IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

COAL RIVER MOUNTAIN WATCH, *et al*. Plaintiffs, v. S.M.R. JEWELL, Secretary of the United States Department of the Interior, and BOB PERCIASEPE, Acting Administrator of the United States Environmental Protection Agency, Defendants, NATIONAL MINING ASSOCIATION, Intervenor-Defendant.	)	**No. 1:08-cv-2212-BJR**

MOTION FOR SUMMARY JUDGMENT
OF PLAINTIFFS COAL RIVER MOUNTAIN WATCH *ET AL.*

Plaintiffs Coal River Mountain Watch, Kentuckians for the Commonwealth, Kentucky Waterways Alliance, Ohio Valley Environmental Coalition, Save Our Cumberland Mountains Sierra Club, Southern Appalachian Mountain Stewards, Waterkeeper Alliance, and West Virginia Highlands Conservancy, hereby move for summary judgment on Counts One and Two of their Amended Complaint filed July 3, 2013. The Amended Complaint challenges a final rule promulgated by the Department of Interior's Office of Surface Mining titled "Excess Spoil, Coal Mine Waste, and Buffers for Perennial and Intermittent Streams," 73 Fed. Reg. 75,814 (Dec. 12, 2008). The final rule revised a 1983 regulation requiring a 100-foot buffer zone to protect certain streams from surface mining disturbances. The Department of Interior conducted its rulemaking on the assumption that the revisions were environmentally beneficial. But as detailed in the accompanying Memorandum in Support, that assumption rested on an interpretation of the 1983 regulation that cannot be reconciled with its text. Because the 1983 regulation clearly and

unambiguously protected streams from environmental harm from surface mining activities, issuance of the final rule violated the National Environmental Policy Act and the Administrative Procedure Act.

DATED this 21st day of October 2013.

Respectfully submitted,

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PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

This case concerns a 1983 regulation that prohibited the disturbance of certain streams by surface mining activities. In 2008, the Department of Interior gutted the regulation, but refused to admit that was what it was doing. The Department claimed it was only clarifying what the regulation had always meant. The task of this Court is to determine whether the Department of Interior's 2008 interpretation is compatible with the 1983 regulation's plain text.

If the Department's interpretation is wrong, then the 2008 rule gutting the regulation is unlawful, for two reasons. First, the Environmental Impact Statement for the 2008 rulemaking takes the new interpretation as the baseline for analysis of environmental impacts. If the correct baseline is the clear and unambiguous text of the 1983 regulation, then all the environmental analysis is flawed. Second, two of the Department's stated reasons for adopting the 2008 rule are that it would benefit the environment and that the 1983 regulation required clarification. If the 1983 regulation clearly and unambiguously protected streams from disturbance, both reasons are arbitrary and capricious.

The 1983 regulation provided:

> No land within 100 feet of a perennial stream or an intermittent stream shall be disturbed by surface mining activities, unless the regulatory authority specifically authorizes surface mining activities closer to, or through, such a stream.

30 C.F.R. § 816.57 (1983). The regulatory authority could authorize surface mining activities "closer to, or through" a perennial or intermittent stream only after making the following determination:

> Surface mining activities will not cause or contribute to the violation of applicable State or Federal water quality standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream.

Id.

The Department concluded in 2008 that this regulation had always allowed highly destructive mining activities in and through perennial and intermittent streams, including burial of entire valleys beneath waste rock and dirt. The Department reasoned that the regulation applied to activities that disturb land near a stream, but not to activities that disturb both the land and the stream itself. The Department revised the regulation to conform to its interpretation.

As explained in this memorandum, the Department's interpretation cannot be reconciled with the plain text of the 1983 regulation.

STATEMENT OF FACTS

I. GOVERNING STATUTES AND REGULATIONS

A. The Mining Control Act

The regulation at issue was adopted under the Surface Mining Control and Reclamation Act of 1977 ("Mining Control Act" or "the Act"). The first objective of that Act is to "protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. § 1202(a). Congress also wanted to provide "the coal supply essential to the Nation's

energy requirements." *Id.* § 1202(f). It therefore resolved to "strike a balance between protection of the environment . . . and the Nation's need for coal[.]" *Id.*

The Act contains some specific requirements and prohibitions. For example, the Act requires operators to minimize disturbances to the prevailing hydrologic balance, minimize disturbances to the quality and quantity of water, and minimize adverse impacts on fish, wildlife, and related environmental values. 30 U.S.C. §§ 1265(b)(10) & (24). But the primary mechanism for the control of mining is a cooperative federalism regime in which the Department of Interior sets "minimum national standards," states develop regulatory programs consistent with those standards, and then states apply to the Department for authority to administer the Act within their territory. *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 288 (4th Cir. 2001); 30 U.S.C. §§ 1253, 1255(b), 1265(a).

State regulatory programs may be more protective of the environment than the federal standards, but may not be less protective. 30 U.S.C. §§ 1254(a)(3) & 1255(b). See also 2008 EPA concurrence letter on Final Rule at 2, EPA-AR001 ("[Mining Control Act] regulations include a preemption provision allowing states to adopt rules that are stricter than federal regulations, but prohibiting adoption of weaker requirements."). The mining laws of some states declare they should not be interpreted to be stricter than the minimum national standards, *e.g.*, Ky. Rev. Stat. § 13A.120(1)(a)[1], so in those states the federal standards function as both floor and ceiling. In states where the Department administers the Act, such as Tennessee, the federal standards apply directly.

[1] The Kentucky Supreme Court has applied this provision to strike down Kentucky mining regulations found to be stricter than federal regulations. *Franklin v. Natural Res. and Envtl. Prot. Cabinet, Commonwealth of Ky.*, 799 S.W.2d 1, 3 (1990).

1. Regulation of Harm to Streams

The national minimum standards have always been "intended to strike a balance between protection of the environment . . . and the Nation's need for coal as an essential source of energy." 43 Fed. Reg. 41662/1 (Sept. 18, 1978). They also have always included measures to protect streams. The first buffer to protect streams was established by interim regulations issued in 1977. It provided:

> No land within 100 feet of an intermittent or perennial stream shall be disturbed by surface coal mining and reclamation operations unless the regulatory authority specifically authorizes surface coal mining and reclamation operations through such a stream.

