEP is not utilizing its authority to ensure that these plans prevent selenium pollution.

IV. WVDEP Wrongfully Relies on Material Handling Plans to Control Selenium

WVDEP wrongfully relies on material handling plans to control selenium. This strategy is flawed for a number of reasons. First, the material handling plans do not apply to the coal itself. Thus, during active coal extraction, there is no mechanism to prevent selenium from entering the discharge or receiving stream. Second, the material handling plans are based on too few core samples (used to identify high selenium strata) from new mines. In the case of existing mines where selenium is found to be a problem, no core samples are done at all. Instead, WVDEP relies on speculation that special material handling of dark shales will prevent selenium water pollution. Third, the material handling plans are based on past experience with preventing acid

²⁹⁷ See Alex Energy Inc., NPDES Permit No WV1024809, Approved Permit (Aug. 21, 2012) (on file with author); PERMIT HANDBOOK 32-18 (1999), available at

<http://www.dep.wv.gov/dmr/handbooks/Documents/Permitting%20Handbook/sect32.pdf>.

²⁹⁸ See Alex Energy Inc., Site ID Core: N-07-03, Cores Sampling Data (2009) (on file with author).

²⁹⁹ 30 C.F.R. § 780.21(h) (2012).

mine drainage and, thus, require alkaline encapsulation of high selenium materials. This does not make sense because alkaline environments increase the mobility of selenium and cause it to be more likely to leach and reach surface and ground water. Finally, and perhaps most importantly, the material handling plans simply do not work. For example, Hobet Mining operates two mines in the Mud River Watershed, both of which are supposed to be implementing the most recent selenium handling plans. Discharges from both of these facilities consistently contain selenium in concentrations that exceed the selenium effluent limits. Indeed, a Hobet manager admitted in a sworn deposition that the selenium handling plan is not working to bring the company into compliance with its selenium limits.³⁰⁰

EPA, in its veto of the Spruce No. 1 Mine, stated that “[m]aterial handling plans will not prevent elevated selenium levels downstream.”³⁰¹ “Available evidence makes clear that bottom-up fill construction and materials handling have not reduced levels of selenium or total dissolved solids below levels known to be harmful to wildlife.”³⁰² “Given the nature of Se distribution in these overburden materials, it is extremely difficult to demonstrate how an effective on-site separation of high Se-bearing overburden materials will be performed without testing all materials within two to four feet above and below the coal beds.”³⁰³ These statements from the EPA make plain its expert opinion that materials handling plans do not prevent selenium discharge into the water.

V. WVDEP Fails to Factor in Relevant Data when Establishing NPDES Permit Limits for Selenium

WVDEP’s Division of Mining does not routinely look at WVDEP’s Division of Water’s (DOW) stream assessment data when developing NPDES permit limits. As a result, many permits fail to consider all important information that could help curtail selenium pollution. For example, the Bandmill Coal Corporation’s Tower Mountain Mine, S502393/WV1015559, is located along the Right Hand Fork of Rum Creek and the Guyandotte River. Rum Creek is on the West Virginia 303(d) list for selenium impairment.³⁰⁴ WVDEP’s DOW stream testing showed selenium of .0276 mg/l³⁰⁵ in June 2011 in Burgess Branch of the Right Hand Fork of Rum Creek, a site of

³⁰⁰ Deposition of Kenny Daniel at 30–31 (Feb. 4, 2008), *Ohio Valley Env’tl. Coal. v. Apogee Coal Co. LLC*, No. 3:07-cv-00413.

³⁰¹ U.S. ENVTL. PROT. AGENCY, *SPRUCE NO. 1 SURFACE MINE FINAL DETERMINATION* 9–11, app. 6 (2011), <http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/spruce.cfm> (last visited Dec. 26, 2012).

³⁰² *Id.* at 5, app. 6.

³⁰³ *Id.* at 14, app. 4.

³⁰⁴ *See* W. VA. DEP’T OF ENVTL. PROT. DIV. OF WATER & WASTE MGMT., 2010 WEST VIRGINIA INTEGRATED WATER QUALITY MONITORING AND ASSESSMENT REPORT LIST 61 (2010), *available at* http://www.dep.wv.gov/WWE/watershed/IR/Documents/IR_2010_Documents/2010IR_EPA_Approved_Full_Version.pdf.

³⁰⁵ Note that this exceeds both the chronic (5 ug/l) and acute (20 ug/l) selenium criteria.

valley fills associated with the Tower Mountain Mine.³⁰⁶ The valley fills are the sole potential source of selenium at this site. Despite overwhelming evidence that discharges from the mine have caused material damage to the hydrological balance in the Rum Creek watershed, WVDEP renewed the Tower Mountain NPDES permit without imposing selenium limits or monitoring at any outfall.³⁰⁷ WVDEP Division of Mining either ignored or never saw the DOW sampling results along Burgess Branch. This kind of bureaucratic oversight results in continued degradation of West Virginia's waters, and is yet another reason that OSM must assume control of West Virginia's surface mining program.

VI. Additional Examples of WVDEP's Flawed Permitting Process Allowing for Selenium Pollution

The renewal of the Tower Mountain NPDES permit illustrates WVDEP's failure to ensure that its various departments are effectively sharing critical information, as well as numerous other flaws in the WVDEP permitting process. For example, at the time of renewal, permit holders are required to do a one-time sampling at outfalls for a list of priority pollutants including selenium. The permittee is allowed to sample a subset of outfalls as representative of the entire mine site. Since there is a great deal of lateral and horizontal variation in the amount of selenium disturbed at any one time, this approach is likely to miss selenium hotspots. At the Tower Mountain Mine, Bandmill did not submit data for outfalls discharging to Burgess Branch. Rather, it reported selenium data at another outfall discharging to Winding Shoals on the Guyandotte River. That data showed selenium of 3.65 ug/l, which is less than the chronic selenium criterion.³⁰⁸ As is typical for the Division of Mining, the data did not trigger a reasonable potential analysis for selenium or lead limits in the permit. The Division of Mining did not follow CWA regulations that require an analysis of the variability of pollutant concentrations.³⁰⁹ Since selenium discharged at mine sites varies both with the strata disturbed and with the flow, that variation must be considered when evaluating whether or not a discharge has a reasonable potential to

³⁰⁶ Data obtained by FOIA request from Margaret Janes, Senior Policy Analyst, Appalachian Mountain Advocates, to W. Va. Dep't of Env'tl. Prot. (Dec. 2011).

³⁰⁷ See Bandmill Coal Corporation, NPDES Permit # WV1015559, Approved Permit (Oct. 24, 2012) (on file with author).

³⁰⁸ See Bandmill Coal Corporation, NPDES Permit # WV1015559, Outfall Laboratory Data (Mar. 10, 2012) (on file with author).

³⁰⁹ 40 C.F.R. § 122.44(d)(1)(ii) (2012); W. VA. DEP'T OF ENVTL. PROT., OFFICE OF WATER RES., WATER QUALITY STANDARDS/MIXING ZONES IMPLEMENTATION GUIDANCE 3 (1997), *available at* http://www.dep.wv.gov/WWE/permit/individual/Documents/370_Mzguide.pdf; U.S. ENVTL. PROT. AGENCY, TECHNICAL SUPPORT DOCUMENT FOR WATER QUALITY-BASED TOXICS CONTROL 53 (1991), *available at* <http://nepis.epa.gov/Exe/ZyNET.exe/100002CU.TXT?ZyActionD=ZyDocument&Client=EPA&Index=1986+Thru+1990&Docs=&Query=&Time=&EndTime=&SearchMethod=1&TocRestrict=n&Toc=&TocEntry=&QField=&QFieldYear=&QFieldMonth=&QFieldDay=&IntQFieldOp=0&ExtQFieldOp=0&XmlQuery=&File=D%3A\zyfiles\Index%20Data\86thru90\Txt\00000004\100002CU.txt&User=ANONYMOUS&Password=anonymous&SortMethod=h-&MaximumDocuments=1&FuzzyDegree=0&ImageQuality=r75g8/r75g8/x150y150g16/i425&Display=p|f&DefSeeKPage=x&SearchBack=ZyActionL&Back=ZyActionS&BackDesc=Results%20page&MaximumPages=1&ZyEntry=1&SeekPage=x&ZyPURL>.

cause or contribute to a selenium water quality standard exceedance and material damage to the hydrologic balance. This is a difficult evaluation to make when so few samples are taken. If WVDEP had followed State and national guidance, based on the data presented in the permit application, it would have determined that there was a reasonable potential for the discharges from the site to violate water quality standards and selenium limitations would have been placed in the permit.

