November 20, 2007

The Honorable Brent Wahlquist
Director, Office of Surface Mining Reclamation and Enforcement
Administrative Record, Room 252-SIB
1951 Constitution Avenue, NW
Washington, DC 20240

Attention Docket ID No. RIN 1029-AC04

RE: Excess Spoil, Coal Mine Waste, and Buffers for Waters of the United States

Dear Mr. Wahlquist:

I am writing on behalf of Trout Unlimited (TU) and its members to express strong opposition to the above-referenced rule proposed by the Office of Surface Mining Reclamation and Enforcement (OSM). TU is a national not-for-profit organization with over 150,000 members and volunteers in more than 400 chapters nationwide. TU has over 21,000 members and 100 chapters in the states most likely to be affected by this rule—West Virginia, Virginia, Pennsylvania, Kentucky, Tennessee, and Maryland. Our mission is to conserve, protect, and restore North America’s trout and salmon fisheries and their watersheds.

OSM indicates that its proposed rule is needed to clarify existing law. But to the extent that the proposed rule clarifies the law, it does so in a way that dramatically weakens protections for Appalachian streams. The proposed rule will allow mining operations that will permanently damage hundreds of miles of Appalachian headwater streams and their ecosystems. The current stream buffer zone (SBZ) rule precludes surface mining activities within 100 feet of an intermittent or perennial stream, except in certain special circumstances.¹ Such activities may be authorized within the 100 feet buffer zone only upon a finding that they will not cause or contribute to the violation of applicable water quality standards and will not adversely affect the water quality or other environmental resources of the stream.² The proposed rule would revoke the 100 foot buffer zone requirement with respect to most types of mining activities, including excess spoil fills, coal waste facilities (including refuse piles and slurry impoundments), sedimentation ponds, road crossings, and some forms of coal extraction.³ Instead of weakening the current rule, OSM should take steps to enforce it. To the extent the rule needs clarification,

¹ 30 C.F.R. § 816.57.
² Id.
OSM should maintain existing levels of protection. The proposed rule would damage water quality, harm aquatic ecosystems, and violate the Surface Mining Control and Reclamation Act (SMCRA).

TU is particularly concerned about the rule because of the organization’s focus on brook trout, the only trout native to the eastern United States. Brook trout populations, and the streams in which they live, have suffered significantly from over 200 years of environmental degradation. They are the only trout native to much of the eastern United States and can survive in only the coldest and cleanest water. Agriculture, logging, coal mining, acid rain, exotic species, and land development have dramatically reduced brook trout populations and, in some cases, driven those populations into the highest mountain headwaters of eastern watersheds—the very areas that are exposed to valley fill from mountaintop removal mining. Brook trout serve as excellent indicators of the overall health of the watersheds they inhabit; a decline in the brook trout population can indicate that the health of an entire ecosystem is at risk. Although they once thrived in every coldwater stream in the East, brook trout now occupy only a small fraction of their native range. The continued growth of mountaintop removal mining represents an unacceptable risk to the restoration and protection of these fish and streams they live in.

The protection and restoration of brook trout is a central organizational goal of TU, and gives TU a particularly strong interest in opposing the proposed rule. More than five years ago, TU staff and volunteers in the East created “Back the Brookie,” an initiative focused exclusively on protecting and restoring wild and native brook trout populations. As part of this initiative, TU participates in watershed-scale projects in the East focused on protecting and restoring brook trout. TU and its volunteers also engage in numerous other smaller-scale brook trout restoration projects.

TU is also a leading member of the Eastern Brook Trout Joint Venture (EBTJV), a consortium of federal and state fish and wildlife agencies, conservation organizations and academic institutions working together to develop a comprehensive restoration and education strategy to improve aquatic habitat and promote brook trout conservation and restoration. The EBTJV recently completed a comprehensive assessment of brook trout populations and a conservation strategy designed to focus federal, state, and private efforts to protect and restore brook trout. The EBTJV assessment found that intact stream populations of brook trout exist in only five percent of their historical watersheds; the vast majority of large rivers historically occupied by brook trout no longer support reproducing populations. Brook trout currently survive almost exclusively as fragmented populations, relegated to the extreme headwaters of streams.

