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October 26, 2015

The Honorable Joseph G. Pizarchik
Director
Office of Surface Mining Reclamation and Enforcement
1951 Constitution Avenue, N.W.
Washington, D.C. 20240

Submitted electronically via Regulations.gov

Re: Comments Of The Attorneys General Of Ohio, West Virginia, Arkansas, Montana, Oklahoma, South Carolina, Wyoming, Louisiana, Arizona, Kentucky, Texas, Wisconsin, Alabama, and Nebraska On The Proposed Stream Protection Rule (Docket No. OSM-2010-0018)

Dear Director Pizarchik:

As the Chief Legal Officers of our States, we write to express our serious concerns about the Proposed Rule issued by the Office of Surface Mining Reclamation and Enforcement ("OSMRE"). The Proposed Rule impermissibly seeks to broaden federal authority at the expense of the States, in violation of: (1) the Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. § 1211 *et seq.*; (2) other federal laws, including the Clean Water Act ("CWA"); and (3) the U.S. Constitution. *See* Stream Protection Rule, 80 Fed. Reg. 44,436 (proposed July 27, 2015) ("Proposed Rule").

In enacting SMCRA, Congress found it "essential to the national interest to insure the existence of an expanding and economically healthy underground coal mining industry," and also provided that "the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations . . . should rest with the States." 30 U.S.C. § 1201(f). The Proposed Rule, if adopted, would undercut both of these central SMCRA goals. It would make coal mining impossible in vast areas of the country and usurp primary responsibility for surface mining permit requirements from the States to the federal government. Even at the federal level, moreover, the Proposed Rule purports to regulate areas within the exclusive authority of other federal regulators, unnecessarily duplicating federal regulatory efforts and regulatory burdens.

OSMRE should withdraw the current proposal and develop a common-sense alternative that respects the strong federalism policies embodied in SMCRA, comports with SMCRA's statutory requirements, and does not unlawfully infringe on or unnecessarily duplicate other regulatory efforts. To facilitate development of this common-sense alternative, we also urge OSMRE to engage in active consultation with State officials, who can help OSMRE understand the full range of State undertakings consistent with SMCRA that balance protection of the environment with the need for an economically healthy coal industry to provide for this nation's energy needs.

DISCUSSION

I. The Proposed Rule Fails To Respect The State Control Over Mining Regulations Recognized In SMCRA

SMCRA recognizes that States have exclusive authority to develop and enforce federally approved mining programs. The Proposed Rule flips this central SMCRA mandate of state primacy on its head by developing a one-size-fits-all approach that leaves no room for the discretion of state agencies that have regulated coal-mining operations for over 30 years.

A. SMCRA, More Than Any Other Federal Environmental Statute, Gives States "Extraordinary Deference" To Implement And Enforce Their Own Mining Programs With Only Limited Federal Oversight.

SMCRA, passed in 1977, struck "a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy." 30 U.S.C. § 1202(f). To achieve this goal, the statute established "a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981); *see* H.R. Rep. No. 95-218, at 167 (1977). The need for this federalism-based approach to surface mining regulation rested on the geographic "diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations." 30 U.S.C. § 1201(f).

SMCRA adopted a two-step approach. It initially instructed the Secretary of the Interior to implement a federal regulatory program setting *minimum* standards for surface coal-mining operations within six months of August 3, 1977. *See* 30 U.S.C. § 1252(e). That initial program would remain in effect nationally until the second step was achieved; that is, until States proposed and received approval for their own individual programs or until permanent federal programs were enacted within the States that did not adopt those state-specific programs. *Id.* The Secretary introduced an initial regulatory program on December 17, 1977. *See* 42 Fed. Reg. 62,639. Since then, 24 States, including Ohio, West Virginia, [and], have received approval to implement their own programs, while the Secretary has implemented federal programs in 12 States. *See Frequently Asked Questions*, Office of Surface Mining Reclamation and Enforcement (last visited Oct. 7, 2015), http://www.osmre.gov/resources/faqs.shtm.

Notably, those States that have gained approval for their own regulatory programs exercise *exclusive* jurisdiction over surface coal-mining operations, while the Secretary exercises

exclusive jurisdiction in States with federal plans. *See* 30 U.S.C. §§ 1253(a), 1254(a). Furthermore, a State that has invested in the right to have exclusive jurisdiction within its borders maintains that exclusive authority except in certain limited situations, such as if the State fails to enforce its program. *See id.* § 1271; *Farrell-Cooper Mining Co. v. U.S. Dept. of the Interior*, 728 F.3d 1229, 1232 (10th Cir. 2013). As the Fourth Circuit has noted, "the Act provides for enforcement of either a federal program or a State program, but not both. Thus, . . . SMCRA exhibits *extraordinary deference* to the States." *Bragg v. West Virginia Coal Ass'n*, 248 F.3d 275, 289 (4th Cir. 2001) (emphasis added). In this way, SMCRA was designed to "provid[e] 'a truly federalist distribution of regulatory authority for the coal mining industry.'" *Pennsylvania Fed'n of Sportsmen's Clubs, Inc. v. Hess*, 297 F.3d 310, 316 (3d Cir. 2002) (citation omitted); *see also Nat'l Miners Ass'n v. U.S. Dept. of Interior*, 251 F.3d 1007, 1012 (D.C. Cir. 2001).

This makes SMCRA unique. It differs from other federal environmental statutes, such as the CWA, that incorporate state law into the federal scheme. *See Hess*, 297 F.3d at 328; *cf. Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992). Whereas those statutes *adopt* state law as federal law, SMCRA *defers* to state law entirely so long as it meets the specified minimum requirements. In fact, SMCRA explicitly states that no state law or regulation shall be superseded by "any provision of this chapter or any regulation issued pursuant thereto" unless the state law or regulation "is inconsistent with the provisions of this chapter." 30 U.S.C. § 1255(a). It further specifies that a state law "which provides for the control and regulation of surface mining and reclamation operations for which no provision is contained in this chapter shall not be construed to be inconsistent with this chapter." *Id.* § 1255(b). This "grant of primacy to a state" with an approved program "wholly but 'conditionally divest[s] the federal government of *direct* regulatory authority." *Hess*, 297 F.3d at 317 (quoting *Bragg*, 248 F.3d at 294). OSMRE, in other words, is supposed to "step[] back and let[] an approved program run"—as it has largely done for decades now. *Id.*

Permitting OSMRE to retroactively change the minimum standards to which approved state programs must adhere in order for those States to maintain their exclusive jurisdiction would undermine the structure and purpose of SMCRA. SMCRA states that the federal regulatory program shall remain operative *only* until the agency approves a state program meeting the minimum regulatory requirements. *See* 30 U.S.C. § 1252(e). Thereafter, the State gains "exclusive jurisdiction" over regulating surface coal mining operations. *Id.* § 1253(a). As the Third Circuit noted, "[e]xclusive . . . means just that—'exclusive.' It does not mean 'parallel' or 'concurrent.'" *Hess*, 297 F.3d at 318. Thus, OSMRE has no authority to enact the Proposed Rule against States with approved programs, and thereby to indirectly undertake in those States what OSMRE cannot undertake directly— federal regulation of coal mining in those States (with the state entities as mere agents). Indeed, allowing OSMRE to interfere with state programs in this manner would retroactively eliminate the States' very incentive to create their own programs in the first place. *See* 30 U.S.C. § 1201(f); H.R. Rep. No. 95-218, at 167 (1977). It should be added that OSMRE does not cite § 1271 (the one section permitting it to intervene if a State has failed to enforce its program) as any legal authority for the Proposed Rule. *See* 80 Fed. Reg. at 44,446-47.