Other Division of Mining permitting flaws are exemplified by the Aracoma Coal, Tinsley Branch Deep Mine U500499/WV1020102. The mine discharges to a tributary of Rum Creek, among other sites. Rum Creek is on the impaired streams list due to selenium impairment.³¹⁰ WVDEP's policy is to presume that discharges to listed streams should contain selenium limitations.³¹¹ However, small tributaries of those listed streams are not included in the policy or considered. In this case, Aracoma reported 3.66 ug/l from a main outfall discharging to Tinsley Branch. That data alone should have triggered selenium limits. The additional information that the discharges would impact a selenium impaired stream less than a quarter of a mile downstream and that the mine was operating in the Chilton Seam, a seam known to be high in selenium, should have triggered a reasonable potential analysis for selenium.³¹² Instead, WVDEP issued the NPDES permit without selenium limitations or monitoring.³¹³

Another example of WVDEP's failure to adequately protect West Virginia's streams from toxic levels of selenium is Dynamic Energy S402096/WV1016539. A number of high selenium seams are being mined at the site.³¹⁴ A recent Section J-6 of the mining permit outlines numerous exceedances of the chronic selenium criterion at baseline water quality monitoring stations.³¹⁵ Despite the findings in the mining permit, the NPDES permit was issued in March of 2012 without selenium limitations or monitoring.³¹⁶

³¹⁰ See W. VA. DEP'T OF ENVTL. PROT. DIV. OF WATER & WASTE MGMT., 2010 WEST VIRGINIA INTEGRATED WATER QUALITY MONITORING AND ASSESSMENT REPORT LIST 61 (2010), *available at* http://www.dep.wv.gov/WWE/watershed/IR/Documents/IR_2010_Documents/2010IR_EPA_Approved_Full_Version.pdf.

³¹¹ See PERMIT HANDBOOK 32-18 (1999), *available at* <http://www.dep.wv.gov/dmr/handbooks/Documents/Permitting%20Handbook/sect32.pdf>.

³¹² See W. Va. Geological & Econ. Survey, *Trace Elements in West Virginia Coals*, <http://www.wvgs.wvnet.edu/www/datastat/te/index.htm> (last visited Dec. 26, 2012).

³¹³ See Aracoma Coal Company Inc, NPDES Permit # WV1020102, Approved Permit (Oct. 16, 2012) (on file with author).

³¹⁴ Dynamic Energy Inc, NPDES Permit # WV1016539, Approved Permit, at Permit Face (Mar. 14, 2012) (on file with author).

³¹⁵ Dynamic Energy Inc, Permit # S-4020-96, CHIA Section of Mining Permit Renewal S402096, Attachment J-6, at 1, 8, 11 (on file with author).

³¹⁶ Dynamic Energy Inc, NPDES Permit # WV1016539, Approved Permit, at Permit Face (Mar. 14, 2012) (on file with author).

Selenium is a serious pollutant and WVDEP has failed to use its authority under SCMRA and the CWA to control its discharge, leading to water quality violations that will harm the State's waters for generations to come. West Virginia is grossly out of compliance with the law. OSM must assume implementation of SMCRA in West Virginia to curtail the release of selenium.

g. WVDEP is Failing to Properly Regulate Conductivity

As discussed above, SMCRA authorities are compelled to protect water quality in the absence of properly protective measures from the State CWA authority. Under SMCRA, “[n]othing in [the Act] shall be construed as superseding, amending, modifying, or repealing” the CWA,³¹⁷ “the State laws enacted pursuant thereto, or other Federal laws relating to the preservation of water quality.”³¹⁸ SCMRA echoes SMCRA in mandating water quality protection, declaring that “[d]ischarge from areas disturbed by . . . mining shall not violate effluent limitations or cause a violation of applicable water quality standards.”³¹⁹ WVDEP is failing to properly manage conductivity despite the fact that it is causing significant harm to West Virginia streams and may poison streams and wildlife for generations to come. OSM's intervention is needed to immediately address the problem of conductivity in West Virginia.

i. Conductivity from Mining Causes Serious Damage

Discharge of ions from mining sites is associated with toxic conductivity. Elevated conductivity levels are caused by the release of ions—including sulfate, calcium, magnesium, and bicarbonate—from parent material found in mining overburden that is exposed to the elements through mountaintop mining and placement of the material in streams to form valley fills.³²⁰

The Programmatic Environmental Impact Statement (PEIS) on Mountaintop Mining and Valley Fills prepared by the EPA in conjunction with OSM, U.S. Army Corps of Engineers, FWS, and WVDEP also acknowledged the role of mining in creating elevated downstream conductivity.

[M]ining and valley filling activity appear to be associated with some downstream changes in surface water chemistry [including] increases in a number of cat ions that are known to be associated with surface mining such as sulfate, total dissolved solids, total calcium, total magnesium, hardness, total manganese, dissolved manganese, specific conductance, alkalinity, and total potassium.³²¹

³¹⁷ 33 U.S.C. §§ 1151–1175 (2012).

³¹⁸ 30 U.S.C. § 1292(a)(3) (2012).

³¹⁹ W. VA. CODE R. § 38-2-14.5.b.

³²⁰ M.A. PALMER & E.S. BERNHARDT, MOUNTAINTOP MINING VALLEY FILLS AND AQUATIC ECOSYSTEMS: A SCIENTIFIC PRIMER ON IMPACTS AND MITIGATION APPROACHES 14 (2009), *available at* <http://wvgazette.com/static/mtrwhitepaper.pdf>.

³²¹ U.S. Env'tl. Prot. Agency, Reg. 3, Mountaintop Mining/Valley Fills in Appalachia Final Programmatic Environmental Impact Statement at II D-7, <http://www.epa.gov/region03/mtntop/eis2005.htm> (last visited Dec. 26, 2012).

Increased conductivity levels are closely linked to the biological impairment of streams. High levels of conductivity can be directly toxic to aquatic organisms and are associated with a loss of sensitive macroinvertebrate taxa from effected streams.³²²

Waterways close to mining sites are at an elevated risk for toxicity from conductivity. A study conducted in EPA's Region 3 found that levels of conductivity measured downstream from mountaintop mining sites could be more than twenty or thirty times higher than the conductivity levels measured downstream from un-mined sites.³²³ The study found that sites downstream of valley fills associated with reclaimed mountaintop mining operations showed very high levels of conductivity even fifteen years after reclamation.³²⁴ EPA scientists concluded that the elevated conductivity in the streams was "limiting recovery of these communities."³²⁵

Stream biologists E.S. Bernhardt and M.A. Palmer summarize the ecosystem wide impacts of conductivity caused by mining:

Pollutants added to ephemeral and intermittent stream channels will be transported downstream to larger rivers. The more surface mining and valley fill activity within a large watershed, the greater the cumulative transport of alkaline mine drainage pollutants to major rivers will be. The streams and rivers below valley fills receive alkaline mine drainage that include highly elevated concentrations of sulfate, bicarbonate, calcium and magnesium ions and which often include elevated concentrations of multiple trace metals. The combined toxicity of multiple constituents results in significant increases in conductivity and total suspended solids below valley fills. This decline in water quality leads to a loss of sensitive aquatic organisms even when downstream habitats are intact. The resulting high conductivity and high sulfates can persist long after mining activities cease and scientists have found no empirical evidence documenting recovery of macroinvertebrate communities in the streams impacted by alkaline mine drainage. The water quality impacts of MTMVF activities are more severe and more persistent than other land use changes within the southern Appalachians.

- Streams impacted by MTVF often have 30-40 fold increases in sulfate concentrations and sulfate concentrations in receiving waters continue to increase after mining activities end. High sulfate concentrations can lead to impacts on aquatic organisms and ecosystem functions.
- Ions of calcium, magnesium, and bicarbonate increase dramatically in the waters so that electrical conductivity levels and total suspended solids in receiving streams below fills can be extremely high ("alkaline drainage syndrome"). Trace elements of iron, aluminum, zinc, and selenium are often elevated as well.

³²² M.A. PALMER & E.S. BERNHARDT, MOUNTAINTOP MINING VALLEY FILLS AND AQUATIC ECOSYSTEMS: A SCIENTIFIC PRIMER ON IMPACTS AND MITIGATION APPROACHES 16-17 (2009), *available at* <http://wvgazette.com/static/mtrwhitepaper.pdf>.

³²³ G.K. Pond et al., *Downstream effects of mountaintop coal mining: comparing biological conditions using family- and genus-level macroinvertebrate bioassessment tools*, 27 J. N. AM. BENTHOL. SOC. 717, 725 (2008).

³²⁴ *Id.* at 730-31.

³²⁵ *Id.* at 731.

- The cumulative effect of elevated levels of all these ions is highly correlated to biological impairment in streams below MTVF. Functionally important aquatic biota are sensitive to ionic stress which disrupts water balance and can cause stress or death.³²⁶

The problems associated with elevated conductivity in streams gives rise to the need for drastic action. In 2009, EPA used its authority under Section 404(c) of the CWA to restrict or prohibit the discharge of dredged or fill material at the Spruce No. 1 mine due to serious concern regarding environmental and water quality impacts.³²⁷ This was the first time EPA had ever used its veto power in such a way. In its veto of the Spruce No. 1 Surface Mine, EPA cited nearly 100 articles and studies published since 2007 that outline the degradation of valuable headwater streams through water quality impacts including conductivity, selenium, and habitat loss.³²⁸ Courts have also recognized the serious harm that conductivity poses—“[t]he Court is thoroughly convinced that large scale surface mining is strongly correlated with elevated levels of conductivity and the loss of sensitive macroinvertebrates downstream of valley fills.”³²⁹ Elevated conductivity levels resulting from coal mining is, according to scientific consensus, the cause of serious harm to aquatic habitats downstream from surface mining operations.

ii. Elevated Levels of Conductivity are Harming West Virginia’s Waters

Impairment resulting from conductivity in West Virginia’s waters has reached alarming levels. A significant portion of West Virginia’s streams are becoming impaired under WVDEP’s watch due to the agency’s failure to take adequate action on this matter.