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5 Id.
6 Id.
7 Id.
9 Id.
10 Id.
From TU’s perspective, the proposed rule change presents a tremendous risk for brook trout populations in Appalachia. Increased sedimentation, nutrient runoff and water temperatures have historically precipitated the decline of brook trout populations across the East. Implementation of the proposed rule will increase spoil fill from mountaintop removal mining activities, thus increasing the amount of sediment entering headwater streams and altering stream temperature and hydrology. These effects will both damage brook trout populations and impede the efforts of federal and state agencies, conservation groups and academic institutions to restore brook trout populations through the EBTJV.

Furthermore, OSM is proceeding with this rule change without adequate knowledge of its effects on the brook trout. The draft programmatic EIS on Mountaintop Mining/Valley Fills in Appalachia, prepared by the Environmental Protection Agency (EPA), fails entirely to analyze the potential effects of mountaintop removal mining and the rule on populations of brook trout or other wild trout species. In many areas endangered by mountaintop removal mining activities, there is a lack of good data regarding the status and structure of brook trout populations. Lack of data does not provide justification for subjecting these already imperiled fish to tremendous risk without adequately analyzing all environmental impacts.

In addition to the aforementioned negative effects that implementation of the proposed rule will have on brook trout, TU specifically opposes the proposed rule for several other key reasons:

(1) Appalachian streams and fish populations are already suffering from the negative environmental consequences of mountaintop removal mining activities;
(2) Implementation of the proposed rule will only accelerate the damage to headwater streams and will contribute to the impairment of aquatic ecosystems;
(3) The proposed rule violates SMCRA and runs contrary to that statute’s overriding purpose and legislative intent; and
(4) OSM’s justifications for the proposed rule are inadequate.

I. Appalachian Streams are Already Suffering

Appalachian streams and fish populations are already reeling from the cumulative effects of over two decades of destructive mountaintop removal mining activities. From 1985 to 2005, the Army Corps of Engineers authorized over 7,000 valley fills in central Appalachia for mountaintop removal mining and other strip mining operations. As a result, over 1,200 miles of Appalachian streams were buried or directly harmed by valley filling in this time span.

Much of this damaging activity has been permitted despite arguments that it violated the SBZ rule. By removing the buffer zone protection for most relevant mining activities, the proposed rule will allow even more burial of Appalachian streams in excess of the already alarming amounts allowed under the current SBZ rule. Mountaintop removal mining activities are

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11 Id.
impeding federal, state and non-governmental efforts to preserve and restore water quality, aquatic ecosystems, and native brook trout populations in the region; implementation of the proposed rule will only hinder future efforts.

The status of brook trout in West Virginia, where much of the impact of the proposed rule will occur, is particularly alarming. Populations in a majority of the state’s remaining brook trout sub-watersheds are greatly reduced, largely due to degraded water quality associated with a long history of poor land management, forestry, and mining. As a result, only one percent of native brook trout populations currently remain intact in West Virginia.\(^{14}\) In addition, acid mine drainage and acid deposition each impair approximately twenty-five percent of available brook trout habitat in the state.\(^{15}\) Implementation of the proposed rule would increase the allowable harmful mining activities that may occur within the traditionally protected 100 foot buffer zone of streams, and accelerate the damage to already reeling brook trout populations in West Virginia.

The destructive environmental effects of surface mining operations already cost U.S. taxpayers substantial funds every year. OSM dispenses public funds to restore lands and streams previously damaged by abandoned mines under the federally-funded Abandoned Mine Reclamation Program. Since 1979, when states began receiving abandoned mine land administrative grants for reclamation and restoration, the federal government has distributed over $3.5 billion dollars.\(^{16}\) In 2004 alone, West Virginia received $33.3 million in grant monies under the program; Pennsylvania received $43.7 million; Kentucky received $16.6 million; and Virginia received $6.3 million.\(^{17}\) Although some of the environmental effects of mountaintop removal mining are different than historic underground mining, mountaintop removal mining activities permanently alter the landscape and degrade streams. The potential cost of restoring these streams in the future is staggering. Adoption of the proposed rule is counterproductive, especially in light of the cumulative negative ecological and economic effects that mountaintop removal mining activities have wrought, and the amount of funding the federal government is spending to address its impacts.