42 Fed. Reg. 62639, 62686/2 (Dec. 13, 1977) (quoting 30 C.F.R. § 715.17(d)(3) (1977)). This initial, interim version contained no express restrictions on the discretion of the regulatory authority to "specifically authorize[]" disturbances within the buffer. *Id.*; *but see* 42 Fed. Reg. 62652/3 (rule preamble explaining that disturbances within the buffer should be authorized only if they can be conducted "in an environmentally acceptable manner").

The first permanent standards, issued in 1979 to replace the interim standards, strengthened the buffer regulation. First, the permanent standards expanded the buffer regulation to cover not only perennial and intermittent streams, but any stream with a biological community meeting certain minimal requirements. 44 Fed. Reg. 14902, 15403/3 (March 13, 1979) (quoting 30 C.F.R. § 816.57 (1979)). Second, the permanent standards sharply narrowed the discretion of the regulatory authority to issue waivers. Incursions into the buffer zone could now be authorized only if, "During and after the mining, the water quantity and quality from the stream section within 100 feet of the surface mining activities [would] not be adversely affected" and, in the event of a diversion of stream flow, "the original stream channel [would] be restored." *Id.*

The Department stated that the main objective of this strengthened buffer was to "protect[] stream channels." 43 Fed. Reg. 41662, 41752/2 (1978) (proposed rule). The Department explained that the regulation prohibited direct impacts to streams from mining activities, stating, "It should be noted that under the [buffer regulation], an operator could not mine through a stream unless it had been diverted around the area of disturbance." 43 Fed. Reg. 41752/3. The Department stated that it expected to secure "a national beneficial impact on water resources by limiting coal mining to only operations which can be conducted in compliance with environmental protection standards[.]" Final Environmental Impact Statement (1979) at AIII-3.[2]

The Department again adjusted the balance between environmental protection and coal production in 1983. At that time the Department considered eliminating the buffer regulation, but decided against it. 48 Fed. Reg. 30312 (June 30, 1983). The Department explained that buffer zones "protect streams from sedimentation and gross disturbance of stream channels caused by surface coal mining" and noted that "streams are often valuable fish and biological habitats." *Id*. The Department did make two significant changes to the buffer regulation. First, the Department narrowed its coverage to perennial and intermittent streams only, regardless of the presence of biological communities in smaller waterways. 48 Fed. Reg. at 30313. Second, at the urging of a coalition of environmental groups, the Department inserted the strongest language to date

[2] Plaintiffs' Exhibits A and B are excerpts from the Final Environmental Impact Statements the Department prepared for the 1979 and 1983 Final Rules. An excerpt from the 1979 Final EIS is included in the administrative record filed with the Court, but that excerpt does not include the portions cited above. *See* SBZ039026-37. The administrative record filed with this Court does not contain copies of any draft or final EIS for the 1983 rule. These Final Environmental Impact Statements are public documents prepared by the Department of Interior and housed in the Department of Interior library. Therefore, we request that the Court take judicial notice of both of these Exhibits because they are matters of public record. *See Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1222 (D.C. Cir. 1993) (district court properly considered "matters of public record"); *Black v. Arthur*, 18 F. Supp. 2d 1127, 1131 (D. Or. 1998), *aff'd on other grounds*, 201 F.3d 1120 (9th Cir. 2000) ("courts are allowed to take judicial notice of matters in the general public record, including records and reports of administrative bodies…").

restricting the discretion of the regulatory authority to grant waivers. 48 Fed. Reg. at 30315-16 (extensive discussion of waiver language, including reasons for rejecting weaker formulations); Supplement to Final Environmental Impact Statement (1983) Volume I at VI-42 (explaining that the Department was "includ[ing] additional restrictions on the stream buffer zone exemption" in response to comments of National Wildlife Federation *et al.*); *Id.* Volume II at 372 (comments of National Wildlife Federation *et al*.). Thus the 1983 regulation conferred stronger protection on a narrower class of streams with "more significant environmental-resource value." 48 Fed. Reg. at 30313.

The Department noted that streams not covered by the narrower regulation would still receive some protection from "general requirements for protection of water quality and hydrologic balance," 48 Fed. Reg. at 30313, but acknowledged in the Environmental Impact Statement that narrowing the coverage of the buffer would produce an adverse effect on small streams. Supplement to Final Environmental Impact Statement, Volume I, Table A at A-72 (1983).

Here is the full text of the final 1983 buffer regulation, which continued in force for 25 years:

> No land within 100 feet of a perennial stream or an intermittent stream shall be disturbed by surface mining activities, unless the regulatory authority specifically authorizes surface mining activities closer to, or through, such a stream. The regulatory authority may authorize such activities only upon finding that—
> (1) Surface mining activities will not cause or contribute to the violation of applicable State or Federal water quality standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream; and
> (2) If there will be a temporary or permanent stream-channel diversion, it will comply with § 816.43.

48 Fed. Reg. at 30327 (quoting 30 C.F.R. § 816.57 (1983)). The referenced section 816.43 contained parallel language prohibiting stream diversions absent a finding that the diversion

would "not adversely affect the water quantity and quality and related environmental resources of the stream." 48 Fed. Reg. 43956, 43991 (Sept. 26, 1983) (quoting 30 C.F.R. § 816.43(b) (1983)).

2. The Bragg *Litigation*

In 1998, several environmental groups sued the State of West Virginia in federal district court for failing to enforce the Mining Control Act, including the buffer regulation. The groups argued that surface mining techniques that had become common in the state, particularly the practice of burying streams beneath "valley fills" consisting of coal mine waste material, violated the buffer regulation. *Bragg v. Robertson*, 72 F. Supp. 2d 642, 647 (S.D.W.Va. 1999) (summarizing plaintiffs' count two); *id.* at 646 & n.6 (describing valley fills). West Virginia conceded that the findings required for a waiver could not be made for valley fills, but defended its consistent practice of granting waivers primarily on the basis that "when the buffer zone rule is read in conjunction, and harmonized, with other [Mining Control Act] regulations, valley fills are not precluded by the buffer zone rule." *Id.* at 647-48.