86% of the West Virginia mountain streams in the WVDEP database with conductivity exceeding 500 $\mu\text{S}/\text{cm}$ were scored as impaired using the genera based GLIMPSS index. Using the more lenient WVSCI index, 67% of all West Virginia mountain streams with conductivities greater than 500 $\mu\text{S}/\text{cm}$ were classified as impaired. Similarly, 81% of all West Virginia small mountain streams with conductivity greater than 1000 $\mu\text{S}/\text{cm}$ were scored as impaired using the WVSCI index, and 91% of those streams were scored as impaired using the GLIMPSS index.³³⁰

³²⁶ MARGARET A. PALMER & EMILY S. BERNHARDT, MOUNTAINTOP MINING VALLEY FILLS AND AQUATIC ECOSYSTEMS: A SCIENTIFIC PRIMER ON IMPACTS AND MITIGATION APPROACHES 3 (2009), *available at* <http://wvgazette.com/static/mtrwhitepaper.pdf>.

³²⁷ Letter from U.S. Env’tl. Prot. Agency, to U.S. Army Corps of Eng’rs (Oct. 16, 2009), *available at* http://www.epa.gov/owow/wetlands/pdf/spruce_1_Oct_16_2009_review_letter.pdf. This veto was overturned by the D.C District Court and but that decision was reversed on appeal and remanded back to the District Court. *Mingo Logan Coal Co. v. U.S. EPA*, 714 F.3d 608 (D.C. Cir. 2013). Still, the fact that EPA was willing to take this extraordinary action in this context indicates the gravity of the problem.

³²⁸ U.S. ENVTL. PROT. AGENCY, FINAL DETERMINATION OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY PURSUANT TO § 404(C) OF THE CLEAN WATER ACT CONCERNING THE SPRUCE NO. 1 MINE, LOGAN COUNTY, WEST VIRGINIA 20 (2011), *available at* http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/upload/Spruce_No-1_Mine_Final_Determination_011311_signed.pdf.

³²⁹ *Ohio Valley Env’tl. Coal. v. U.S. Army Corps of Eng’rs*, No. 3:11-0419, slip op. 28 (S.D. W. Va. 2012).

³³⁰ MARGARET A. PALMER & EMILY S. BERNHARDT, MOUNTAINTOP MINING VALLEY FILLS AND AQUATIC ECOSYSTEMS: A SCIENTIFIC PRIMER ON IMPACTS AND MITIGATION APPROACHES 18 (2011), *available at* <http://wvgazette.com/static/mtrwhitepaper.pdf>.

The 2009 fish kill in Dunkard Creek in northern West Virginia is an example that outlines the seriousness of heightened conductivity levels.³³¹ During September 2009, over 130 species of aquatic organisms, including fish, mussels, and amphibians such as the salamander pictured below, died in massive numbers in a thirty-eight-mile stretch of stream of Dunkard Creek in Monongalia County, West Virginia.³³²



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WVDEP identified the cause of the kill as a toxic golden algal bloom of the species *Prymnesium parvum*—an algae known to grow only in waters with high conductivity. In EPA’s update on its investigation into Dunkard Creek, the agency declared that “any stream with high ionic strength in excess of 750 μS could be at risk for a *P. parvum* [golden alga] bloom and associated fish kill.”³³⁴ Just before the EPA report was published, WVDEP wrote a report on the fish kill identifying eighteen other streams in West Virginia where the conductivity exceeds 1,500 μS .³³⁵

Valley fills and mining disturbances increase conductivity to toxic levels in places where levels are already high enough to put many waterways at risk for fish kills and significant stream impairment. The problem is pervasive in West Virginia and there is no evidence that WVDEP is

³³¹ Similar problems have arisen in Kentucky, especially in the Big Sandy River watershed, which is one of the most intensive coal producing areas in the state. See KY. ENVTL. & PUB. PROT. CABINET DIV. OF WATER, 2004 KENTUCKY REPORT TO CONGRESS ON WATER QUALITY 34 (2008), available at <http://water.ky.gov/waterquality/Integrated%20Reports/305b2004.pdf>.

³³² See Ken Ward Jr., *Friends of Dunkard Creek seek EPA takeover on fish kill*, CHARLESTON GAZETTE, Oct. 1, 2009, <http://blogs.wvgazette.com/coalattoo/2009/10/01/friends-of-dunkard-creek-seek-epa-takeover-on-fish-kill/#more-1257>.

³³³ Scott Finn et al., *DEP allowed Consol to exceed chloride limits in Dunkard Creek for years*, W. VA. PUB. BROADCASTING, Sept. 23, 2009, <http://www.wvpubcast.org/newsarticle.aspx?id=11396>.

³³⁴ LOUIS REYNOLDS, U.S. ENVTL. PROT. AGENCY REG. 3, UPDATE ON DUNKARD CREEK 17 (2009), available at <http://www.epa.gov/region03/dunkard.pdf>.

³³⁵ W. VA. DEP’T OF ENVTL. PROT., DUNKARD CREEK AQUATIC LIFE KILLS SEPTEMBER 2009 26 (2009) available at http://www.wvdep.org/Docs/18239_dunkardaqlkillpvc.pdf.

doing anything to address these concerns. OSM must take control of West Virginia's surface mining program to control the release of conductivity into West Virginia's streams.

iii. WVDEP Relies on Flawed Guidance to Manage Conductivity, Resulting in Significant Harm to Aquatic Life

On May 27, 2011, EPA issued a crucial document that established the benchmark for conductivity in Appalachian Streams.³³⁶ The guidance established that “[t]he chronic aquatic life benchmark value for conductivity derived from all-year data from West Virginia is 300 $\mu\text{S}/\text{cm}$.”³³⁷ Instead of adhering to EPA's guidance, WVDEP issued its own flawed guidance document.³³⁸ This guidance is highly problematic for the reasons outlined below. WVDEP's reliance upon it is resulting in harm to aquatic ecosystems. OSM should assume control of mining in West Virginia so it can implement EPA's guidance and effectively control conductivity.

I. The Guidance does not Apply to Operations Deemed Substantially Complete

One of the key failures of WVDEP's guidance is that it does not apply to operations deemed “substantially complete.” Substantially complete is defined as those operations “past the point when measures that could be undertaken under either an AEPP [Aquatic Ecosystem Protection Plan] or an AMP [Adaptive Management Plan] could be effective in reducing the operation's impact on the aquatic ecosystem.”³³⁹ In other words, even if these sites are causing material damage to the hydrological balance and causing or contributing to water quality standard excursions they would be excluded from the guidance because the operators could not remedy the harm through simple and inexpensive best management practices (BMPs). This very scenario occurred in September 2012 when WVDEP issued a NPDES permit to Alex Energy for its Whitman No. 3 Mine, WV1008285/S505489.³⁴⁰ The mine is still open but reclaimed and substantially complete. The mine discharges to Whitman Creek in the Guyandotte River.³⁴¹ Whitman Creek is on the 303(d) list for biological impairment and a TMDL is scheduled for

³³⁶ U.S. ENVTL. PROT. AGENCY, A FIELD-BASED AQUATIC LIFE BENCHMARK FOR CONDUCTIVITY IN CENTRAL APPALACHIAN STREAMS (FINAL REPORT) (2011), <http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=233809>.

³³⁷ *Id.* at xv.

³³⁸ W. VA. DEP'T OF ENVTL. PROT., PERMITTING GUIDANCE FOR SURFACE COAL MINING OPERATIONS TO PROTECT WEST VIRGINIA'S NARRATIVE WATER QUALITY STANDARDS (2012), *available at* <http://www.dep.wv.gov/pio/Documents/2011-05-11%20Narrative%20Standards%20Permitting%20Guidance%20%28Rev%20%202%29.pdf>.

³³⁹ *Id.* at 1 n.3.

³⁴⁰ Alex Energy Inc, NPDES Permit # WV1008285, Approved Permit (Sept. 14, 2012) (on file with author).

³⁴¹ Alex Energy Inc, NPDES Permit # WV1008285, Approved Permit, at Permit Face (Sept. 14, 2012) (on file with author).

2018.³⁴² The land use in the impaired segment is limited to mining, yet the recently issued permit is without limits for whole effluent toxicity (WET), conductivity/sulfates/TDS, or requirements for biological testing. The recent permit application shows that conductivity of 1,092 umhos was being discharged to Whitman Creek from a major outfall.³⁴³ This level greatly exceeds the levels scientists believe will cause biological impairment. The agency's own guidance justification document indicates that conductivity at this level is likely to cause impairment,³⁴⁴ yet the agency still did not place conductivity/sulfate/TDS limitations in the permit because the operation was deemed substantially complete.

II. The Guidance Does Not Apply to Rainfall Driven Discharges

Another key failure of the guidance is that it does not apply to discharges that are rainfall driven.³⁴⁵ WVDEP's failure to regulate rainfall driven discharges is a significant oversight because rainfall driven discharges can add significant loads of pollutants to a watershed and extend the harm to aquatic life downstream. This was confirmed in a pivotal study on the cumulative effects of mountain top removal mining in the Mud River Watershed of West Virginia which found that "as eight separate mining impacted tributaries contributed their flow, conductivity and the concentrations of selenium, sulfate, magnesium, and other inorganic solutes increased at a rate directly proportional to the upstream areal extent of mining."³⁴⁶ The results of this study "demonstrate the cumulative impact of multiple mines within a single catchment and provide evidence that mines reclaimed nearly two decades ago continue to contribute significantly to water quality degradation within this watershed."³⁴⁷ WVDEP's failure to look at rainfall driven discharge, given that these discharges can contribute to degradation for decades to come, is unacceptable.