SMCRA's promise to States that they will receive exclusive control if they meet certain minimum requirements would prove an empty one if those requirements could be revised by OSMRE at any time. In some respects, then, SMCRA is comparable to federal spending legislation—it is "'much in the nature of a contract.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (citation omitted). The States agreed to follow the minimum requirements; Congress agreed to give them exclusive control. SMCRA thus should be interpreted *not* to allow OSMRE to retroactively impose new conditions on state programs unless SMCRA gives the agency that power *unambiguously*. *See Arlington Cent. Sch. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). It does not, evidenced by OSMRE's reliance on SMCRA's "purpose" provision, 30 U.S.C. § 1202, as the "legal authority" for the Proposed Rule. *See* 80 Fed. Reg. 44,446 (proposed July 27, 2015). Yet even if OSMRE plans to rely on claimed penumbras flowing out of SMCRA as the grounds for the Rule, it should recognize that they point in a decidedly different direction than the Agency's one-size-fits-all regulatory approach.

B. The Proposed Rule Impermissibly And Needlessly Replaces State And Local Regulation With Top-Down, Federal Control

The Proposed Rule conflicts with OSMRE's responsibility under SMCRA to "assist the States in the development of State programs for surface coal mining operations which meet the requirements of [SMCRA], and at the same time, reflect *local* environmental and agricultural conditions." 30 U.S.C. § 1211(c)(9). Contrary to SMCRA and express congressional intent, the Proposed Rule strips away the States' responsibility and authority and hands it over to OSMRE in at least two ways. *First*, the Proposed Rule removes substantial state and local control by re-defining "material damage to the hydrologic balance outside the permit area" in a way that fails to reflect local conditions or maintain the current flexibility that States possess in evaluating impacts or potential impacts from mining on a site-specific basis. *Second*, the Proposed Rule improperly requires States to provide fish and wildlife resource information to the United States Fish and Wildlife Service automatically rather than only when requested by the Service.

1. The Proposed Rule improperly defines "material damage to the hydrologic balance outside the permit area."

The Proposed Rule creates a new federally mandated definition of "material damage to the hydrologic balance outside the permit area." To issue a permit under SMCRA and current regulations, a State must determine that the mining operation "has been designed to prevent material damage to the hydrologic balance outside the permit area." 30 U.S.C. § 1260(b)(3); 30 C.F.R. § 773.15(e). Neither SMCRA nor the current regulations define those terms, but rather defer to the judgment of the State as the primary regulatory authority. In its proposal, OSMRE takes a different approach, defining those terms to mean "any adverse impact from surface coal mining and reclamation operations or from underground mining activities, including any adverse impacts from subsidence that may occur as a result of underground mining activities, on the quality or quantity of surface water or groundwater, or on the biological condition of a perennial or intermittent stream, that would" either: (1) "[p]reclude any designated use under sections 101(a) or 303(c) of the Clean Water Act or any existing or reasonably foreseeable use of surface water or groundwater outside the permit area"; or (2) "impact threatened or endangered species, or have an adverse effect on designated critical habitat, outside the permit area in violation of the

Endangered Species Act of 1973, 16 U.S.C. § 1531 *et seq.*" 80 Fed. Reg. 44,588 (proposed July 27, 2015) (to be codified at 30 C.F.R. § 701.5).

a. Contrary to OSMRE's claims, a federal definition of "material damage to the hydrologic balance outside the permit area" is neither permissible nor necessary.

First, SMCRA makes it the role of the States, not OSMRE, to determine when a permit applicant has demonstrated that the mining operation is designed to prevent material damage to the local hydrologic balance. As noted above, SMCRA assigns the States the responsibility of "developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations" because of "the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations." 30 U.S.C. § 1201(f). Those considerations are particularly relevant to determining whether a mining operation is designed to avoid material damage to the hydrologic balance, as hydrologic conditions differ significantly across the country. For instance, one would expect criteria for determining material damage to the hydrologic balance to be different in arid climates with less than 10 inches of precipitation per year than in areas with more than 50 inches of precipitation. A uniform federal rule would make little sense and is inconsistent with the statute. As the D.C. Circuit has explained, each State is "the entity that applies the general standards of [SMCRA] to the particular geographical and geological circumstances of the state." *In re Permanent Surface Min. Regulation Litig.*, 653 F.2d 514, 519 (D.C. Cir. 1981).

Second, a federally mandated definition of material damage to the hydrologic balance outside the permit area is unnecessary because of the States' work to define that term. OSMRE claims as justification for the definition that "very few states have adopted a definition or established programmatic criteria for material damage to the hydrologic balance outside the permit area." 80 Fed. Reg. 44,473 (proposed July 27, 2015). That is not so. Many States have adopted rules to guide that decisionmaking process. For example, West Virginia by regulation defines "material damage to the hydrologic balance outside the permit areas" as "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 resource(s) to support existing conditions and uses." W. VA. CODE R. § 38-2-3.22.e. Other States have adopted similar definitions. *See, e.g.*, MONT. CODE ANN. § 82-4-203(31). Additionally, other States make these decisions on a case-by-case basis to better incorporate local conditions at each site. For example, Ohio, through its Ohio Department of Natural Resources, does a material-damage assessment for each permit application. It requires that applications include all necessary information for making this assessment, and its technical staff then review the body of evidence to reach a material-damage conclusion. If the applicant states that material damage will not occur, but the application responses do not support that finding, the Ohio Department of Natural Resources requires application revisions. By reviewing the application and approving the material-damage statement and documentation in the application, the agency conclusively determines that material damage will not occur. *See* OHIO REV. CODE §§ 1513.07(B)(1)(k) (requiring permit applicant to explain probable hydrologic consequences), (E)(2)(c)(i) (requiring chief to affirmatively find that there will not be material damage); OHIO ADMIN. CODE 1501:13-4-14 (underground mining

permit application requirements for reclamation and operations plans); *id.* 1501:13-9-04 (protection of the hydrologic system); *id.* 1501:13-4-13 (underground mining permit application requirements for information on environmental resources); *id*. 1501:13-4-05 (surface mining requirements). Other States have adopted rules similar to those adopted by Ohio. *See, e.g.*, 312 IND. ADMIN. CODE 25-6-12; 405 KY. ADMIN. REGS. 18:060; UTAH ADMIN. CODE r. 645-301-729.

b. Even if it were proper to adopt a federal definition of "material damage to the hydrologic balance outside the permit area," the proposed definition is both too broad in some respects and too narrow in others.