The district court firmly disagreed:

> The Court . . . finds and concludes the [Mining Control Act] regulations may be harmonized without reading out or discounting the buffer zone rule. The rule states: No land within one hundred feet of an intermittent or perennial stream (including portions or parts thereof) shall be disturbed by surface mining operations including roads unless specifically authorized by the Director. Valley fill waste disposal is a surface mining operation from which streams are protected. No other [Mining Control Act] regulations implicitly or explicitly contemplate such stream fill. Accordingly, the buffer zone rule, which protects entire intermittent and perennial streams from incursions within the one hundred foot buffer zone, is harmonious with other state and federal [Mining Control Act] regulations and must be accorded full force and effect.

Id. at 653.

On appeal to the Fourth Circuit, the Department of Interior agreed with the environmental plaintiffs on this point, not with West Virginia. The Department explained that, "[b]y its plain

terms, [the buffer regulation] protects particular stream segments and does not allow mining activities, such as valley fills, in intermittent or perennial streams unless there is a finding that the activity will cause no adverse environmental effect in the affected stream segment." Brief for the Federal Appellants at 41, *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275 (4th Cir. 2001) (attached as Exhibit C).

The Fourth Circuit never decided the question. It held instead that suit against West Virginia was barred by the doctrine of sovereign immunity. *See Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 286 (4th Cir. 2001). The Fourth Circuit vacated the district court decision without reaching the merits. *Id.*

3. 2008 Revision

In January 2004, the Department of Interior began the rulemaking process that culminated in the 2008 Final Rule challenged in this litigation.[3] The Department proposed to revise the buffer regulation to "clarify" that disturbance of streams may be authorized even if serious environmental harm will result, as long as the operator will take certain steps to minimize the harm to the extent possible. 69 Fed. Reg. 1036 (Jan. 7, 2004). After several delays and a pause for additional public process, the Department re-proposed the revision in 2007. 72 Fed. Reg. 48890 (Aug. 24, 2007), SBZ029831 - SBZ029868.

Environmental groups submitted several sets of comments objecting to the proposed revision. They argued that the proposal would not clarify the buffer regulation, but change it by replacing a clear prohibition on harm to streams with "vague, redundant, underprotective, and largely unverifiable and unenforceable provisions." Comments of Earthjustice *et al*. to DOI at 3.

[3] The proposed rule is located in the administrative record at SBZ031960 - SBZ031972. Throughout this brief, proposed and final rules are referenced by their federal register page numbers.

SBZ024973. The Department acknowledged these comments in the Final Rule preamble, but disagreed:

> [T]he perception that the proposed rule or this final rule would remove an obstacle to mountaintop removal operations or other large-scale mining operations is inaccurate. As we explained in the preamble to the proposed rule, our changes to the stream buffer zone rule are intended to clarify when and how that rule applies[.]

73 Fed. Reg. 75814, 75822 (Dec. 12, 2008). The Department claimed the revision did not change the 1983 buffer regulation because the 1983 regulation never applied to disturbance of the stream itself:

> [T]he 1983 stream buffer zone rule applied only to activities within 100 feet of a perennial or intermittent stream. It did not apply to activities planned to occur in intermittent or perennial streams.

Id. The Department then reasoned that, if the stream itself was not protected, it follows that the land adjacent to the disturbed stream was not protected either:

> Maintaining a 100-foot buffer zone to protect the stream's water quality and environmental resources makes sense only if the stream segment adjacent to the buffer zone is to remain intact.

Id. Thus the Department concluded that the 1983 regulation had never applied to surface mining disturbances in streams or through streams. The Department also reasoned that this interpretation of the 1983 regulation was necessary to avoid a conflict with Section 515(b)(22)(D) of the Mining Control Act, 30 U.S.C. § 1265(b)(22)(D), as interpreted by the Fourth Circuit in *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425 (4th Cir. 2003). 73 Fed. Reg. at 75822.

The 2008 Final Rule effectuates this interpretation by exempting from the buffer several surface mining activities that disturb both the land near streams and the streams themselves. It adds a new paragraph (b), entitled "Exception," which states that "[t]he buffer requirement of

paragraph (a) of this section does not apply to those segments of a perennial or intermittent stream for which the regulatory authority" approves

- Diversion of a perennial or intermittent stream,
- Placement of bridge abutments, culverts, or other structures in or within 100 feet of a perennial or intermittent stream to facilitate crossing of the stream,
- Construction of sedimentation pond embankments in a perennial or intermittent stream, or
- Construction of excess spoil fills and coal mine waste disposal facilities in a perennial or intermittent stream.

30 C.F.R. 816.57(b) (2009).[4] In place of the 1983 regulation's prohibition on harm to environmental resources, the 2008 Rule makes these mining activities subject to various provisions requiring only minimization of environmental harm to the extent possible. *E.g.*, 30 C.F.R. § 816.71 (2009) (adverse environmental impacts from excess spoil disposal must be minimized "to the extent possible, using the best technology currently available"); 30 C.F.R. § 816.43(a)(2)(iii) (2009) (stream diversions shall "[p]revent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow outside the permit area"); 30 C.F.R. § 816.43(a)(1) (2009) (stream diversions "shall be designed to minimize adverse impacts to the hydrologic balance"); 30 C.F.R. § 816.45(a) (2009) ("sediment control measures shall be designed, constructed, and maintained using the best technology currently available to . . . minimize erosion to the extent possible").

For activities that remain subject to the buffer, such as mining directly in streams, the Final Rule changes the finding required for a waiver. The regulatory authority may now grant a

[4] The Final Rule issued on Dec. 12, 2008, with an effective date of January 12, 2009, so the first Code of Federal Regulations reflecting these revisions is the 2009 edition.

waiver if "[a]voiding disturbance of the stream is not reasonably possible." 30 C.F.R. § 780.28(d); 30 C.F.R. § 816.57(a)(1).

Whether any particular reduction in environmental harm is "reasonable," or "possible," or reflects the "best technology," is a discretionary, case-by-case determination that depends in part on whether it would impede coal recovery or increase costs. 30 C.F.R. § 780.35 (2009) ("[A]n alternative generally may be considered unreasonable if its cost is substantially greater than the costs normally associated with this type of project."); 73 Fed. Reg. 75865/2 ("[T]he analysis of alternatives . . . would be the primary means of demonstrating use of the best technology currently available."); 73 Fed. Reg. 75824/3-75825/1 (explaining that the terms "reasonably possible" and "to the extent possible" should not be applied "without regard to cost" and call for consideration of the coal recovery and energy security goals of the Act); 30 C.F.R. § 701.5 (2009) (defining "best technology" as the technology that minimizes environmental harm "to the extent possible," as determined by the regulatory authority "on a case-by-case basis").