³⁴² See W. VA. DEP'T OF ENVTL. PROT. DIV. OF WATER & WASTE MGMT., 2010 WEST VIRGINIA INTEGRATED WATER QUALITY MONITORING AND ASSESSMENT REPORT 60 (2010), available at http://www.dep.wv.gov/WWE/watershed/IR/Documents/IR_2010_Documents/2010IR_EPA_Approved_Full_Version.pdf.

³⁴³ See Alex Energy Inc, NPDES Permit # WV1008285, Permit Application, at Data Sheet (on file with author).

³⁴⁴ See W. VA. DEP'T OF ENVTL. PROT., JUSTIFICATION AND BACKGROUND FOR PERMITTING GUIDANCE FOR SURFACE COAL MINING OPERATIONS TO PROTECT WEST VIRGINIA'S NARRATIVE WATER QUALITY STANDARDS 7 (2010), available at

<http://www.dep.wv.gov/pio/Documents/Narrative/Narrative%20Standards%20Guidance%20Justification.pdf>.

³⁴⁵ See W. VA. DEP'T OF ENVTL. PROT., PERMITTING GUIDANCE FOR SURFACE COAL MINING OPERATIONS TO PROTECT WEST VIRGINIA'S NARRATIVE WATER QUALITY STANDARDS 1 (2012), available at <http://www.dep.wv.gov/pio/Documents/2011-05-11%20Narrative%20Standards%20Permitting%20Guidance%20%28Rev%20%2029.pdf>.

³⁴⁶ T. Ty Lindberg et al., *Cumulative impacts of mountaintop mining on an Appalachian watershed*, 108 PROC. OF THE NATL. ACAD. SCI. at abstract (2011), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3248525/>.

³⁴⁷ *Id.*

III. WVDEP Relies on its Guidance to Avoid Federal Permitting Requirements

WVDEP's Guidance says:

If the applicant cannot demonstrate, by means of its chemical and biological monitoring and the control measures outlined in its AEPP, that it does not have reasonable potential ("RP") to cause or contribute to an excursion above the narrative criteria, the permit writer should treat new or expanded discharges as if they have RP and include WET limits in the permit, in accordance with 40 C.F.R. § 122.44(d)(1)(v).³⁴⁸

DEP relies on this citation in isolation to justify its failure to comply with all Federal permitting requirements. WVDEP attempts to use WET to establish limits instead of using it as an adjunct to chemical specific limits. WET testing has been shown to be less sensitive to high sulfates and conductivities than macroinvertebrate testing.³⁴⁹ EPA's Guidance requires independent application of three standard types of assessments.

As techniques are made available for implementing biocriteria, they too should be integrated into the water quality-based toxics control, thus creating a triad of approaches: whole effluent, chemical-specific, and biological assessments. Each approach has its limitations and thus, exclusive use of one approach alone cannot ensure required protection of aquatic life and human health. The advantages/disadvantages of each approach and how the integrated approach creates an effective toxics control program are discussed in the text.³⁵⁰

EPA has explained that:

[i]ndependent applications state that where different types of monitoring data are available for assessment of whether a water body is attaining aquatic life uses or for identifying the potential of pollution sources to cause or contribute to non attainment of aquatic life uses, any one assessment is sufficient to identify an existing or potential impact/impairment, and no one assessment can be used to override a finding of existing or potential impact or impairment based on another assessment.³⁵¹

WVDEP's misplaced reliance on WET to establish limits rather than establishing WQS and following EPA's guidance to utilize whole effluent, chemical specific, and biological assessments for effective water quality based toxics control is highly problematic.

³⁴⁸ W. VA. DEP'T OF ENVTL. PROT., PERMITTING GUIDANCE FOR SURFACE COAL MINING OPERATIONS TO PROTECT WEST VIRGINIA'S NARRATIVE WATER QUALITY STANDARDS 1 (2012), *available at* <http://www.dep.wv.gov/pio/Documents/2011-05-11%20Narrative%20Standards%20Permitting%20Guidance%20Rev%20202%29.pdf>.

³⁴⁹ Pam Kasey, *Effectiveness of EPA conductivity guidance questioned*, THE STATE JOURNAL, Dec. 2, 2012, <http://www.statejournal.com/story/19988229/effectiveness-of-epa-conductivity-guidance-questioned>.

³⁵⁰ U.S. ENVTL. PROT. AGENCY, TECHNICAL SUPPORT DOCUMENT FOR WATER QUALITY-BASED TOXICS CONTROL xiv-xv (1991), *available at* <http://www.epa.gov/npdes/pubs/owm0264.pdf>.

³⁵¹ Water Quality Standards Regulation, 63 Fed. Reg. 36,742, 36,795 (proposed July 7, 1998).

IV. WVDEP Allows Operations that Fail WET Tests to Avoid Taking Immediate Action to Prevent Continued Violations of WQS

WVDEP essentially endorses the failure of surface mining operations to comply with the law by allowing a mining operation to fail a WET test and then not taking immediate action to prevent continued violations of WQS. WVDEP says, “[i]f WET testing shows noncompliance with specified limitations in the permit, the permittee shall resample and test the effluent within thirty days. If the second test shows compliance, the permittee shall continue WET testing in accordance with the permit requirements.”³⁵² In order to comply with Federal permitting requirements, however, the permit must be written to assure compliance with WQS at all times.

Limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.³⁵³

As such, WVDEP’s Guidance wrongfully essentially endorses the failure to comply with this requirement.

V. WVDEP Relies on Monitoring and Fails to Place Limits on Key Discharges

WVDEP requires monitoring of mining-related conductivity parameters but does not place limitations on the amount of total dissolved solids (TDS) or sulfates discharged.³⁵⁴ Instead, WVDEP claims that BMPs at the mine site and WET limits in the permit will lead to compliance with WQS and reduce conductivity and sulfates to an acceptable level.³⁵⁵ None of these BMPs have been shown to effectively achieve this crucial feat. In addition, at a recent trial in Federal court, John Tyner, a hydrologist from the University of Tennessee, explained the inherent conflicts between SMCRA’s requirement to control run off post-mining by increasing infiltration to fills and efforts to reduce infiltration into the valley fill after mining to avoid the increased potential for release of conductivity. Speaking specifically about the Highlands, Reylas Mine, he

³⁵² W. VA. DEP’T OF ENVTL. PROT., PERMITTING GUIDANCE FOR SURFACE COAL MINING OPERATIONS TO PROTECT WEST VIRGINIA’S NARRATIVE WATER QUALITY STANDARDS 3 (2012), *available at* <http://www.dep.wv.gov/pio/Documents/2011-05-11%20Narrative%20Standards%20Permitting%20Guidance%20%28Rev%20%202%29.pdf>.

³⁵³ 40 C.F.R. § 122.44(d)(1)(i) (2012).

³⁵⁴ *See* W. VA. DEP’T OF ENVTL. PROT., PERMITTING GUIDANCE FOR SURFACE COAL MINING OPERATIONS TO PROTECT WEST VIRGINIA’S NARRATIVE WATER QUALITY STANDARDS 3 (2012), *available at* <http://www.dep.wv.gov/pio/Documents/2011-05-11%20Narrative%20Standards%20Permitting%20Guidance%20%28Rev%20%202%29.pdf>.

³⁵⁵ *See* Central Appalachia Mining LLC, NPDES Permit # WV1029967, Approved Permit, at 2 (Apr. 27, 2012) (on file with author).

stated, “[t]he SWROA predicts that there would be more infiltration after mining than before, but the BMPs [to reduce conductivity] say that they will reduce infiltration into the valley fill after mining.” The applicant and WVDEP cannot have it both ways.

WVDEP’s reliance on its flawed guidance continues to result in unacceptable conductivity problems in West Virginia’s streams. OSM should step in assume control of this program and implement EPA’s guidance for managing conductivity.

h. WVDEP is Failing to Ensure Adequate Bond for Sites that Discharge or May Discharge Polluted Water

West Virginia has failed to adjust bonding requirements to adequately address the ongoing cost of long term selenium, conductivity, and acid mine pollution treatment. Section 509 of SMCRA requires permittees to post a performance bond in an amount sufficient to ensure that in the event of forfeiture, reclamation plans are completed.³⁵⁶ In addition, SMCRA imposes a non-discretionary duty to adjust the amount of performance bonds in response to information showing the need for long-term treatment.³⁵⁷ Finally, SMCRA requires permits to include adequate information for the agency to determine the potential for selenium pollution.³⁵⁸ SMCRA and its implementing regulations outline detailed bonding requirements.³⁵⁹ WVDEP should utilize these bonding requirements to ensure that long term pollution can be properly addressed. However, WVDEP fails to properly utilize its bonding program to this end. OSM is undoubtedly well aware of this problem as it is the focus of a separate primacy petition and the subject of ongoing litigation, thus this petition simply raises bonding as yet another significant deficiency in WVDEP’s program that compels action from OSM.

i. WVDEP’s Failure to Properly Define Impacted Areas in Cumulative Hydrologic Impact Analysis Results in Harm to Watersheds

The cumulative hydrologic impact analysis (CHIA) is one of the core requirements of a SMCRA permit. West Virginia law mandates that the:

Secretary shall perform a separate CHIA for the cumulative impact area of each permit application. This evaluation shall be sufficient to determine whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. Material damage to the hydrologic balance outside the permit areas means any long term or permanent change in the hydrologic balance caused by surface mining operation(s), which has a

³⁵⁶ 30 U.S.C. § 1259(e) (2012); *see also* 30 C.F.R § 800.15 (2012).