On the one hand, the proposed definition focuses too narrowly on the hydrologic balance in particular streams. It incorporates the CWA's designated use criteria, which are designed to protect individual "waters of the United States" from pollution. But SMCRA focuses on an area's overall hydrologic balance. *See* 30 U.S.C. § 1266(b) ("Each permit issued . . . shall require the operator to . . . minimize the disturbances of the prevailing hydrologic balance at the minesite and in associated offsite areas."); *id.* § 1260(b) ("[T]he proposed operation . . . has been designed to prevent material damage to hydrologic balance outside permit area.").

On the other hand, the definition of cumulative hydrologic impact area is far too broad. SMCRA expressly requires consideration of local conditions. *See id.* § 1201(f). But the Proposed Rule seeks to define the cumulative impact area within which the hydrologic impact must be assessed to include the permit area, the "HUC-12 (U.S. Geological Survey 12-digit Watershed Boundary Dataset) watershed or watersheds in which the actual or proposed permit area is located," and "any other area within which impacts resulting from an actual or proposed surface or underground coal mining operation may interact with the impacts of all existing and anticipated surface and underground coal mining on surface-water and groundwater systems." 80 Fed. Reg. 44,587 (proposed July 27, 2015) (to be codified at 30 C.F.R. § 701.5). The inclusion of one or more HUC-12s substantially expands the cumulative impact area. For example, the average size of an HUC-12 in Ohio is 10,000 to 40,000 acres, with some as small as 3,000 acres. The data collection and analyses accompanying the requirement that the HUC-12 watershed be part of the cumulative impact area would overwhelm the permitting process and provide no valuable information relative to the cumulative hydrologic impact of a defined mining operation. New information or data from nearby mining operations would need to be collected and submitted. Given the size of the cumulative impact area (HUC-12 watershed, minimum), the data gathering requirement would either overwhelm the regulatory agency or the applicant, or it would become so boilerplate as to be meaningless. Impacts between operations at opposite ends of an HUC-12 watershed would be non-existent; therefore the required data gathering is unnecessary. The watershed portion alone establishes a very large cumulative impact area and an even larger area for operations that happen to cross watersheds. Broader still is the inclusion of any area where coal mining "impacts" surface-water or groundwater.

2. <u>The Proposed Rule's requirements regarding fish and wildlife resource information improperly subordinate the States' permitting authority to federal control.</u>

The Proposed Rule unjustifiably subordinates state permitting authority to the federal government with new requirements regarding fish and wildlife resource information. Under the current regulations, a State need only provide resource information contained in a SMCRA permit application to the Fish and Wildlife Service upon the Service's request. 30 C.F.R. § 780.16(c). The proposal, in contrast, *requires* a State to provide such information to the "regional or field office of the U.S. Fish and Wildlife Service whenever that information includes species listed as threatened or endangered under the Endangered Species Act of 1973 . . . , critical habitat designated under that law, or species proposed for listing as threatened or endangered under that law." 80 Fed. Reg. 44,593 (proposed July 27, 2015) (to be codified at 30 C.F.R. § 779.20(d)(1)(i)). The State must also refrain from approving the permit application if the Fish and Wildlife Service disagrees with the State's decision on the permit. *Id.* (to be codified at § 779.20(d)(2)(ii)). But SMCRA vests no such veto power in the Fish and Wildlife Service. At a minimum, these new requirements force States to delay acting on permit applications even where federal authorities have expressed no concern with the application.

3. OSMRE failed to engage with States in its rulemaking process as required.

Finally, the proposal is also disrespectful to the States' role in mining regulation because OSMRE failed to engage in meaningful cooperation with state agencies as required by regulations governing rulemakings subject to the National Environmental Policy Act (NEPA). 40 C.F.R. §§ 1501.6, 1508.5. These regulations require the agency to "request the participation of each cooperating agency in the NEPA process at the earliest possible time" and "meet with a cooperating agency at the latter's request." *Id.* §§ 1501.6(a), 1508.5(a). By agreement state agencies may become cooperating agencies, and agencies from 11 States did so with respect to the Proposed Rule. 40 C.F.R. § 1508.5; OSMRE, Stream Protection Rule Environmental Impact Statement Draft 5-2 (July 2015). In late 2010 and early 2011, OSMRE provided state agencies the opportunity to comment on Chapters 2 through 4 of a working draft of the Draft Environmental Impact Statement. *Id.* at 5-3. There was no more communication between OSMRE and the States until February 23, 2015, when 11 state agencies wrote a letter to OSMRE expressing concern about the lack of cooperation between OSMRE and the States and declaring their intent to terminate their participation. *See id.* Seven of these States subsequently terminated their involvement. *Id.* The Proposed Rule thus fails to account for the efforts States have undertaken to appropriately balance environmental protection with the need for an economically healthy coal industry consistent with SMCRA. Had States that were cooperating agencies in the development of the initial draft of the Environmental Impact Statement been more fully and appropriately involved in the complete process, they would have been in a better position to comment fully on the Proposed Rule. OSMRE should reengage with States in order to write a rule consistent with SMCRA's "extraordinary deference to the States." *Bragg*, 248 F.3d at 289.

II. The Proposed Rule Exceeds OSMRE's Authority Under SMCRA.

A. The Proposed Rule's Restriction On Mining Activities In Or Near Streams Exceeds The Agency's Authority Under SMCRA.

In contrast to the current regulations, the Proposed Rule broadly prohibits nearly all mining-related activity in or within 100 feet of any perennial or intermittent stream. The current regulations prohibit only surface mining activities that the regulatory authority finds will "cause or contribute to a violation of applicable State or Federal water quality standards, and will . . . adversely affect the water quantity and quality or other environmental resources of the stream." 30 C.F.R. § 816.57. The Proposed Rule, however, would preclude any mining-related activity in or within 100 feet of a perennial or intermittent stream unless the activity would not: (1) "[p]reclude any premining use or any designed use under section 101(a) or 303(c)"; (2) "[r]esult in conversion of the stream segment from intermittent to ephemeral, from perennial to intermittent, or from perennial to ephemeral"; (3) "[c]ause or contribute to a violation of applicable water quality standards"; or (4) "cause material damage to the hydrologic balance outside the permit area." 80 Fed. Reg. 44,610 (proposed July 27, 2015) (to be codified at 30 C.F.R. § 780.28(b)(2)). As already noted, the Proposed Rule broadly defines "material damage to the hydrologic balance outside the permit area." It also expansively defines "perennial stream" as "a stream or part of a stream that has flowing water year-round during a typical year." 80 Fed. Reg. 44,588 (proposed July 27, 2015).