In sum, the 2008 regulations permit disturbances within the buffer even if the disturbance will "adversely affect the water quantity and quality or other environmental resources of the stream," as long as the regulatory authority decides reasonable steps will be taken to minimize the harm. *Compare* 30 C.F.R. 816.57(a) (1983) *with* 30 C.F.R. 816.57(a) & (b) (2009).

B. The National Environmental Policy Act

For every major federal action, including rulemakings, the National Environmental Policy Act (NEPA) directs federal agencies to prepare an Environmental Impact Statement (EIS) to assess "the environmental impact of the proposed action" and "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.18(b)(1) ("[A]ctions [include] rules, regulations, and interpretations[.]"). The EIS must describe the proposed action along with a

range of alternatives, including the "no action" alternative, and perform a comparative assessment. 40 C.F.R. § 1502.14. "A material misapprehension of the baseline conditions existing in advance of an agency action can lay the groundwork for an arbitrary and capricious decision." *Friends of Back Bay v. U.S. Army Corps of Eng'rs*, 681 F.3d 581, 588 (4th Cir. 2012). "[C]ourts not infrequently find NEPA violations when an agency miscalculates the 'no build' baseline or when the baseline assumes the existence of a proposed project." *N. C. Wildlife Fed'n v. N. C. Dept. of Transp.*, 677 F.3d 596, 603 (4th Cir. 2012).

The Department prepared an EIS for the 2008 revision using the new interpretation of the 1983 regulation as the baseline. *See* Final Environmental Impact Statement ("FEIS") Book One, Excess Spoil Minimization Stream Buffer Zones at II-19, SBZ000140 (describing the no-action baseline by saying that "maintenance of an undisturbed stream buffer zone clearly makes no sense [when] the stream segments either will be buried or directly disturbed"); *id.* at IV-169, SBZ000290 ("Under the 'No Action' alternative, the environmental impacts currently associated with construction of excess spoil fills, coal mine waste facilities, and stream buffer zone incursions . . . would continue."); *see also id.*, Abstract at 1, SBZ000102 (describing the action under evaluation as a clarification of the applicability of the buffer).

Judging against a baseline without any buffer to protect streams from surface mining activities in and through them, the EIS determines that the revision would not materially change the status quo. For instance, with respect to direct stream impacts, the EIS states the impacts of mining on streams have been declining and that "[t]he changes to the stream buffer zone regulation under Alternatives 1, 2, and 4 would cause no discernable changes to the direct stream impact trend." *Id.* at IV-147, SBZ000268. With respect to indirect stream impacts, the EIS states that "the proposed regulatory language changes to the stream buffer zone rule would essentially

be 'impact neutral,'" and that "[t]here would be no net increase or decrease in stream buffer zone incursions." *Id.* at IV-149, SBZ000270. Having assumed no change in the legality of mining inside the buffer, the EIS predicts a positive environmental effect or no effect compared to the "no-action" baseline for every type of environmental impact considered, including hydrology, aquatic fauna, terrestrial fauna, threatened and endangered species, geotechnical impacts, culture, environmental justice, and cumulative impacts. *Id.*at IV-142 (summary table), SBZ000263; *id.*at IV-174, SBZ000295; *id*. at IV-149, SBZ000270 (predicting that the minimization requirements may reduce the size of some excess spoil fills). The EIS declares the proposed revision the "environmentally preferable alternative." *Id.*, Abstract at 2, SBZ00103.

C. The Administrative Procedure Act

The Administrative Procedure Act provides for judicial review of final agency action. 5 U.S.C. § 704. It directs the reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706. The agency must articulate a satisfactory explanation for its action. "In reviewing that explanation, [the reviewing court] must consider whether . . . there has been a clear error of judgment." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted); *see also Sasol N. Am., Inc. v. N.L.R.B.*, 275 F.3d 1106, 1112-13 (D.C. Cir. 2002) (reversing based on agency's "mistaken understanding" of underlying policy and "failures in reasoning"); *Ark Las Vegas Rest. Corp. v. N.L.R.B.*, 334 F.3d 99, 111 (D.C. Cir. 2003) (vacating order because it was "based on a misunderstanding of" the rules at issue); *Town of Barnstable, Mass. v. FAA*, 659 F.3d 28 (D.C. Cir. 2011) (vacating and remanding where agency had misinterpreted its internal guidelines);

Judulang v. Holder, 132 S. Ct. 476 (2011) ("So the premise of the Government's argument is wrong. And if the premise, so too the conclusion . . . .").

The Administrative Procedure Act directs the reviewing court to "decide all relevant questions of law." 5 U.S.C. § 706. Courts frequently defer to an agency's interpretation of its own regulations. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 414 (1945)). But deference is "undoubtedly inappropriate" when the agency's interpretation is "plainly erroneous or inconsistent with the regulation." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (quoting *Auer v. Robbins,* 519 U.S. 452, 461 (1997)); *see also Carus Chemical Co. v. U.S. E.P.A.*, 395 F.3d 434, 439 (D.C. Cir. 2005) (Courts must reject an agency's interpretation if "an alternative reading is compelled by the regulation's plain language or by other indicia of … intent at the time of the regulation's promulgation.") Deference is likewise unwarranted when the agency's interpretation "conflicts with a prior interpretation." *Id*. (citing *Thomas Jefferson Univ. v. Shalala,* 512 U.S. 504, 515 (1994)).[5]

II. THIS LITIGATION

Plaintiffs filed their original Complaint on December 22, 2008, raising claims under NEPA and the APA, among others, and asking the Court to vacate and set aside the rule. Dkt. 1. A subsequent complaint was filed with this Court by the National Parks Conservation Association ("NPCA") in Case No. 1:09-cv-0115, alleging claims under section 7(a)(2) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a)(2), among others.

[5] *Auer v. Robbins* should be overturned for the reasons given by Justice Scalia in dissent in *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1399-42 (2013); *see also id.* at 1338-39 (Roberts, C.J., concurring). But the vitality of *Auer* is not relevant to decision in this case if this Court agrees that the Department's 2008 interpretation is plainly inconsistent with the 1983 regulation, or that deference is not warranted because the Department has offered inconsistent interpretations.