³⁵⁷ *Id.*

³⁵⁸ 30 U.S.C. § 1260(b) (2012) ; 30 C.F.R. §773.15 (2012).

³⁵⁹ W. VA. CODE § 22-3-11) (2012) ; W. VA. CODE R. §§ 38-2-11, 38-2-12 (2012).

significant adverse impact on the capability of the affected water resource(s) to support existing conditions and uses.³⁶⁰

WVDEP's implementation of the CHIA requirements is inadequate in numerous ways, many of which are not even touched upon in this petition. This section will just focus on one of the most obvious and egregious CHIA violations—WVDEP's failure to consider the actual "cumulative impact area." This failure results in inadequate analysis and subsequent material damage to the hydrologic balance.

Both West Virginia and Federal regulations define cumulative impact area as:

[T]he area, including the permit area, within which impacts resulting from the proposed operation may interact with the impacts of all anticipated mining on surface- and ground-water systems. Anticipated mining shall include, at a minimum, the entire projected lives through bond releases of: (a) The proposed operation, (b) all existing operations, (c) any operation for which a permit application has been submitted to the regulatory authority, and (d) all operations required to meet diligent development requirements for leased Federal coal for which there is actual mine development information available.³⁶¹

Specifically, WVDEP is failing to comply with the law by frequently not requiring the inclusion of both anticipated and existing mining operations in the cumulative impact areas considered in CHIAs.

One example of the WVDEP's failure to include anticipated mining in a CHIA can be seen in permit #S-3010-04 issued to the Marfork Coal Company for its Bee Tree Surface Mine. The CHIA for this permit was completed on March 2, 2006 and the permit was issued on July 11, 2006.³⁶² The cultural resources map submitted as part of the permit application shows two adjacent proposed mines.³⁶³ One of the proposed mines was Eagle 2, which has since been issued permit number S-3028-05. The inclusion of these adjacent proposed mines on a map submitted as part of the permit application shows without a doubt that both Marfork Coal Company and the WVDEP were anticipating these proposed operations. Furthermore, an Administrative Review Correction Sheet created by the WVDEP on December 21, 2005 lists the status of Eagle 2's permit as pending.³⁶⁴ Despite the fact that both the Eagle 2 and Eagle 3 mines

³⁶⁰ *Id.* § 38-2-3.22(e).

³⁶¹ W. VA. CODE R. § 38-2-2.39 (2012); 30 C.F.R. § 701.5 (2012).

³⁶² Marfork Coal Company, Permit # S-3010-04, Permit Details, https://apps.dep.wv.gov/WebApp/_dep/search/Permits/OMR/Permit_details.cfm?permit_id=S301004&dep_office_id=OMR&responsible_party_name=MARFORK%20COAL%20COMPANY%20INC (last visited Dec. 27, 2012).

³⁶³ Marfork Coal Company: Bee Tree Surface Mine, Permit Application # S-3010-04, at fig.2, <http://dep-foia.org/permits/full/S301004/files/S301004-0066.pdf>.

³⁶⁴ W. VA. DEP'T OF ENVTL. PROT., ADMINISTRATIVE REVIEW CORRECTION SHEET 1 (2005), *available at* <http://dep-foia.org/permits/full/S302805/files/S302805-0151.pdf#page=32>.

were “anticipated mining” under SMCRA’s definition of the cumulative impact area, neither mine was included in the CHIA of the Bee Tree Mine.³⁶⁵

Another example of WVDEP ignoring proposed adjacent mining operations when conducting CHIAs is Patriot Coal’s Wildcat No. 2 Mine, #S-3016-06. For this mine, the CHIA was completed in November of 2007 and the permit was issued on January 7, 2008. The CHIA makes no mention of the proposed Wildcat Longbottom Surface Mine despite it being located in the cumulative impact area. The permit application for the Wildcat Longbottom Surface Mine was submitted in 2007 by Patriot Coal. Furthermore, the CHIA mentions the existence of adjacent underground mines, but fails to assess groundwater flow, dip, head pressure, or the possibility of interbasin transfer.

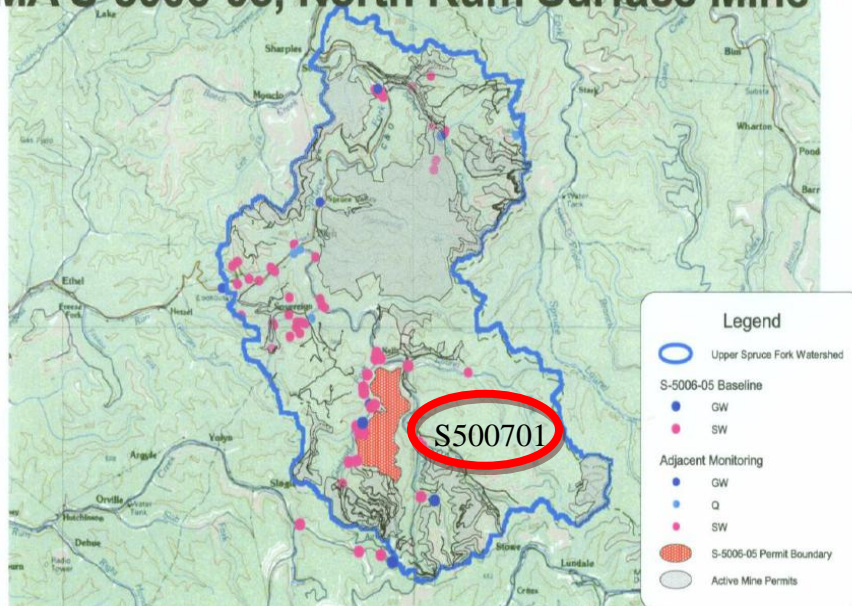
WVDEP also regularly fails to include existing mining operations within the cumulative impact area of proposed mines in its CHIAs. The CHIA of the Apogee Coal Company’s North Rum Surface Mine is an example of this failure. This operation was approved under permit # S-5006-05 on March 15, 2006 even though the mine operating under permit # S-5007-01, which had been in operation since December of 2001,³⁶⁶ is 898 acres and was plainly located in the cumulative impact area, was not considered in the CHIA. The map below shows where permit number S-5007-01 is located and where it should have been on the Cumulative Impact Area map³⁶⁷ created for the CHIA of the North Rum Surface Mine.

³⁶⁵ See generally Marfork Coal Company, Permit # S-3010-04, Cumulative Hydrologic Impact Assessment (Mar. 2, 2006) (excluding Eagle 2 and Eagle 3 from the discussion), <http://www.coalriver.org/mdb/litigation/permitsections/S301004-CHIA.pdf>; see also Marfork Coal Company, Permit # S-3010-04, CHIA map (2006), <http://dep-foia.org/permits/full/S301004/files/S301004-0043.pdf>.

³⁶⁶ Apogee Coal Co. dba Arch of West Virginia, Permit # S-5007-01, at Inspection Details (Mar. 15, 2006), https://apps.dep.wv.gov/WebApp/_dep/search/Permits/OMR/Inspection_Details.cfm?permit_id=S500701&dep_office_id=OMR&insp_unit_id=ENTIRE&unit_insp_date=03%2F15%2F2006%2013%3A00%3A00 (last visited Dec. 27, 2012).

³⁶⁷ Apogee Coal Co. dba Arch of West Virginia, Permit # S-5006-05, at CIA map, <http://www.coalriver.org/mdb/litigation/permitsections/S500605-CHIA.pdf#page=11> (last visited Dec. 27, 2012).

CIA Map for Apogee Coal Company's SMA S-5006-05, North Rum Surface Mine



Independence Coal Company's Twilight South Mine provides yet another example of WVDEP's failure to include both existing and proposed mining operations within the cumulative impact area in the CHIA. The Twilight South Mine's CHIA was completed in January of 2010 and was issued permit #S-5028-08 on March 25, 2010, yet the CHIA failed to mention permit #S-5017-07, which was issued on April 15, 2009 or Independence Coal's own Twilight III-A, permit #S-5024-08, which was applied for in 2008.

All four of the above examples are located in the Coal River Watershed. The Coal River Watershed is approximately 570,000 acres in size. 116,000 acres, or twenty percent of the total acreage of this watershed, are permitted for surface mining. Approximately 42,000 acres, or seven percent of the total acreage, have been disturbed by mining since 1977. Approximately one hundred miles of streams have been buried in the Coal River Watershed, and another fifty miles of streams are in danger of being buried by proposed valley fills while another ten miles of streams are likely to be covered by valley fills when the applications which are pending are approved and applications held up by litigation decisions. When such a high amount of mining activity exists within a single watershed, the consequences of WVDEP's frequent failure to consider all anticipated mining when conducting CHIAs is devastating to the Watershed and is yet another reason why OSM should assume control of West Virginia's surface mining program.