II. Implementation of the Proposed Rule Will Further Damage Headwater Streams and Brook Trout Populations in Appalachian Watersheds

A. Impact on Headwater Streams and Brook Trout

The negative environmental impacts of mountaintop removal mining activities on headwater streams are well-recognized. In the words of EPA, “[m]ining operations and associated fills can directly impact headwaters by mining through or burying streams and eliminating existing terrestrial, riparian, and aquatic habitats…When streams are filled or mined all biota living in the footprint of the fill or in the mined area are lost.”\(^{18}\) Not surprisingly, valley


\(^{15}\) Id.


\(^{17}\) Id.

\(^{18}\) EPA DEIS, supra note 13, at III. D-2.
fill disposal methods have resulted in substantial losses of headwater streams and associated habitats throughout the Appalachian region.\textsuperscript{19}

The proposed rule is especially alarming because it categorically allows most mountaintop removal mining-related activities to occur within the currently-protected 100 foot buffer zone, including coal waste facilities, excess spoil fills, sedimentation ponds, road crossings and some forms of coal extraction.\textsuperscript{20} Eliminating the buffer zone protection will increase the number of streams that are filled and increase the number of streams that become degraded downstream of these fills.

The filling of headwater streams, and other mountaintop removal mining activities adjacent to those streams, creates a cascade of downstream effects. Headwater streams perform a variety of very significant ecological functions. They serve important functions for numerous species, including as refuge from temperature and flow extremes and competitors and predators; as spawning and rearing areas; as a rich source of food; and as migration corridors throughout watersheds.\textsuperscript{21} First-order headwaters also play a key role in shaping downstream water quality and quantity.\textsuperscript{22} According to EPA, headwater streams “make up a significant proportion of the overall stream length…and deserve protection.”\textsuperscript{23}

Headwater streams and small tributaries are critical for the persistence of brook trout populations in Appalachian watersheds. Such streams provide preferred spawning areas for brook trout because they protect larvae and juveniles from predators and competitors.\textsuperscript{24} The protection and recovery of small tributaries is absolutely necessary for the recovery of brook trout populations throughout watersheds in West Virginia and other affected states.\textsuperscript{25}

By revoking the buffer requirement and allowing more fill material in Appalachian streams, the proposed rule will increase sedimentation and in-stream water temperatures. In its draft EIS on Mountaintop Mining/Valley Fills in Appalachia, EPA explicitly recognized that surface mining operations impact headwaters and downstream water bodies by altering sedimentation patterns.\textsuperscript{26} EPA even cited to one scientific study that observed increased sediment deposition and smaller substrate particle sizes in areas downstream of mountaintop removal mining/valley fill sites in Kentucky when compared with reference streams.\textsuperscript{27} In another recent EIS analyzing the environmental effects of a proposed mountaintop removal

mining operation in Logan County, West Virginia, the Army Corps of Engineers acknowledged the devastating effects that such an operation would have on nearby streams.\textsuperscript{28} Involving eight valley fills, drainage ponds, mine pits and numerous access roads, the project is projected to permanently impact almost 48,000 linear feet of ephemeral and intermittent stream channels, and impound nearly 6,400 linear feet of such channels with sediment-laden water.\textsuperscript{29} This EIS provides just one example of the devastating impacts that sediment, introduced by mountaintop removal mining activities, can have on nearby streams. Also, in an extensive analysis of the impacts of mountaintop removal mining in \textit{U.S. News and World Report}, one federal mining expert stated that virtually every stream at a mountaintop removal site is inevitably contaminated with sediment from the mine, resulting in incalculable negative effects on nearby fish and wildlife.\textsuperscript{30} Mountaintop removal mining clearly increases sedimentation in headwater streams, as “soil disturbance from the mountaintop removal mine itself injects huge amounts of sediment into the stream ecosystems.”\textsuperscript{31}

When it first promulgated the current SBZ rule, OSM stated that such a rule was necessary “to protect streams from sedimentation and gross disturbances of stream channels caused by surface coal mining and reclamation operations.”\textsuperscript{32} If it replaces the current SBZ requirement with the proposed rule, OSM will be exposing streams to precisely these problems by categorically permitting most mountaintop removal mining activities to take place within the buffer zone.