On April 27, 2009, the Department moved in the NPCA case for a voluntary remand and vacatur of the 2008 Rule on the grounds that it had erred by failing to initiate consultation pursuant to the ESA. Based on its motion in the NPCA case, the Department moved to dismiss this case as moot. Dkt. 11. The Court denied the Government's motion for voluntary vacatur in the NPCA case in a Memorandum Opinion and Order dated August 12, 2009, holding that vacatur of the rule without a decision on the merits would, under the circumstances, violate the APA. The Court likewise denied the Department's motion to dismiss this case as moot. Dkt. 14. As a result, the Department initiated a notice and comment rulemaking to replace the 2008 Rule. See 74 Fed. Reg. 62664 (Nov. 30, 2009).

Plaintiffs and the Federal Defendants reached a settlement under which they agreed to move this Court for a stay of judicial proceedings, and further agreed not to seek to lift the stay unless: (1) the Department failed to sign, by February 28, 2011, a proposed rule to amend or replace the 2008 Rule; or (2) the Department failed to sign, by June 29, 2012, a final action on that proposed rule. Settlement Agreement filed with the Joint Motion of Plaintiffs and Federal Defendants to Hold Judicial Proceedings in Abeyance (Mar. 19, 2010) (Dkt. 29-2). To date the Department has not proposed or promulgated a rule. Plaintiffs engaged in a series of meetings and discussions with the Department between July 2012 and January 2013. Having failed to reach a mutually agreeable resolution of Plaintiffs' claims, Plaintiffs requested that the Court lift the stay of proceedings, and the Court granted that motion. Dkt. 38.

Due to the lapse of congressional appropriations, on October 1, 2013, the Department of Justice requested a stay of the briefing schedule, including the October 15 deadline to file motions for summary judgment. On the same day the Court entered a minute order staying this case until such time that Congress passes a continuing resolution or other legislation to fund the

federal government. On Wednesday, October 16, Congress passed legislation funding the federal government, ending the stay of this case.

STANDING

Plaintiffs are non-profit membership organizations dedicated to the conservation and enhancement of environmental resources, particularly those at risk of destruction or harm from mountaintop removal mining and other large-scale surface coal mining. Most of the groups are regional or state-based while others, like Sierra Club and Waterkeeper Alliance, represent members and supporters from across the nation. Ex. D-O. As shown in the attached declarations, Plaintiffs' members use and enjoy natural resources threatened by surface mining activities subject to the Mining Control Act and its implementing regulations.

For example, Vickie Terry, a member of Statewide Organizing for Community Empowerment (SOCM) and Sierra Club, uses and enjoys the Clear Fork River watershed in Tennessee. Ex. D, E. She is concerned about two proposed mines that would be sited in the Clear Fork River watershed. The proposed Cooper Ridge Surface Mine would involve disturbances within 100 feet of streams for mining and backfilling and construction of sediment basins. *Id*. The proposed Sterling & Strays Mine would involve disturbances within 100 feet of streams for mining operations, construction of sediment ponds, and road crossings. Adverse impacts to streams by those activities would diminish Vickie's use and enjoyment of the Clear Fork River. *Id*.

Stanley Sturgill and Carl Shoupe are members of Kentuckians for the Commonwealth (KFTC) who live near Looney Creek in Kentucky. Ex. F, Ex. G. Carl Shoupe is also a member of Kentucky Waterways Alliance (KWA). Ex. E. Both Carl and Stanley enjoy the beauty and natural resources of the creek, and use it as a drinking water source. Ex. F and G. A & G Coal

Co. has requested a permit for their proposed Looney Creek Strip mine, which would require authorization to conduct mining activities within 100 feet of Long Rock Branch, a tributary to Looney Creek. *Id*. Harm to Long Rock Branch and Looney Creek as a result of these activities would diminish Carl's and Stanley's use and enjoyment of Looney Creek, particularly as the source of their drinking water. *Id*.

Judy Needham is a member of Southern Appalachian Mountain Stewards (SAMS) who lives near Callahan Creek in southwestern Virginia, close to the site of the Kelly Branch Surface Mine. Ex. H. Robert Patrick, another member of SAMS, lives near Looney Creek in southwestern Virginia, close to the site of the Looney Ridge Mine. Ex. I. The operator of the Kelly Branch Surface Mine and the Looney Ridge Mine mines seeks permission to conduct surface mining and construct temporary sediment ponds and fills within 100 feet of Callahan Creek, Looney Creek, and their tributaries. Ex. H and I. Harm to the streams that is likely to occur as a result of those activities would diminish Judy and Robert's use and enjoyment of streams they value highly. *Id*.

Coal River Mountain Watch (CRMW) member Nanette Nelson lives within one-fourth of a mile of the boundary of the Boone Number 5 Mine site in West Virginia. Ex. J, K. That operation would involve mining-through 15,079 linear feet of streams, and construction of sediment ponds that would impact another 2,663 feet of perennial and intermittent streams, in the Roundbottom Creek and Mill Branch watersheds near Racine, West Virginia. *Id*. Nanette's use and enjoyment of those watersheds would be diminished by adverse impacts that are likely to result from those activities. Nanette is also a member of Ohio Valley Environmental Coalition (OVEC). Ex. J. Together with West Virginia Highlands Conservancy (WVHC) and Sierra Club, CRMW and OVEC have filed a challenge to the permit for the Boone Number 5 Mine, which

would involve mining activities in nearly 18,000 feet of streams in the Coal River watershed. Ex. J, K.

Cindy Rank is the Chair of the West Virginia Highlands Conservancy (WVHC) Mining Committee. Ex. L. Of particular concern to WVHC are two mines that threaten streams in the Gauley River watershed, near the Gauley River National Recreation Area where WVHC members use and enjoy streams. *Id*. West Virginia has already granted permission to mine within 100 feet of streams for the Alex Energy Federal Surface Mine, and the Atlantic Leasco Muddlety Surface Mine No. 1, both of which will impact tributaries to the Gauley River. *Id*.