VI. WEST VIRGINIA DOES NOT MEET SMCRA'S REQUIREMENTS FOR THE RECLAMATION OF MINE SITES

OSM must ensure that “surface mining operations are not conducted where reclamation as required by this Act is not feasible.”³⁶⁸ OSM has a duty to ensure mining does not occur in areas where reclamation has failed or is not likely to succeed.³⁶⁹ Under SMCRA, reclamation plans must “comply with applicable air and water quality laws.”³⁷⁰ West Virginia routinely permits mines where reclamation neither occurs nor is feasible, leading to a failure to comply with applicable air and water quality laws.

a. WVDEP is Failing to Enforce SMCRA's Contemporaneous Reclamation Requirements

i. Overview of SMCRA's Contemporaneous Reclamation Requirements

SMCRA requires that reclamation efforts, “including but not limited to backfilling, grading, topsoil replacement, and revegetation on all land that is disturbed by surface mining activities shall occur as contemporaneously as practicable with mining operations”³⁷¹ The requirements for contemporaneous reclamation mandates performance standards for backfilling, regrading, and stabilization.³⁷² Each mining operation is required to submit a mining and reclamation plan reflecting how these standards will be implemented to “minimize total land disturbance and to keep reclamation operations as contemporaneous as possible.” These plans should contain detailed descriptions of the timing, sequence, and “areal extent of each progressive phase.”³⁷³ WVDEP's failure to adhere to these requirements is a violation of

³⁶⁸ 30 U.S.C. § 1202(c) (2012).

³⁶⁹ SMCRA makes reclamation integral to the permitting process by requiring reclamation bonds. Every mine operator must post a reclamation bond before commencing mining operations. 30 U.S.C. § 1259(a) (2012). The amount of the reclamation bond must be “sufficient to assure the completion of the reclamation plan if the work has to be performed by the regulatory authority in the event of forfeiture.” *Id.*; 30 C.F.R. § 800.14(b) (2012). The amount of the bond must also “[r]eflect the probable difficulty of reclamation, giving consideration to such factors as topography, geology, hydrology, and revegetation potential.” 30 U.S.C. § 1259(a) (2012); 30 C.F.R. § 800.14(a)(3) (2012). The regulatory authority may adjust the bond amount at any time “where the cost of future reclamation changes.” 30 U.S.C. § 1259(e) (2012); 30 C.F.R. § 800.15(a) (2012). An operator may be released from all or part of its bond liability only upon demonstration to the appropriate State or Federal regulator that reclamation work meets all regulatory requirements and complies with the terms of the reclamation plan. 30 U.S.C. § 1269(a) (2012). Deficiencies in West Virginia's bonding program are the subject of a separate action to remove primacy, so this petition will not address them in detail.

³⁷⁰ *Id.* § 1258(a)(9).

³⁷¹ 30 C.F.R. § 816.100 (2012); *see also* 30 C.F.R. § 817.100 (2012).

³⁷² W. VA. CODE R. § 38-2-14.15(a) (2012).

³⁷³ These operation plans “minimize the amount of disturbed, unreclaimed area, minimize surface water runoff, comply with the storm water runoff plan and to quickly establish and maintain a specified ratio of disturbed versus reclaimed area throughout the life of the operation.” *Id.* § 38-2-14.15(a)(2).

SMCRA and provides OSM with an excellent reason to assume control of West Virginia's surface mining program.

ii. WVDEP is Failing to Enforce These Requirements

Despite the express legal mandates and the critical importance of the contemporaneous reclamation regulations for minimizing environmental damage, WVDEP has failed to provide sufficient enforcement to ensure compliance with proposed contemporaneous reclamation. The poster child for this failure is the Twilight Mine Complex in Boone County.³⁷⁴



The complex consists of six contiguous surface mine permits (S502396, S500398, S502798, S502808, S502007, S301999) totaling a staggering 7901.5 acres. Four of these permits (S502396, S500398, S502007, S301999), totaling 5843.1 acres, received contemporaneous reclamation variances. The numbers alone suggest an abuse of discretion given the huge area allowed to be disturbed at one time, especially since this area is in the headwaters of the West Fork of the Pond Fork of the Little Coal River. The variances for this complex were granted improperly and WVDEP has failed to act on violations.

On Twilight I (S502396), the application bluebook contains no justification for the variance. WVDEP simply declares that “[the] variance is necessary for the operation of the permit as

³⁷⁴Photo of Twilight Mine taken during aerial tour provided by South Wings on 2/18/13. Photo credit Vivian Stockman, Ohio Valley Environmental Coalition.

proposed.” No alternative analysis exists. In Amendment #2 to the permit, which added 577 acres, WVDEP simply states that nine spreads of equipment are being used. The agency does not provide a statement to justify the practical or economic necessity of this plan. WVDEP appears to have bent the regulations to meet the coal company’s mining plan rather than requiring the mining plan to be changed to meet the standards set by law. The next permit in the complex, Twilight II (S500398), also received a contemporaneous reclamation variance with a claim that it would only need to exceed the acreage limits in the first phase of mining. Again, there is no alternatives analysis and no detailed justification for this variance. In an attempt to uphold the mandates of SMCRA and protect the environment, WVDEP’s own inspector objected to both the AOC and contemporaneous reclamation variance, but was overruled by the lead engineer. The inspector further pointed out that Twilight I, started only a year earlier, had racked up fourteen violations, four of which were unabated, and had a pending show cause complaint. Still, WVDEP’s lead engineer prevailed and a variance was granted for Twilight II. This resulted in a combined 850 acres of disturbance allowed on the two permits. By December 2002, the lax permitting had resulted in conditions that were so bad that the area inspector, in his comments on the status of operations at this site, wrote that the “concurrent reclamation practices on the adjacent permits owned/controlled by the applicant are dismal at best.”³⁷⁵

Undaunted by this dismal state of affairs, WVDEP has continued to approve new contemporaneous reclamation variances, such as the Upper Big Branch Surface Mine, permit #S-3019-99. Revisions to the application were supposed to correct problems with the reclamation plans, however, in June of 2010 both Twilight I and Upper Big Branch Surface were found in violation of contemporaneous reclamation requirements *even though* they had variances. Independence Coal Company simply could not comply with their requirements, no matter how far WVDEP went to make it convenient for them. The inspection report for Twilight I indicated that nearly 800 acres of the permit were un-reclaimed, far more than the 470 allowed by variance. In fact, the permits were so far behind on reclamation that the violations issued June 3, 2010 were not remedied until May 31, 2012. No enhanced enforcement action was taken even after Independence missed the June 2, 2011 deadline imposed by WVDEP. Coal extraction continued across the Twilight Complex. WVDEP knew contemporaneous reclamation was not happening as it should have been as early as 2002 and yet it issued no violations until 2010.

This was not the only recent instance of permits getting so far behind in reclamation that it took an operator well over a year to come into compliance. The Power Mountain Complex is a large area of contiguous surface mine permits in Nicholas, West Virginia. Two adjacent permits in that complex, the Robinson North Mine and the Spruce Run Mine, were issued violations for failing to keep up with reclamation requirements. In this case the violations were not abated until November 28, 2011, over a year and a half after the violations were issued, without any

³⁷⁵ Inspector Alan Kuhn’s SMA Narrative (Dec. 13, 2002); Independence Coal Co., Permit # S-5027-98, Application Blue Book 131, <http://dep-foia.org/permits/full/S502798/files/S502798-0028.pdf> (last visited Dec. 29, 2012).

enhanced enforcement action taken. Knowingly allowing such substantial complexes to fall so far behind on reclamation shows WVDEP is not stepping up to the task of enforcing these requirements. This is yet another reason why OSM should step in and assume control of implementing West Virginia's surface mining program.

b. Revegetation Requirements

SMCRA requires that mining sites be revegetated when mining ceases.³⁷⁶ SCMRA mandates that the re-vegetation consist of "a diverse, effective, and permanent vegetative cover of the same seasonal variety native to the area" that is "capable of self-regeneration and plant succession" at its naturally occurring rate.³⁷⁷ Introduction of new species is only allowed if it will further the objectives of the approved post mining plan.³⁷⁸ In order to create stable growth, operators are required to keep the revegetated area healthy for five years after the revegetation efforts have been implemented.³⁷⁹

OSM and the State's regulations require diverse, effective, and permanent cover that is native to the area and in accordance with the postmining plan.³⁸⁰ Operators must also comply with 30 C.F.R. §§ 816.113, 816.114, and 816.116, which set forth specific requirements for timing, soil stabilization and standards for success. When creating the standards for success, OSM describes each monitoring requirement necessary for the type of land area being revegetated.

c. Requirements for Soils Preservation

SMCRA contains stringent requirements for the manner in which topsoil and subsoil must be preserved and used to promote revegetation on a reclaimed mine site. Operators must:

Remove the topsoil from the land in a separate layer, replace it on the backfill area, or if not utilized immediately, segregate it in a separate pile from other spoil and when the topsoil is not replaced on a backfill area within a time short enough to avoid deterioration of the topsoil, maintain a successful cover by quick growing plant or other means thereafter so that the topsoil is preserved from wind and water erosion, remains free of any contamination by other acid or toxic material, and is in a usable condition for sustaining vegetation during reclamation.³⁸¹

The operator is required to "restore the topsoil or the best available subsoil which is best able to support vegetation."³⁸² For prime farm lands the rule is more stringent and requires segregation

³⁷⁶ 30 U.S.C. § 1265(b)(19) (2012).