For several reasons, and contrary to SMCRA, the result of the Proposed Rule is to prohibit nearly all mining activities with any effect on perennial or intermittent streams. *First*, the Proposed Rule significantly expands regulation from "mining" alone to "all mining-related activities." *Second*, the definition of perennial stream makes a change in the quantity of water in a stream segment, rather than the entire stream, sufficient to prohibit the mining-related activity. *Third*, the Proposed Rule introduces the requirement that the activity not prohibit any "reasonably foreseeable use . . . or impact threatened or endangered, or have an adverse effect on designated critical habitat." *Fourth*, the proposal prohibits any mining-related activity that affects the biological condition of a stream even if it does not affect water quality. *Fifth*, the Proposed Rule expands the definition of perennial stream to include streams with continuous flow during a typical year rather than only streams with continuous flow during all of the calendar year. 80 Fed. Reg. 44,477, 44,586 (proposed July 27, 2015) (to be codified at 30 C.F.R. § 701.5). Taken together these restrictions prohibit nearly all mining-related activities that in any way affect a broadly defined stream or stream segment, making mining impossible in vast areas of the country, contrary to SMCRA's design.

Such a sweeping prohibition on mining-related activities is inconsistent with the text of SMCRA. In SMCRA, Congress recognized the importance of coal mining to the nation's economy and expressly sought to protect it. 30 U.S.C. § 1201(b). In fact, Congress found it "essential to the national interest to insure the existence of an expanding and economically healthy underground coal mining industry." *Id.* Consistent with this goal, SMCRA adopts the balanced goal of seeking to "*minimize* disturbances and adverse impacts . . . on fish, wildlife, and related environmental values" "to the extent possible using the best technology currently available." 30 U.S.C. § 1265(b)(24) (emphasis added). And SMCRA expressly authorizes placing excess spoil in "springs, natural water course or wet weather seeps" so long as "lateral drains are constructed." 30 U.S.C. § 1265(b)(22)(D); *see also Kentuckians for Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 443 (4th Cir. 2003) ("it is beyond dispute that SMCRA recognizes the possibility of placing excess spoil material in waters of the United States.").

OSMRE has also asked for comment on whether to extend these restrictions even further to include ephemeral streams. *See* 80 Fed. Reg. 44,451 (proposed July 27, 2015). For all of the above reasons, OSMRE should decline to do so. The Proposed Rule far exceeds the authority provided by statute.

B. The Proposed Rule Discourages Longwall Mining By Setting Up Requirements For Permit Issuance That Are Unrealistic, Difficult, Or Impossible To Meet, Contrary to SMCRA, And Unfounded In Science.

Congress has recognized that "the overwhelming percentage of the nation's coal reserves can only be extracted by underground mining methods and that it is, therefore, essential to the national interest to insure the existence of an expanding and economically healthy underground coal mining industry . . . ." 30 U.S.C. §1201(b). Nonetheless, the Proposed Rule jeopardizes the existence of an expanding and economically healthy underground coal mining industry. One of SMCRA's core purposes is to "encourage the full utilization of coal resources through the development and application of underground extraction technologies . . . ." *Id.* § 1202(k). The Proposed Rule violates that purpose by, for example, making longwall mining all but impossible. The Proposed Rule impedes longwall mining by, among other things: (1) requiring permit denials when longwall mining may have a chance of adversely impacting the quantity or quality of surface water or groundwater; (2) requiring permit denials when impacts to ephemeral streams may not be avoided; and (3) requiring the inclusion of contiguous reserves of longwall mining operations for cumulative hydrologic impact assessments (CHIAs).

1. In violation of SMCRA, the Proposed Rule may require the denial of longwall-mining permit if there is any chance of an adverse impact on a stream.

Depending on interpretation or application, the Proposed Rule would require denying a longwall-mining permit if it cannot be shown at the permitting stage that the longwall mining would not have any adverse impacts on the quantity or quality of surface water or groundwater. The definition of "material balance to the hydrologic balance outside the permit area" includes "any adverse impacts from subsidence that may occur as a result of underground mining activities on the quality or quantity of surface water of groundwater." 80 Fed. Reg. 44,475 (proposed July 27, 2015). It is well-known that the longwall-mining method may negatively impact the quantity and quality of surface water or groundwater. *Fully* restoring streams to pre-mining water quantity and quality conditions may not be technologically or economically feasible given the subsidence that occurs with longwall mining. SMCRA also recognizes that longwall mining operators should not be required to prevent subsidence damage to the same extent as surface mine operators. SMCRA provides that underground coal mining operators "shall adopt measures consistent with known technology in order to prevent subsidence causing material damage to the extent technologically and economically feasible . . . *except in instances where the mining technologically used requires planned subsidence in a predictable and controlled manner*." 30 USC § 1266(b)(1) (emphasis added). SMCRA clearly recognizes that longwall mining must be regulated differently given the nature of the longwall mining method. The Proposed Rule does not.

The Proposed Rule is also unnecessary because the States themselves have rules minimizing the negative impacts on the quantity and quality of groundwater and surface water from longwall mining. Ohio's regulation provides an instructive example. Its approach to disruption of water sources in wells, developed springs, and streams is to replace wells and springs based on Procedure Directive Regulatory 2013-01, which was developed in cooperation with OSMRE staff, and current state regulations at 1501:13-4-04(F), 1501:13-4-13(F), and 1501:13-9-04(P) of the Ohio Administrative Code that require identification of alternative water sources and water replacement. Following inspector and hydrologist reviews and verification of stream impacts, streams require repair based on protection of the hydrologic balance under 1501:13-4-05(E), 1501:13-4-14(E), and 1501:13-9-04 of the Ohio Administrative Code and the subsidence control plan under 13-4-14 (M) and 1501:13-12-03 of the Ohio Administrative Code. The ODNR also requires avoidance of perennial streams where the cover is less than 200 feet. Further, Ohio requires an evaluation of the potential of mine pool development during review of initial underground mining applications and a plan to re-evaluate mine pool potential at the end of mining followed by implementation of appropriate action (e.g. a detailed mine-pool study; deletion of mining areas that are higher than local drainage; relocation of mine entries) based on the evaluation. Ohio requires action plans to address creation of mine pools, including upgrade water treatment facilities, creation of long-term water treatment systems and trusts, which require regular inspection and enforcement, and/or pumping mines to keep the water level lower than potential surface discharge points.

2. The Proposed Rule's envisioned requirement to avoid impacts to ephemeral streams is contrary to SMCRA and creates an unnecessary and heavy financial burden that effectively curtails longwall mining.

OSMRE has asked for comment on whether to extend the stream buffer requirements to ephemeral streams. 80 Fed. Reg. 44,451. Though states may opt in their own statutes to provide coverage for ephemeral streams, the proposed rule would exceed agency authority under SMCRA because SMCRA does not contain a provision that requires the avoidance of impacts to ephemeral streams. Requiring the movement or stoppage of longwall panels to mine around ephemeral streams would leave many coal reserves stranded and cause the longwall mining operator great expense in having to stop and alter the movement of large longwall panels to account for ephemeral streams.