Waterkeeper Alliance (WKA) is a national non-profit organization that connects and supports local Waterkeeper programs, and advocates on issues common to Waterkeeper programs. Ex. M. Pat Banks is the Kentucky Riverkeeper, a member of WKA. Current and proposed coal mining threatens water quality in the headwaters of the North, Middle, and South Forks of the Kentucky River. Ex. N. Such adverse impacts harm Kentucky Riverkeeper's interests in protecting and improving the River, including the nationally-recognized Kentucky River Water Trail. *Id*. Nelson Brooke is the Black Warrior Riverkeeper, a member of WKA. Ex. O. Black Warrior Riverkeeper has been fighting a coal mine proposed to be sited across the river from an intake that serves Birmingham, Alabama drinking water users. *Id*. This and other proposed coal mining operations in the watershed threaten the water quality of the river. *Id*.

The Department's 2008 rule weakens the protection afforded to these natural resources by allowing surface mining activities within 100 feet of perennial and intermittent streams even if they will adversely affect water quality, water quantity, and other environmental resources of the streams. In Tennessee, where the Department's Office of Surface Mining serves as the regulatory authority and the federal standards constitute the exclusive regulatory regime for

surface mining activities, 30 U.S.C. § 1254(g), the weakened federal rule applies directly. The weakened federal rule may likewise have an automatic on-the-ground effect in Kentucky, because state law provides that mining regulations may not be more stringent than federal regulations. Ky. Rev. Stat. § 13A.120(1)(a); Ky. Rev. Stat. § 350.028(5); *Franklin v. Natural Res. and Envtl. Pro. Cabinet, Commonwealth of Ky.*, 799 S.W.2d 1, 3 (1990) (holding that Kentucky regulations the court found to be "more stringent than the federal law and regulations" were "in violation of KRS 13A.120(1)," making the more stringent regulations "null, void and unenforceable."). Moreover, Kentucky, Virginia, and West Virginia are all empowered by the 2008 rule to weaken their regulations below the floor formerly set by the 1983 regulation.

Plaintiffs' members' injuries are fairly traceable to the 2008 rule because it made legal what was formerly illegal—namely, the threatened incursions into the buffer zone. "[I]njurious private conduct is fairly traceable to the administrative action contested in the suit if that action authorized the conduct or established its legality." *Natural Law Party of U.S. v. FEC*, 111 F. Supp. 2d 33, 47 (D. D.C. 2000) (quoting *Tel. and Data Systems, Inc. v. FCC*, 19 F.3d 42, 47 (D.C. Cir. 1994)). *See also Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 442 (D.C. Cir. 1998) ("Both the Supreme Court and this circuit have repeatedly found causation where a challenged government action *permitted* the third party conduct that allegedly caused a plaintiff injury, when that conduct would have otherwise been illegal.") (emphasis in original).

Conversely, if this Court grants Plaintiffs the relief they seek by setting aside the 2008 Rule, the robust protections of the 1983 regulation will be restored as the "minimum national standard[ ]" applicable to the surface mining activities that threaten Plaintiffs' members. *Bragg*, 248 F.3d at 288.

The injuries discussed above are germane to Plaintiffs' organizational purposes, which include protecting people and the environment from surface mining. Adjudication of this challenge to a nationwide rule does not require the participation of individual members. Accordingly, Plaintiffs have standing to bring this lawsuit on behalf of their members. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 181 (2000).

ARGUMENT

I. THE 2008 RULE VIOLATED NEPA.

A. The Department Materially Mischaracterized the Baseline for Analysis.

The Department of Interior violated NEPA in 2008 by assuming the existence of the rule change it wanted to make. This was a "material misapprehension of the baseline conditions" that "[laid] the groundwork for an arbitrary and capricious decision" under NEPA. *See Friends of Back Bay v. U.S. Army Corps of Eng'rs*, 681 F.3d 581, 588 (4th Cir. 2012)).

1. The 2008 Interpretation Conflicts with the Regulation's Plain Text.

The Department based the 2008 rule on an extremely convoluted and counterintuitive interpretation of the 1983 regulation. According to the Department, the regulation covered activities that disturb land, but not activities that disturb both the land and the stream itself. 73 Fed. Reg. at 75822; *accord* 30 C.F.R. 816.57(b) (2009) (carving out exceptions to the buffer for activities that disturb both streams and the land around them). This interpretation is impossible to square with the plain text. Here again is the text of the regulation:

> No land within 100 feet of a perennial stream or an intermittent stream shall be disturbed by surface mining activities, unless the regulatory authority specifically authorizes surface mining activities closer to, or through, such a stream.

30 C.F.R. § 816.57 (1983). This language plainly covers "surface mining activities" that disturb "land within 100 feet of a perennial stream or an intermittent stream" regardless of whether the

stream itself is also disturbed. And the last few words of the sentence, requiring specific authorization by the regulatory authority for activities "closer to, or through" the stream, likewise leave no room for doubt that the regulation covers disturbance of land even if the disturbance extends "through" the stream. There is no way to read "activities closer to, or through, [] a stream" to exclude activities because they extend into the stream. The word "through" compels precisely the opposite result. The regulation therefore must be read to apply equally to activities that disturb land only and activities that disturb land and the stream itself.

In addition to contradicting the plain text of the 1983 regulation, the Department's interpretation is absurd. It would make no sense to assiduously protect land 100 feet away from a stream but not extend the same protection to the stream bank and stream bed. This is especially true given that "the primary objective" of the 1983 buffer regulation was "to provide protection for the hydrologic balance and related environmental values of perennial and intermittent streams." 48 Fed. Reg. 30312, 30313 (June 30, 1983). Indeed, the Department recognizes the absurdity of interpreting the regulation to protect land but not streams when it says, "[m]aintaining a 100-foot buffer zone to protect the stream's water quality and environmental resources makes sense only if the stream segment adjacent to the buffer zone is to remain intact." 73 Fed. Reg. at 75822/2. But having recognized that reading the regulation to protect the land but not the stream would be absurd, the Department concludes this must mean *neither* is protected when direct stream impacts are threatened – a result plainly at odds with the text, and not remotely within the realm of any possible ambiguity.

The Department makes no other attempt to reconcile its interpretation of the 1983 regulation with its plain text. The Department asserts that it has "historically interpreted [the buffer regulation] as allowing placement of fill material, including coal mine waste, in waters of

the United States," 73 Fed. Reg. at 75855/1, and that the buffer regulation "has historically been applied—and continues to be applied—to allow each of the [now-exempted activities] to occur." *Id.* at 75857/1. But there is no effort to justify this interpretation legally, except for the theory discussed above and shown to be inconsistent with the regulation. The Department also notes that "[surface mining activities] in streams inherently involve[] disturbance of all or part of what would have been the buffer zone," *id*. at 75856, and that "[w]hen [regulatory authorities] approve the conduct of activities within the stream and/or its buffer zone, an undisturbed buffer between those activities and the stream inherently cannot be maintained." *Id.* at 75855. If this is intended as a legal justification, it is circular. The Department fails to explain why these "surface mining activities," 30 C.F.R. § 816.57 (1983), are not covered by the 1983 regulation.