³⁷⁷ *Id.*

³⁷⁸ *Id.*

³⁷⁹ *Id.* § 1265(b)(20)(A).

³⁸⁰ 30 C.F.R. § 816.111(a)(b) (2012); W. VA. CODE § 22-3-13(19) (2012).

³⁸¹ 30 U.S.C. § 1265(b)(5) (2012).

³⁸² *Id.* § 1265(b)(6).

of soils, protection of soils from exposure to harmful materials, replacement and regrading of root zone material, and redistribution and regarding of the surface soil horizon.³⁸³

SMCRA's implementing regulations elaborate on proper soil reclamation procedures. These regulations demand special care so that topsoil does not get contaminated.³⁸⁴ The original soils may only be changed if the substitute is deemed to be of equal or greater value to vegetation growth.³⁸⁵ Stored soils are regulated under part (c) of this section. If a soil is stored, it must be protected from wind and water erosion as well as contaminants that would interfere with the revegetation process. Once ready for reclamation, the soils must be redistributed in a manner that is "consistent with the approved postmining land use, contours, and surface-water drainage systems," "prevents excess compaction of the materials," and "protects the materials from wind and water erosion before and after seeding and planting."³⁸⁶

West Virginia's regulations for proper backfilling operations and soil reclamation contain language similar language to SMCRA, requiring soil segregations and mandating topsoil backfill unless the topsoil is of poor quality.³⁸⁷ West Virginia requires operators to "[r]estore the topsoil or the best available subsoil which is best able to support vegetation."³⁸⁸ WVDEP has failed to facilitate the achievement of this goal, instead allowing for widespread soil degradation, as discussed *infra*.

d. WVDEP is Failing to Require Properly Protective Soil Removal and Reclamation Measures for Mining Sites

WVDEP is not properly requiring surface mines to ensure that soil at mining sites is properly removed, stored, and reclaimed. Primarily, operators are rarely required to retain the topsoil layer, as WVDEP all too often accepts inadequate claims that the soil at many sites is of "insufficient quantity" for sustaining vegetation and therefore subject to a topsoil substitute exemption from the rule. SMCRA exempts soils from the provision only if "topsoil is of insufficient quantity or of poor quality for sustaining vegetation, or if other strata can be shown to be more suitable for vegetation requirements..."³⁸⁹ Inspections of mine sites where this exception has been allowed indicates that the exception is regularly misapplied and impermissibly granted.

³⁸³ *Id.* § 1265(b)(7).

³⁸⁴ 30 C.F.R. § 816.22(a) (2012).

³⁸⁵ *Id.* § 816.22(b).

³⁸⁶ *Id.* § 816.22(d)(1)(i-iii).

³⁸⁷ W. VA. CODE § 22-3-13(5) (2012).

³⁸⁸ *Id.* § 22-3-13(6).

³⁸⁹ 30 U.S.C. § 1265(b)(5) (2012).

Where exceptions are granted, WVDEP does not even impose the required conditions for exceptions. Under the exception, the operator must “remove, segregate, and preserve in a like manner such other strata which is best able to support vegetation.”³⁹⁰ The Act further requires mine operators to “restore the topsoil or the best available subsoil which is best able to support vegetation.”³⁹¹ Operators are not following these practices and WVDEP is neither imposing nor enforcing these requirements. This failure is causing significant harm to West Virginia’s soils.

Extensive investigation of both mining permits issued by WVDEP and on-site inspections demonstrates that for virtually all sites investigated, the scattering of crushed, nutrition deficient rock constitutes soil restoration. The result is that in most sites, no vegetation of value has returned years after mining has ceased. In short, what mining operations are leaving behind, and what WVDEP is permitting mining operations to leave behind, cannot reasonably be considered meaningful revegetation.

WVDEP routinely allows the use of grey sandstone for soil substitution and revegetation. Studies have shown using gray sandstone for soil substitution and revegetation during reclamation results in a failure to achieve revegetation goals. A three-year study conducted at the University of Kentucky evaluated the effectiveness of brown, gray, and mixed sandstone in six research plots established on surface mines in Kentucky.³⁹² The study shows that the gray un-weathered sandstone preferred by many mining operations, and often permitted by WVDEP, is inferior to brown weathered sandstone in reestablishing pre-mining capability.³⁹³ The study determined that the brown sandstone plots had “significantly higher average tree volume index” than both the mixed (mixed sandstone and shale) and gray sandstone plots.³⁹⁴ After three years the average tree volume was 235 cm² in brown sandstone plots compared to only 44.7 cm² in mixed plots and 36 cm² in gray plots.³⁹⁵ This Kentucky study was corroborated by a peer-reviewed study from West Virginia University published in the *Journal of Environmental Quality*, which found that the “rate of growth was significantly greater” for trees on brown sandstone plots as opposed to gray sandstone plots.³⁹⁶ The evidence of the superiority of brown over gray sandstone for the revegetation of surface mines is so well established that in 2011, the Appalachian Regional Reforestation Initiative released a Forest Reclamation Advisory recommending the use of brown sandstone. The Advisory states that gray sandstone should only

³⁹⁰ *Id.* § 1265(b)(5).

³⁹¹ *Id.* §1265(b)(6).

³⁹² Patrick N. Angel et al., *Forest Establishment and Water Quality Characteristics as Influenced by Spoil Type on a Loose Graded Surface Mine in Eastern Kentucky*, in PROCEEDINGS OF THE 25TH NATIONAL MEETINGS OF THE AMERICAN SOCIETY OF MINING AND RECLAMATION (2008).

³⁹³ *See generally, id.*

³⁹⁴ *Id.* at 28.

³⁹⁵ *Id.* at 58.

³⁹⁶ *See P. Emerson et al., Survival and Growth of Hardwoods in Brown versus Gray Sandstone on a Surface Mine in West Virginia*, 38 J. ENVTL. QUALITY 1821 (2009).

be used when it is “unavoidable” and even then it should be mixed because gray sandstone “used alone will not support either rapid tree growth or rapid re-colonization by native plants.”³⁹⁷

WVDEP frequently ignores this research and allows soil substitutes known to be insufficient for revegetation to be used for surface mines reclamation. The following table provides examples where WVDEP allowed the use of gray sandstone in the reclamation of surface mines in West Virginia:

| Permit Number | Soil Variance | Post Mine Land Use | Acres | Date Issued |
|---------------|---------------|-----------------------------------|-------|-------------|
| S-5017-07 | Yes | Forestland Commercial Forestry | 703 | 4/15/2009 |
| S-5021-08 | Yes | Forestland Commercial Forestry | 626 | 12/4/2009 |
| S-5028-08 | Yes | Forestland | 1900 | 3/25/2010 |
| S-3013-09 | No | Forestland | 221 | 1/13/2011 |

OSM raised concern about this in its 2012 Annual Evaluation Report for West Virginia. In discussing the Forestry Reclamation Approach (FRA) that seventy-nine percent of permits approved in 2011 elected to utilize, OSM voiced its concern that both operators and WVDEP’s inspectors were failing follow both regulations and permitting requirements.

Through OSM oversight inspections, it is apparent that some operators, as well as some State inspectors, are not supportive of the changes in regulations and permitting requirements with respect to the FRA. Improper selection of growth medium and over tracking still occur on some sites with forest as the post mining land use.³⁹⁸

No studies have shown gray sandstone to be the “best available in the permit area to support revegetation,” nor have any studies shown that this material is “equal to, or more suitable for sustaining vegetation than, the existing topsoil” as required by the law.³⁹⁹ Hydrologic studies, discussed *supra*, show that the pre-mining curve numbers used by the WVDEP in conducting SWROAs are significantly lower than accurate, which in turn lowers the threshold for the post mining runoff allowed.⁴⁰⁰ If WVDEP used the more accurate pre-mining curve number in their SWROAs, it would further show how completely inadequate gray sandstone is for revegetation. This is significant because revegetation is a critical factor in the amount of surface water runoff at a mined site, and is a significant factor for flooding.

³⁹⁷ J. SKOUSAN AT AL., THE APPALACHIAN REGIONAL REFORESTATION INITIATIVE’S FOREST RECLAMATION ADVISORY NO. 8., SELECTING MATERIALS FOR MINE SOIL CONSTRUCTION WHEN ESTABLISHING FORESTS ON APPALACHIAN MINE SITES 4 (2011), available at http://arri.osmre.gov/FRA/Advisories/FRA_No.8%20Soil%20Materials.PDF.

³⁹⁸ OFFICE OF SURFACE MINING RECLAMATION & ENFORCEMENT, WEST VIRGINIA ANNUAL EVALUATION REPORT 43 (2012), available at <http://odocs.osmre.gov/qdocs.aspx>.

³⁹⁹ 30 C.F.R. § 816.22(b) (2012).

⁴⁰⁰ BIOENGINEERING GRP., A REVIEW OF PRE-MINING CURVE NUMBERS USED IN THE SURFACE WATER RUNOFF ANALYSIS FOR SIXTEEN SURFACE MINES IN WEST VIRGINIA 5 (2012).