The Proposed Rule's requirement to conclusively determine whether perennial streams may be converted to ephemeral streams or whether intermittent streams may be converted to ephemeral streams from mining, 80 Fed. Reg. 44,602, 44,602 (proposed July 27, 2015) (to be codified at 30 C.F.R. § 780.19 and 30 C.F.R. § 780.28), impedes surface and underground mining including longwall mining because it is difficult or nearly impossible to make such a determination in advance of mining given that there are factors that cannot be predicted with certainty during the mining operation and backfilling of spoil. As such, the Proposed Rule exceeds OSMRE's authority under the law.

3. The Proposed Rule's requirement to include an applicant/owner's entire contiguous reserves in a CHIA analysis is irrational, has no scientific basis, and imposes a heavy burden on agency review.

The Proposed Rule expands underground mine Cumulative Hydrologic Impact Assessments ("CHIA") to all areas where the company owns or controls coal reserves contiguous to the proposed mining area. 80 Fed. Reg. 44,587 (proposed July 27, 2015) (to be codified at 30 C.F.R. § 701.5). But hydrological impacts are not governed by coal ownership; instead, they are determined by geological and hydrological principles. The amount of coal a company owns has no scientific connection to impacts or potential impacts on a permit area. Water does not change how it behaves based on the extent of a company's coal holdings. Longwall mining operators typically own and/or control large areas of reserves. While in some instances the coal reserves may be mined in the near future, there are many instances in which coal is not projected to be mined for many years, and a coal mining permit application will not be submitted for such area until years or perhaps decades in the future. There is no rational basis to require a CHIA of all contiguous coal reserves and such a requirement dramatically impedes longwall mining operators with substantial reserves. Additionally, it places a heavy and unnecessary burden on state agency review.

The Proposed Rule's requirements are also inconsistent with SMCRA because SMCRA recognizes the need to regulate longwall mining and other forms of underground mining differently and in a way that recognizes the unique nature of underground mining methods. 30 U.S.C. § 1266(a) requires: "That in adopting any rules and regulations the Secretary shall consider the distinct difference between surface coal mining and underground coal mining." SMCRA recognizes the difference between surface mining and underground mining in, for example, its requirements on subsidence, as noted above. SMCRA provides that coal mining operators "shall adopt measures consistent with known technology in order to prevent subsidence causing material damage to the extent technologically and economically feasible . . . *except in instances where the mining technology used requires planned subsidence in a predictable and controlled manner*." 30 USC § 1266(b)(1) (emphasis added).

Despite SMCRA's requirements to regulate longwall mining differently, the Proposed Rule disregards the unique differences of the longwall-mining method by imposing heavy burdens impeding its development. This is especially significant in States like Ohio where longwall mining currently accounts for at least 50 percent of the State's coal production annually.

C. OSMRE's Proposal To Require A Material Damage Finding For Permit Renewals Violates SMCRA.

The proposal also violates SMCRA by requiring permit *renewal* applications to assess material damage to the hydrologic balance outside the permit area. The law limits such an assessment to "permit or revision application[s]" only. It provides that "[u]pon the basis of a complete *mining application and reclamation plan or a revision or renewal thereof* . . . the regulatory authority shall grant, require modification of, or deny the application for a permit in a reasonable time." 30 U.S.C. § 1260(a) (emphasis added). Then, it states that "[n]o *permit or revision application* shall be approved unless the application affirmatively demonstrates and the regulatory authority finds in writing . . . that . . . the operation . . . has been designed to prevent material damage to hydrologic balance outside [sic] permit area." *Id.* § 1260(b)(3) (emphasis added). The statute thus uses "mining application," "revision," and "renewal" to mean different

things. Contrasted with Section 1260(a), it is clear that Section 1260(b)(3) limits the material damage to the hydrologic balance assessment to applications for permits or revisions to permits. *See United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute . . . .") (citation and internal quotation marks omitted).

Moreover, a finding that the operation is designed to prevent material damage to the hydrologic balance would make little sense in the case of a permit *renewal*, which is reserved for situations where the applicant has not made changes to the design of the previously-approved operation. Under SMCRA, a permit may be renewed only if the terms and conditions of the existing permit are being met. Thus, SMCRA requires a regulatory authority to issue a renewal unless "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;
(D) the operator has not provided evidence that the performance bond in effect for said operation will continue . . .
(E) any additional revised or updated information required by the regulatory authority has not been provided."

30 U.S.C. § 1256(d)(1). These standards assume that the initial design has already been approved and remains unchanged. OSMRE has no authority to amend these clear standards through regulation.

D. OSMRE Proposes To Impermissibly Broaden The Definition Of Reclamation.

OSMRE's proposed definition of "reclamation" is considerably broader than its meaning under the current regulations and increases the obligations imposed on mine operators. The current regulations define reclamation as "those actions taken to restore mined land as required by this chapter to a postmining land use approved by the regulatory authority." 30 C.F.R. § 701.5. In contrast, the Proposed Rule expands this definition to include "those actions taken to restore mined land and associated disturbed areas to a condition in which the site is capable of supporting the uses it was capable of supporting prior to any mining or any higher or better uses approved by the regulatory authority." 80 Fed. Reg. 44,588 (proposed July 27, 2015) (to be codified at 30 C.F.R. § 701.5). Also in contrast with the current regulation, this definition is not limited to the mined area. Further, it requires restoration of land to a condition capable of supporting all uses the land was capable of supporting before mining rather than simply the approved post-mining use.

The provision of SMCRA on which OSMRE relies for its new definition does not support the expansive definition that the Agency proposes. OSMRE claims its definition implements SMCRA's purpose to "assure that adequate procedures are undertaken to reclaim surface areas as contemporaneously as possible with the surface coal mining operations." 30 U.S.C.

§ 1202(e). But "contemporaneously" means "at or during the same time." 3 THE OXFORD ENGLISH DICTIONARY 813 (2d ed. 1989). What SMCRA requires is reclamation as soon as possible after mining, not restoration of all lands to pre-mining condition.

The Proposed Rule's broad definition also again fails to heed SMCRA's command to balance environmental impacts with the need for an "economically healthy underground coal mining industry." 30 U.S.C. § 1201(b). Requiring mine operators in every case to restore land to all uses it was capable of supporting before mining creates an expensive burden that is not always balanced by sufficient benefits. To properly balance environmental and economic concerns as required under SMCRA, a regulatory authority must be permitted to weigh possible post-mining land uses against other concerns. And it is state and local authorities that are best suited to determine the value of potential post-mining land uses to their communities based on their individual circumstances.