2. The 2008 Interpretation Is Not Compelled by Section 515(b)(22)(D) of the Mining Control Act.

The Department also claims its interpretation of the 1983 regulation was needed to avoid conflict with section 515(b)(22)(D) of the Mining Control Act, and the Fourth Circuit's decision in *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425 (4th Cir. 2003). 73 Fed. Reg. at 75826, 75822 & 75815. Section 515(b) contains a long list "environmental protection performance standards" with which all surface coal mining operations must comply. General environmental performance standard (22)(B) provides that the disposal area used for excess spoil must "not contain springs, natural water courses or wet weather seeps unless lateral drains are constructed from the wet areas to the main underdrains in such a manner that filtration of the water into the spoil pile will be prevented." 30 U.S.C. § 1265(b)(22)(D).

There is no conflict between the plain meaning of the 1983 buffer regulation and environmental performance standard (22)(D). The performance standard places a restriction on the disposal of spoil; it does not say, explicitly or implicitly, that this is the only permissible

limitation on spoil disposal. The Act makes clear that the performance standards are "minimum" standards, 30 U.S.C. § 1265(b), and expressly authorizes the Department to promulgate "other requirements" and "prescribe" "other actions." *Id.* § 1265(a) & (b)(10)(G). Nor are the two provisions redundant of one another. Section 515(b)(22)(B) provides some minimal protection to all or most waters, while the 1983 buffer regulation provided more robust protection to a narrower category of streams with "more significant environmental-resource value," as the Department explained at the time of adoption. 48 Fed. Reg. at 30313.[6]

Nor does the Fourth Circuit's decision in *Kentuckians for the Commonwealth v. Rivenburgh*, 317 F.3d 425 (4th Cir. 2003), create any conflict. *Kentuckians for the Commonwealth* considered the definition of "fill material" under the Clean Water Act and rejected the argument—which the district court had found persuasive, 204 F. Supp. 2d 927, 942-43 (S.D. W. Va. 2002)—that the Mining Control Act compelled a Clean Water Act definition limited to discharges with a beneficial purpose. In rejecting that argument, the Fourth Circuit stated, "it is beyond dispute that [the Mining Control Act] recognizes the possibility of placing *excess spoil* material in waters of the United States even though those materials do not have a beneficial purpose." *Id.* at 443 (citing Section 515(b)(22)(D) (emphasis in original)). The court never suggested that the Mining Control Act requires authorization of spoil disposal regardless of environmental impact, nor questioned any environmental safeguards adopted under the Mining Control Act. It only rejected the argument that the Mining Control Act should be read to prohibit any waste disposal at all in any U.S. waters. *Kentuckians for the Commonwealth* does not support the Department's interpretation of the 1983 buffer regulation.

[6] If performance standard (22)(B) did implicitly compel authorization of every excess spoil fill that complied with it, the 2008 rule would not resolve the conflict. The 2008 buffer regulation still prohibits the disposal of excess spoil in natural water courses under some circumstances—namely, when the plan for excess spoil disposal fails to minimize "adverse impacts on fish, wildlife, and related environmental values to the extent possible." 30 C.F.R. § 816.71(a)(4) (2009).

3. The 2008 Interpretation Conflicts with the Department's Prior Interpretation.

The primary reason the Court should reject the 2008 interpretation is that it conflicts with the plain text of the regulation. But even were it not plainly inconsistent with the regulation, the Court still should not defer to the 2008 interpretation because it conflicts with the Department's prior interpretation and the Department did not even acknowledge the conflict.

The Department has clearly stated on three occasions that the buffer regulation covers mining activities that occur in streams. First, it stated in the preamble to the final rule adopting the first permanent buffer regulation, "Under Section 816.57, an operator cannot mine through a stream covered by Section 816.44 (intermittent and perennial streams), unless it has been diverted around the area of disturbance in accordance with that Section." 44 Fed. Reg. 14902, 15177/1 (1979); *accord* 43 Fed. Reg. 41752/3.[7] Thus the Department clearly stated that the 1979 regulation, which for present purposes was materially identical to the 1983 regulation, covered mining in streams and required the operator to obtain a waiver from the regulatory authority.[8]

Second, in the preamble to 1983 Final Rule, the Department stated, "Buffer zones are used to protect streams from sedimentation *and from gross disturbance of stream channels* caused by surface coal mining and reclamation operations." 48 Fed. Reg. at 30312 (emphasis added). Thus the Department made clear in the very rulemaking that adopted the buffer regulation that it protected against direct disturbance of stream channels.

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[7] The contemporaneous regulation governing diversion of perennial and intermittent streams required restoration of the original stream channel and prevention of adverse effects on water quality and quantity. 30 C.F.R. §§ 816.44(a)(1) & 816.57(a) (1979). The regulation for diversion of ephemeral streams was more permissive. *Id.* § 816.43 (1979).

[8] The 1979 regulation read: "No land within 100 feet of a perennial stream or a stream with a biological community determined according to Paragraph (c) below shall be disturbed by surface mining activities, except in accordance with Section 816.43-816.44, unless the regulatory authority specifically authorizes surface raining activities closer to or through such a stream[.]" 33 C.F.R. 816.57 (1979).

Finally, the Department of Interior stated in briefing in the *Bragg* litigation before the U.S. Court of Appeals for the Fourth Circuit that:

> valley fills in intermittent or perennial streams may be authorized under the buffer zone rule only if the permitting agency finds that they will not adversely affect the environmental resources of the filled stream segments. . . . The district court correctly rejected the arguments that [West Virginia] was not required to make the buffer zone findings, holding that the findings required by the buffer zone rule must be made for the filled stream segments and not at some point downstream from the valley fills; and (2) findings made by the Corps under the CWA section 404(b)(1) guidelines are not a substitute for the buffer zone findings. The district court also correctly. . .[held]. . .that the burial of substantial portions of intermittent or perennial streams in valley fills causes adverse environmental impact in the filled stream segments and therefore cannot be authorized consistent with the buffer zone rule. The uncontested evidence demonstrates that the burial of substantial portions of intermittent or perennial [*sic*] causes adverse environmental effects to the filled stream segments, as such fills eliminate all aquatic life that inhabited those segments.