The July 2001 valley fill failure at the Princess Beverly Coal Mine (permit #Z002781) on Kayford Mountain in Raleigh County is believed to have contributed significantly to the flooding that consumed dozens of houses along the Clear Fork of the Coal River in the town of Dorothy.



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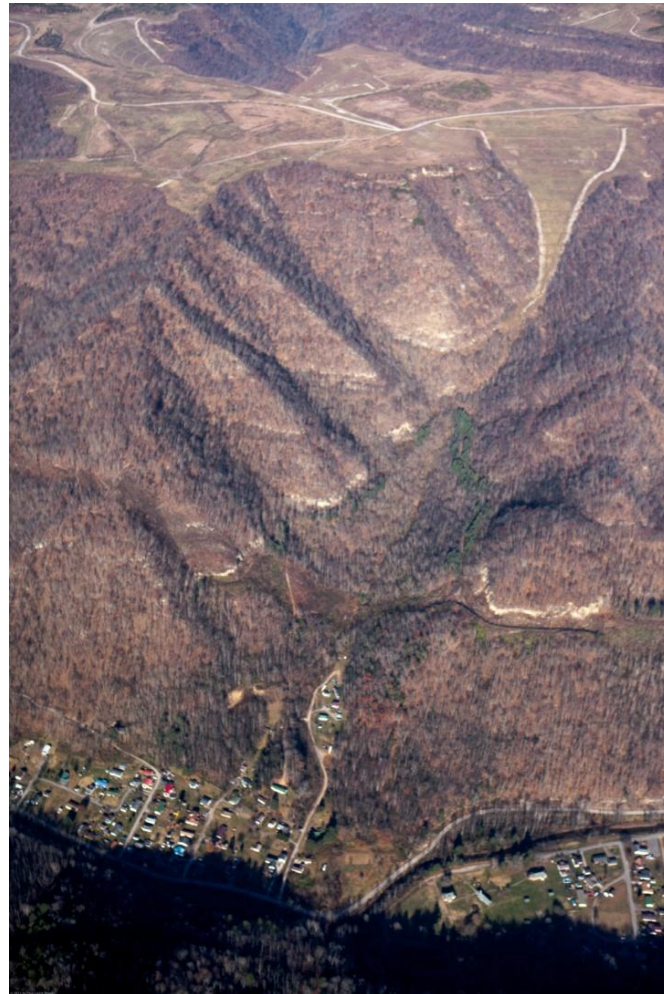
The failure of this valley fill and subsequent catastrophic flooding can be attributed, at least in part, to the failure of the permittee to comply with its requirement to establish the diverse, effective, and permanent vegetative cover required by law. According to MSHA's mine data retrieval system, coal production ended on this permit in the fourth quarter of 2000. As demonstrated in the photos below, over a decade has passed since that time and revegetation has not been achieved on this site. In 2010, rather than insisting on the implementation of an appropriate and effective revegetation plan, WVDEP prematurely allowed LCC WV, LLC to remove drainage structures at the bottom of all valley fills on the permit, even though adequate vegetative cover had not yet been achieved.



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⁴⁰¹ Photo taken in the aftermath of the 2001 Dorothy Flood. Photo credit Bob Gates.

As a result, the community of Dorothy, shown in the photo below situated directly under this mine site, remains to this day at an increased risk of flooding.



Vegetation stores water on its canopy, increases the soils' capacity to store water, and reduces soil erosion. Proper revegetation of surface mines is critical to reducing flooding, and protecting communities, downstream.

WVDEP's failure to meet SMCRA's requirements for the reclamation of mine sites is a serious violation of SMCRA that has resulted in devastation to communities that surround coal fields. WVDEP's glaring disregard for reclamation, revegetation, and soil preservation requirements compels OSM to assume control of West Virginia's surface mining program.

⁴⁰² Photo of Princess Beverly Coal Mine taken in December 2012 during aerial tour provided by South Wings. Photo credit Paul Corbit Brown.

⁴⁰³ Photo of Princess Beverly Coal Mine taken in December 2012 during aerial tour provided by South Wings. Photo credit Paul Corbit Brown.

VII. WVDEP'S ACTIONS FAIL TO COMPORT WITH THE MANDATES OF THE ENDANGERED SPECIES ACT

Congress enacted the Endangered Species Act (ESA) for the purpose of providing a “means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species . . .”⁴⁰⁴ Section 7 of the ESA requires Federal agencies to ensure that their actions are “not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical habitat].”⁴⁰⁵ Section 7 also requires Federal agencies to consult with FWS if there is reason to believe that a proposed action may affect endangered or threatened species or critical habitat.⁴⁰⁶

The ESA also requires an agency to assess whether an action may destroy or adversely modify critical habitat. If the action agency determines that destruction or adverse modification is likely, it must initiate consultation with the FWS.⁴⁰⁷ It is up to the action agency to make this threshold determination. After this initial determination, the ESA imposes an ongoing and affirmative duty on both the action agency and the consulting agency to reinitiate consultation if new information reveals that the action that may affect listed species or critical habitat in a manner or to an extent not previously considered.⁴⁰⁸

In addition, the ESA prohibits the “take” of endangered species.⁴⁰⁹ The ESA and its implementing regulations define “take” to “include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”⁴¹⁰ An agency can circumvent the ESA’s prohibition on taking protected species by entering into formal consultation with the consulting agency, proving that the take is not purposeful and will not jeopardize the species, and obtaining an incidental take statement which identifies measures appropriate for reducing the amount and impact of take.⁴¹¹

⁴⁰⁴ 16 U.S.C. § 1531(b) (2012).

⁴⁰⁵ *Id.* § 1536(a)(2).

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.* § 1536(a)(4); 50 C.F.R. § 402.10 (2012).

⁴⁰⁸ “Reinitiation of consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and . . . (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered.” *Id.* § 402.16(b).

⁴⁰⁹ 15 U.S.C. § 1538(a)(1)(B) (2012).

⁴¹⁰ *See* 50 C.F.R. § 17.3 (2012) (defining harm).

⁴¹¹ 16 U.S.C. §§ 1536(a)(2), (b)(4), (o) (2012).

On September 24, 1996, FWS issued a Biological Opinion (1996 BiOp) addressing the impact of current and future surface coal mining operations on listed species.⁴¹² In the 1996 BiOp, FWS concluded that “surface coal mining and reclamation operations conducted in accordance with properly implemented Federal and State regulatory programs under SMCRA are not likely to jeopardize the continued existence of listed or proposed species, and are not likely to result in the destruction or adverse modification of designated or proposed critical habitats.”⁴¹³ The 1996 BiOp also includes an incidental take statement (ITS) that authorizes the taking of a limited, but unquantified, number of individuals of a listed species when the take is incidental to mining operations, and it also includes specific terms and conditions that must be met by both mining companies and regulatory agencies in order minimize the take.⁴¹⁴

The 1996 BiOp is premised on a conclusion that compliance with SMCRA is sufficient to ensure compliance with the ESA. However, West Virginia has failed to comply with SMCRA, as discussed throughout this petition. Therefore, as a threshold issue, according to the 1996 BiOp and the exhaustive body of evidence showing West Virginia is failing to comply with SMCRA, West Virginia’s mining program is failing to comply with the ESA. This is a serious problem, especially when considering Section 9 of the ESA,⁴¹⁵ because the Incidental Take Statement in the 1996 BiOp is premised on compliance with SMCRA. West Virginia’s program fails to comply with SMCRA, thus it follows any take of endangered species is unauthorized. The unauthorized take of a species protected under the ESA can lead to civil action and penalties as well as criminal enforcement.

In addition to this overarching problem, West Virginia is also failing to comply with its own guidance for ESA compliance. Under the 1996 BiOp, OSM and WVDEP require mining companies to conduct surveys for endangered species. WVDEP’s guidance states that all permits and permit renewals require consultation.⁴¹⁶ A review of FWS permit files from 2010 and 2011 obtained by a public records request from WVDEP reveals serious inconsistencies in the survey processes utilized for endangered species, especially imperiled bats and mussels.⁴¹⁷ In 2010, many permits were accompanied by surveys and consultation requests. A review of 2011 permits revealed that surveys were almost never included in permit files and consultation was almost never requested. WVDEP’s spotty compliance with its own guidance imperils threatened and endangered species and is very serious matter that OSM must investigate.

⁴¹² U. S. FISH & WILDLIFE SERV., ENDANGERED SPECIES ACT—SECTION 7 CONSULTATION BIOLOGICAL OPINION AND CONFERENCE (1996), *available at* <http://www.osmre.gov/guidance/docs/biologicalopinion.pdf>.

⁴¹³ *Id.* at 10.

⁴¹⁴ *Id.* at 11–13.

⁴¹⁵ 16 U.S.C. § 1538 (2012) (generally prohibiting the taking of ESA listed species).

⁴¹⁶ W. VA. DEPT. OF ENVTL. PROT., PERMIT HANDBOOK 27-3 (1999), *available at* <http://www.dep.wv.gov/dmr/handbooks/Documents/sect27.pdf>.

⁴¹⁷ Documents on file with author.

CONCLUSION

For the reasons discussed throughout this petition, we respectfully urge OSM to withdraw West Virginia's approved program and substitute it with direct Federal implementation and enforcement of surface mining in West Virginia.

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Respectfully submitted on behalf of the petitioners,

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