E. The Proposed Rule Includes Revegetation Requirements Outside The Scope Of SMCRA.

Similarly, the Proposed Rule requires the States to set stringent revegetative success standards based on pre-mining land use despite SMCRA's emphasis on preparing land for its approved post-mining use. The proposal states that "standards of success applied to a specific permit must be adequate to demonstrate restoration of pre-mining land use capability." 80 Fed. Reg. 44,669 (proposed July 27, 2015) (to be codified at 30 C.F.R. § 816.116(b)). A site may only be revegetated consistent with the post-mining land use if that use "will be implemented before expiration of the revegetation responsibility period." *Id.* If adopted, this provision would require a mining operator to plant vegetation sufficient to return land to its pre-mining state even if the regulatory authority has approved a different post-mining use that will begin immediately after revegetation. For example, if an area is approved through state permitting for use as pastureland post-mining but had been used as cropland before mining took place, the operators would still be unnecessarily required to restore the land's ability to support cropland.

The Proposed Rule departs significantly from SMCRA. SMCRA requires revegetative standards to focus on the state-approved post-mining land use. Under SMCRA, a native vegetative cover is necessary, but "introduced species may be used in the revegetative process where desirable and necessary to achieve the approved postmining land use plan" regardless of when that plan is completed. 30 U.S.C. § 1265(b)(19). Thus, under SMCRA revegetation with native species is only necessary where there is no approved post-mining land use; conversely, when there is a post-mining use, revegetation should be consistent with that use. OSMRE's current regulations adhere much more closely to SMCRA, providing that "success of revegetation shall be judged on the effectiveness of the vegetation for the approved postmining land use, the extent of cover compared to the cover occurring in natural vegetation of the area, and the general requirements of §816.111." 30 C.F.R. § 816.116. Further, "introduced species [may be used] where desirable and necessary to achieve the approved postmining land use and approved by the regulatory authority." *Id.* § 816.111(a)(2).

Under the Proposed Rule, revegetation plans will have to be reestablished for all areas that do not have an agronomic use. 80 Fed. Reg. 44,491. Areas to be planted in trees will have to be planted to a primarily native planting species with only a minimum amount of introduced species

for soil stabilization. Tree planting plans will require design by a professional forester or ecologist, which will be an added expense. All organics will need to be reapplied and may cause instability, elevated suspended solids and conductivity in surface water in adjacent areas for longer period of time due to a slower process of revegetation, as well as result in a final product that may not be conducive to surface owner priorities and plans for land uses following mining. The proposed changes create ambiguous requirements that alter the current clear standards under which state regulatory authorities are working within known parameters and established guidelines. Substantial work has led to the development of successful guidelines for re-establishing forest and wildlife habitat in the States, but the Proposed Rule ignores the expertise of regional State reclamation professionals.

F. The Proposed Rule Violates SMCRA's Requirement To Balance The Nation's Economic Need For Coal With Protecting The Environment.

Congress designed SMCRA "to assure that the coal supply essential to the Nation's energy requirements, and to its economic and social well-being is provided and strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy." 30 U.S.C. § 1202(f). The Proposed Rule does not strike this balance.

The Proposed Rule would increase required water sampling and monitoring requirements nationwide without considering local requirements and local environmental and agricultural conditions. The required parameters are not based on local geology. In some instances, for example, sampling would be required for a parameter like copper even if copper is not generally found in the geology of a particular State. The Proposed Rule also creates a new requirement that sampling be done for 12 consecutive months. Should there be a drought or excessive wet conditions during the 12 months, the sampling would need to start over again. Sampling for 12 consecutive months is especially unrealistic because of the Proposed Rule's requirement to use the Palmer Drought Index ("PDI"). By the time the PDI publishes a number indicating that a particular month of sampling is invalid, the operator can do little to plan and must restart the sampling process. The delay in documentation will make sampling for an application nearly impossible and reduce certainty for the applicant as to when, if ever, baseline sampling will be completed. Such uncertainty would significantly hamper planning for mining operations.

Moreover, there has been no showing of why sampling that accounts for seasonal variations reflective of local conditions is inadequate to establish baseline quality and quantity. For example, Ohio developed a seasonal variations protocol for three different seasons to account for high, low, and intermediate conditions. Other States, too, should continue to have the flexibility to develop sampling protocols that reflect their local conditions: different States have different (or limited) seasonal variations, and what obtains in Alaska may not always be the case in Florida. The Proposed Rule's one-size-fits-all approach simply does not work.

The Proposed Rule also mandates that the Regulatory Agency or an additional third party verify quality assurance and quality control data. 80 Fed. Reg. 44,603 (proposed July 27, 2015) (to be codified at 30 C.F.R. § 780.19). This extra layer of Quality Assurance and Quality Control (QA/QC) is unnecessary. The existing QA/QC chain of command analysis is a valuable requirement. Regulatory authorities should be able to trust labs authorized and approved by the

EPA to provide credible data associated with sample results, and there is no need to have a third party to evaluate the same data or simultaneously evaluate samples. States have the authority to conduct sampling if they have reason to believe there is an error in the submitted data.

Significantly, too, and as discussed above, the Proposed Rule includes data-collection requirements relating to ephemeral streams. 80 Fed. Reg. 44,601 (proposed July 27, 2015) (to be codified at 30 C.F.R. § 780.19(c)(3)). Locating these ephemeral streams would require mine operators to conduct extensive biological sampling and field observation and surveys over what are often very large and difficult to access sites. And the Proposed Rule would vastly expand the scope of the Cumulative Hydrologic Impact Assessment ("CHIA") requirements of the permit application process. 80 Fed. Reg. 44,587 (proposed July 27, 2015) (to be codified at 30 C.F.R. § 701.5). The analysis is not only costly for the applicants to perform, but it is also taxing on the state agency's staff to perform such an excessively large hydrologic review. There has been no showing that such a vast expansion is necessary or has a valid scientific foundation.

SMCRA contemplates a balance between promoting economic development and protecting the environment, but these and other costly, unnecessary, burdensome, and unfunded mandates ignore that statutory imperative. Contrary to 30 U.S.C. § 1201(d), the Proposed Rule disregards economic and technical feasibility in the context of avoiding adverse impacts. And it imposes economically or technically infeasible requirements for longwall mining subsidence damage that SMCRA does not require. The Proposed Rule thereby threatens the existence of entire industry segments.

III. The Proposed Rule Seeks To Regulate Unnecessarily And Impermissibly In Areas Within The Exclusive Authority Of The EPA, The Army Corps Of Engineers, And The States Under The Clean Water Act Or The Endangered Species Act.

A. The Proposed Rule Seeks To Regulate In Areas Beyond OSMRE's Authority That Are Governed By The CWA as interpreted by other federal agencies.

The Proposed Rule creates requirements for water quality that exceed those in the CWA. Water-quality standards are regulated by Section 303 of the CWA and implemented by Section 402 permits and Section 404 permits issued under those chapters. The CWA gives States authority to set water-quality standards, incorporate those standards into CWA permits, and enforce water-quality standards that are more stringent than those required by federal law. As the law is currently interpreted by federal agency authorities, almost all surface coal mining operations require Clean Water Act permits to operate.