Ex. C, Brief for the Federal Appellants at 24-25, *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275 (4th Cir. 2001). The Department further stated, "valley fills that disturb intermittent or perennial streams may be approved only if there is a finding that activity will not adversely affect the environmental resources of the filled stream segment." *Id*. at 41 (emphasis omitted).

The 2008 rule does not even acknowledge these prior inconsistent interpretations, which provide another reason the Court should not defer to the Department's interpretation of the 1983 regulation. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012); *Auer v. Robbins,* 519 U.S. 452, 461 (1997); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994).

B. The Department's Misinterpretation of the 1983 Regulation Led It to Violate NEPA.

The 1983 regulation clearly and unambiguously required specific authorization from the regulatory authority pursuant to 30 C.F.R. § 816.57(a)(1) before any land within 100 feet of a perennial or intermittent stream could be disturbed by surface mining activities, even if the

activity also threatened direct harm to the stream. It was error to use a less-protective interpretation as the baseline for analysis under NEPA. *Friends of Back Bay v. U.S. Army Corps of Eng'rs*, 681 F.3d 581, 588-89 (4th Cir. 2012); *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008) ("The baseline alternative should not have assumed the existence of the very plan being proposed.") (internal quotation marks omitted). *See also Humane Soc. of the U.S. v. Johanns*, 520 F. Supp. 2d 8, 29 (D. D.C. 2007) (holding that rulemaking did not merely perpetuate the "status quo" for purposes of NEPA because "'status quo' refers to the legal or regulatory status quo," not to "whether an action, albeit legally different, will perpetuate the same effects").

The Department erred not only in assessing the baseline for analysis, but also in assessing the environmental impact of the revision—a central requirement for an Environmental Impact Statement under NEPA. 42 U.S.C. § 4332(2)(C). The FEIS concedes that surface mining activities in and near streams cause harm to the environment. *E.g.*, FEIS at IV-145, SBZ000266 (estimating that 4.1% of Central Appalachia's total stream miles are directly impacted by mining every ten years, disrupting "a number of important ecological functions"); *id.* at IV-147-48, SBZ000268-69 (discussing alterations in water chemistry and loss of "unique biological diversity"). But the FEIS maintains that the 2008 rule will not harm streams because it does not change the regulatory status quo. The FEIS begins from the premise that the buffer regulation already allowed mining activities in and through streams, determines the revision will not alter the status quo, and finally predicts a positive environmental effect or no effect compared to the no-action baseline for every type of environmental impact considered. *See supra* at 12. Thus the Department's misinterpretation of the 1983 regulation resulted in failure to evaluate the environmental consequences of weakening the regulation, in violation of NEPA.

The Department cannot argue that the negative consequences of weakening the buffer are outweighed by the regulations requiring minimization of environmental harm to the extent possible. First, the Department did not and could not have made that determination, because it neither acknowledged the weakening of the buffer nor assessed its environmental consequences. Second, the minimization requirements are toothless in comparison to the buffer regulation's clear prohibition on disturbances that harm streams. Finally, the Mining Control Act already required minimization of environmental harm from surface mining operations. 30 U.S.C. § 1265(b)(10)(B)(i) ("[Operations must be conducted] so as to prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow, or runoff outside the permit area"); *id.* § 1265(b)(24) ("[Operations must] to the extent possible using the best technology currently available, minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable").

II. THE 2008 RULE VIOLATED THE APA.

The 2008 rule violates the Administrative Procedure Act's basic requirement of rational agency decisionmaking because it is based on a "clear error of judgment." *See State Farm*, 463 U.S. at 43. Two of the Department's reasons for adopting the rule are arbitrary and capricious.

First, the Department decided to adopt the 2008 revision based on its determination that it was needed to "clarify the scope and meaning of the [1983 regulation]" and reduce "misunderstandings associated with application of the 1983 rule." 73 Fed. Reg. at 75818, 75855, 75857; *accord* 69 Fed. Reg. 1036 (2004). The Department specifically denied it was doing anything but clarifying what the regulation had always meant. 73 Fed. Reg. at 75822-23. But because the 1983 buffer regulation clearly and unambiguously applied to surface mining

operations in perennial and intermittent streams, there in fact was no need to change the regulation to clarify it. The Department's primary reason for issuing the 2008 rule was therefore arbitrary and capricious.

Second, the Department decided to adopt the 2008 regulation based in part on its determination that it would benefit the environment. *E.g.*, 73 Fed. Reg. 75870/3 ("Alternative 1 is both the preferred alternative and the environmentally preferable alternative."). But the conclusion that the rule was good for the environment was based on the same "clear error of judgment." *See State Farm*, 463 U.S. at 43. *See supra* at 26 (discussing the FEIS's premise that the buffer regulation already allowed mining activities in and through streams and its conclusion that revision would not alter the status quo). Because the 2008 rule in fact eliminated a clear prohibition on harm to perennial and intermittent streams from surface mining activities within 100 feet of the stream, and replaced it with lenient provisions calling for minimization of harm to the extent possible, the determination that the revision was good for the environment was arbitrary and capricious.

CONCLUSION

Because the Department of Interior's 2008 revision of the 1983 buffer regulation was premised on an interpretation that cannot be squared with the regulation's clear and unambiguous text, the 2008 revision should be set aside.

Respectfully submitted this 21st day of October, 2013:

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CERTIFICATE OF SERVICE

I, Jennifer C. Chavez, hereby certify that on this 21st day of October, 2013, I filed the foregoing Motion for Summary Judgment and Memorandum In Support Of Summary Judgment of Plaintiffs Coal River Mountain Watch, Kentuckians for the Commonwealth, Kentucky Waterways Alliance, Ohio Valley Environmental Coalition, Save Our Cumberland Mountains, Sierra Club, Southern Appalachian Mountain Stewards, Waterkeeper Alliance, and West Virginia Highlands Conservancy using the Court's CM/ECF system, which caused a copy to be served on counsel of record.

/s/ *Jennifer C. Chavez*
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