The Supreme Court has consistently affirmed that the CWA is a "comprehensive program for controlling and abating water pollution" within defined federal jurisdiction. *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 319 (1981) (citing *Train v. City of New York*, 420 U.S. 35, 37 (1975); *see also Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987). And the Court has acknowledged that, by its very terms, the CWA specifies the "policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration,

preservation, and enhancement) of land and water resources…." *Rapanos v. United States*, 547 U.S. 715, 737 (2006), (plurality op.) (quoting 33 U.S.C. § 1251(b)).

SMCRA itself illustrates that the Clean Water Act was intended to be, and is, the controlling federal legislation governing water pollution and water-quality standards of those waters that fall under federal authority. Section 702(a) of SMCRA explicitly provides that "[n]othing in this Act shall be construed as superseding, amending, modifying, or repealing" the Clean Water Act, or any state laws enacted pursuant to the Clean Water Act. 30 U.S.C. § 1292.

Yet the Proposed Rule would effectively and illegally amend the CWA in many ways.

1. The Proposed Rule unlawfully makes the Corps' stream definitions binding for purposes of SMCRA.

The Proposed Rule includes two definitions of streams tied to actions by the Army Corps of Engineers ("the Corps"). First, it seeks to redefine "perennial stream" in a manner substantively identical to the (overreaching) manner in which the Corps defines that terms under CWA Section 404. Second, OSMRE invited comment on whether the final rule should specify that the Corps "has the ultimate authority to determine the point at which an ephemeral stream becomes an intermittent stream or a perennial stream and vice versa." 80 Fed. Reg. 44,476 (proposed July 27, 2015).

OSMRE should reject both of these proposals. The breadth of the proposed definition of "perennial stream" significantly and illegally expands the streams subject to the stream buffer zone rule and makes mining impossible in large areas. That is inconsistent with SMCRA. As for the second proposal, Congress granted the Corps no rulemaking authority under SMCRA. The Corps has no authority to determine when an ephemeral stream becomes an intermittent stream or a perennial stream for purposes of SMCRA, and OSMRE cannot by regulation give the Corps such authority.

2. The Proposed Rule incorporates an illegal definition of "waters of the United States."

OSMRE's proposal to adopt the EPA and Corps' recently promulgated definition of "waters of the United States" is unlawful. To begin with, the term "waters of the United States" comes from the CWA, a statute under which OSMRE has no authority or responsibility. 33 U.S.C. §§ 1344, 1362(7). Moreover, as explained by well over half of the nation's States in several cases currently being litigated around the country, the definition of "waters of the United States" that OSMRE now proposes to adopt violates both the CWA and U.S. Supreme Court precedent. *See, e.g.*, Am. Compl., *Georgia v. McCarthy*, No. 2:15-cv-00079 (S.D. Ga.); Compl., *U.S. Chamber of Commerce v. U.S. E.P.A.*, No. 4:15-cv-00386 (N.D. Okla.); Compl., *North Dakota v. U.S. E.P.A.*, No. 3:15-cv-00059 (D. N.D.); Compl., *Ohio v. U.S. Army Corps of Eng'rs*, No. 2:15-cv-2467 (S.D. Ohio); Compl., *Texas v. U.S. E.P.A.*, No. 3:15-cv-00162 (S.D. Tex.). In *Rapanos*, a plurality of the Supreme Court concluded that only relatively permanent bodies of water and waters with a continuous surface connection to those waters fall within the

CWA. 547 U.S. at 739-42. Casting the fifth vote, Justice Kennedy wrote a concurring opinion in which he concluded that only navigable waters and those with a "significant nexus" to those waters fall within the CWA. *Id.* at 779. The definition of "waters of the United States" that OSMRE has proposed to adopt flunks both of these tests: it exceeds federal jurisdiction under statute and under the Constitution. That definition unlawfully includes broad swaths of intrastate waters, and sometimes-wet lands, that are connected to navigable interstate waters only after a once in a hundred year rainstorm. It also improperly includes isolated waters within an arbitrary distance of navigable waters and broadly-defined "tributaries" that carry any amount of water to navigable waters.

3. The Proposed Rule creates redundant water-quality requirements.

The Proposed Rule's water-quality requirements are redundant. Any conditions imposed on a coal-mining operation by a Clean Water Act permit would be subject to enforcement authority by both the CWA regulatory authority and the SMCRA regulatory authority. *See* 80 Fed. Reg. 44,515 (proposed July 27, 2015). Such enforcement would place another burden on States already regulating coal-mining operations through the CWA, would burden industry with duplicative regulation, would be a tremendous waste of government resources, and could lead to inconsistent interpretations of applicable laws. The Proposed Rule invites comment on whether permit conditions under the CWA should be directly enforceable under SMCRA, or whether the Proposed Rule should be considered informational in nature in referencing Clean Water Act requirements. *See* 80 Fed. Reg. 44,549 (proposed July 27, 2015). OSMRE is not statutorily empowered to enforce the CWA.

4. The Proposed Rule illegally conditions SMCRA permits on obtaining CWA permits.

The Proposed Rule adds a new permit condition requiring mine operators to obtain all necessary CWA permits, certifications, and authorizations before the SMCRA permit can be approved. 80 Fed. Reg. 44,590 (proposed July 27, 2015) (to be codified at 30 C.F.R. § 773.17(h)). Further, it requires the regulatory authority to "take enforcement action if the permittee does not obtain all necessary Clean Water Act authorizations, certifications, and permits before beginning any activity under the SMCRA permit that also requires approval or authorization under the Clean Water Act." 80 Fed. Reg. 44,515 (proposed July 27, 2015). Current regulations contain no such permit condition. 30 C.F.R. § 773.17. OSMRE initially proposed a similar provision in 2008, but then rejected the proposal in response to comments about its illegality and impracticality. 73 Fed. Reg. 75,842, 75,878 (proposed Dec. 12, 2008). OSMRE concluded at that time that, "we believe that maintaining the distinction between the SMCRA and Clean Water Act regulatory programs is both administratively and legally appropriate." *Id.* at 75,821. The Proposed Rule unjustifiably contravenes that prior proper ruling.

The Proposed Rule goes beyond OSMRE's legal authority in requiring regulatory authorities to enforce CWA permits. SMCRA was not designed to displace or modify the CWA in any way; as noted, "[n]othing in [SMCRA] shall be construed as superseding, amending, modifying, or repealing" the Clean Water Act. 30 U.S.C. § 1292. OSMRE's proposal seeks to

modify the enforcement procedures outlined in the CWA, 33 U.S.C. §§ 1311-1346, by adding an enforcement mechanism and an additional enforcement entity. This was not the purpose of SMCRA. As OSMRE has recognized, "nothing in SMCRA provides the SMCRA regulatory authority with jurisdiction over the Clean Water Act or the authority to determine when a permit or authorization is required under the Clean Water Act. . . . In addition, nothing in the Clean Water Act vests SMCRA regulatory authorities with the authority to enforce compliance with the permitting and certification requirements of that law." 73 Fed. Reg. 75,842 (proposed Dec. 12, 2008). OSMRE does not have the authority under either SMCRA or the CWA to allow, let alone require, the SMCRA regulatory authority to enforce the provisions of the CWA.

5. The Proposed Rule duplicates the Corps' stream-mitigation regulations under CWA Section 404.

OSMRE's stream-mitigation proposal duplicates activities exclusively conducted by the authorized regulatory authority under the CWA as interpreted by federal authorities. When a mine operator proposes to mine in or through a perennial or intermittent stream or stream segment and receives a permit allowing it to do so, the Proposed Rule would require the operator to restore the form and ecological function of the stream segment. 80 Fed. Reg. 44,656 (proposed July 27, 2015) (to be codified at 30 C.F.R. § 816.57). But Section 404 of the CWA already prohibits mine operators from discharging dredge and fill material into "waters of the United States" without a permit from the Corps. 33 U.S.C. § 1344. And in implementation of this provision, the Corps has adopted regulations requiring permit holders to restore disturbed streams. 33 C.F.R. §§ 332.1–.8. The stream mitigation proposal thus exceeds OSMRE's authority by reaching into an area of regulation within CWA authority as claimed by the Corps.

6. The Proposed Rule conflicts with federal agency interpretations of the CWA by prohibiting off-site restoration.

Proposed 30 C.F.R. § 780.28, 80 Fed. Reg. 44,610, does not allow any flexibility for off-site mitigation or other measures to compensate for potential stream impacts that are authorized under the CWA as currently interpreted by federal agency authorities. Ohio and other States allow off-site restoration if the applicant shows on-site restoration is not possible. Under the Proposed Rule, an operator cannot impact a stream unless it is restored on-site. States would no longer have the discretion to issue a mining permit by utilizing off-site restoration. Therefore, the Proposed Rule effectively eliminates an off-site restoration option for coal mines and places an unreasonable burden on the coal-mining industry and the States. In some instances, on-site restoration is a practical impossibility.

B. The Proposed Rule imposes unnecessary dual regulation of endangered species by creating requirements exceeding the Endangered Species Act.

The Proposed Rule significantly expands the current SMCRA performance standards with respect to fish and wildlife protection. It would require coal-mining operations to include in their permit applications and in their fish-and-wildlife protection and enhancement plans those species that are *not listed as threatened or endangered* but merely proposed for listing as threatened or endangered. *See* 80 Fed. Reg. 44,565, 44,620 (proposed July 27, 2015) (to be

codified at 30 C.F.R. § 784.16); *see also id.* at 44,665, 44,690. The current SMCRA performance standards include a prohibition on issuing a surface mine permit that would jeopardize the continued existence of any endangered or threatened species or result in destruction or adverse modification of critical habitat. 30 C.F.R. § 816.97. The Proposed Rule would expand these regulations by requiring that permit applications include information on species identified as "sensitive" by a state or federal agency. 80 Fed. Reg. 44,593 (proposed July 27, 2015) (to be codified at 30 C.F.R. § 779.20). Likewise, permit applications would be required to include information on *state* endangered species. *Id*. at 44,614 (to be codified at 30 C.F.R. § 783.20).

The Proposed Rule's expansion of the endangered and threatened species requirements of the performance standards is contrary to the Endangered Species Act. The purpose of the Endangered Species Act is "to provide 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 . . . ." 16 U.S.C. § 1531(b). The Endangered Species Act provides that agencies other than the Fish and Wildlife Service must seek to conserve endangered and threatened species, but does not provide authority regarding "sensitive" species that are not threatened or endangered. *Id*. States may opt, pursuant to their own statutes, to provide protections for sensitive species, but this attempt to expand SMCRA's performance standards to cover species not listed as threatened or endangered is unnecessary, costly, and inconsistent with the Endangered Species Act.

IV. The Proposed Rule Raises Grave Constitutional Questions By Exceeding The Powers Authorized To The Federal Government And Intruding On The Powers Reserved To The States And The People.

The Proposed Rule violates fundamental constitutional principles. For this reason, even if the Proposed Rule were not inconsistent with SMCRA, which as demonstrated above it is, it would not be entitled to any judicial deference under *Chevron U.S.A., Inc. v. Natural Res. Def., Council, Inc.*, 467 U.S. 387 (1984). *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) ("*SWANCC*") ("We thus read the statute as written to avoid the significant constitutional and federalism questions raised . . . and therefore reject the request for administrative deference."); *see also Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Chamber of Commerce v. FEC*, 69 F.3d 600, 605 (D.C. Cir. 1995). The Proposed Rule raises three serious constitutional issues.

First, the Proposed Rule raises serious separation-of-powers concerns. OSMRE acts as though it has the legislative authority to rewrite SMCRA. It does not. OSMRE's duty is to execute the law duly enacted by Congress through SMCRA—not to assume *lawmaking* power. The Proposed Rule's definition of "material damage to the hydrologic balance outside the permit area," for example, and its new requirements for assessing impacts to ephemeral streams are sweeping attempts at statutory amendment. Likewise, the rule targets longwall mining and mountain top mining through new federally imposed requirements that effectively will require the denial of permits and remove state primacy and control over the States' federally approved programs. These provisions, too, go well beyond OSMRE's statutory authority in SMCRA. Accordingly, "[w]ere [courts] to recognize the authority claimed by [OSMRE] in the [Proposed]

Rule, [they] would deal a severe blow to the Constitution's separation of powers." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014).

Second, the Proposed Rule raises serious Commerce Clause concerns. Concurring in the judgment in *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981), then-Justice Rehnquist rightly suggested that, through SMCRA, "there can be no doubt that Congress in regulating surface mining has stretched its authority to the 'nth degree.'" *Id.* at 311 (Rehnquist, J., concurring in the judgment). The Proposed Rule stretches SMCRA even further beyond the bounds of Congress' Commerce Clause authority.

Third, the Proposed Rule raises serious federalism concerns. Under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or the people." U.S. Const. amend. X. Among the rights reserved to the States is the authority to regulate land use and water resources. *SWANCC*, 531 U.S. at 174. In SMCRA, Congress expressed its intention to honor this mandated state primacy by granting the States "primary government responsibility" over surface mining and reclamation operations. 30 U.S.C. § 1201(f). The Proposed Rule violates the States' Tenth Amendment rights, as recognized in SMCRA, by displacing the States' authority to regulate intrastate land and water resources. Because of these federalism concerns, the Proposed Rule is an impermissible reading of SMCRA.

In sum, the Proposed Rule lacks any legal basis, violates the Constitution, and should be withdrawn.

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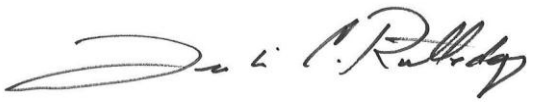

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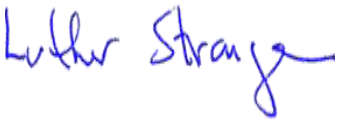

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