The introduction of more sediment in headwater streams with the proposed rule is especially problematic because headwaters are relied upon by imperiled species like brook trout for habitat and refuge from temperature and flow extremes.\textsuperscript{33} Brook trout, in particular, are highly reliant on clean substrate for spawning and rearing, and a great deal of their decline is due to increased sedimentation and water temperatures.\textsuperscript{34} Increased sediment loads can cause fish mortality by “clogging gills and opercular cavities” and also create distributional changes such as “avoidance behavior, reduced feeding and growth, respiratory impairment, and general physiological stress that can lead to a reduced tolerance to diseases and toxicants.”\textsuperscript{35} The negative effects of increased sedimentation on brook trout populations in particular are well-documented in the scientific literature.\textsuperscript{36} The increased sediment pollution that will result from

\textsuperscript{29} Id.
\textsuperscript{32} 48 Fed. Reg. 30312.
\textsuperscript{33} Meyer et al., supra note 21.
\textsuperscript{34} Eastern Brook Trout Joint Venture, supra note 4.
\textsuperscript{35} Lilly, supra note 31, at 728-29.
the proposed rule’s expansion of permissible activities near streams thus poses a clear, formidable and direct risk to brook trout.

Finally, it should be noted that in its analysis of the environmental effects of mountaintop removal mining activities in both its draft and final environmental impact statements, EPA fails entirely to mention potential impacts upon brook trout. And while the EBTJV has made significant strides in the collection of data regarding brook trout populations throughout the East, there is still a dearth of data regarding the status of populations in many of the areas impacted by mountaintop removal mining activities, particularly in West Virginia. EPA’s failure to consider the effects of the rule on brook trout populations in either relevant EIS is a failure to consider an important aspect of the rule’s potential environmental effects. OSM therefore should not even consider proceeding with a rule change until the appropriate federal agencies consider the potential effects on particularly vulnerable fish populations such as brook trout, and until the responsible state and federal fish and wildlife agencies have completely assessed the status of brook trout populations in all potentially impacted areas.

B. Other Negative Impacts of the Proposed Rule

The proposed rule would also have disastrous consequences in areas downstream of where mining activities and valley fill actually occur. EPA has extensively documented the negative effects of mountaintop removal mining activities on downstream aquatic communities, including the loss of upstream energy from buried stream reaches, changes in downstream water chemistry, alterations to thermal and flow regimes, changes in downstream sedimentation patterns, and negative effects on downstream biota. Specifically, streams and rivers impacted by mountaintop removal mining activities are characterized by an increase in mineral content and less diverse, more pollutant-tolerant macroinvertebrates and fish species. Brook trout populations are also threatened by the introduction of new, more pollutant-tolerant fish species—non-native fish are ranked as the highest biological threat to brook trout.

Mountaintop removal mining activities can also cause in-stream concentrations of selenium that exceed relevant aquatic wildlife standards. Fish and birds are very sensitive to selenium contamination in aquatic environments. As exposure increases, toxic effects can range from degradation of the immune system to embryo, juvenile and adult mortality. Bioaccumulation in food chains may also result in the transfer of toxic levels of selenium to upper trophic level species, including humans.

(2004) (noting that reductions in brook trout population condition and density were related to increased fine sediment levels).
37 See generally Eastern Brook Trout Joint Venture, supra note 14.
38 EPA DEIS, supra note 13, at III. D-4-9.
40 Eastern Brook Trout Joint Venture, supra note 14, at 3.
42 Id.
Finally, implementation of the proposed rule would result in negative economic consequences, particularly in West Virginia, which is highly dependent on its natural resources and scenic beauty to promote hunting and fishing activities to visitors. In 1998 alone, hunting and fishing license sales generated over $15.5 million in revenue.\textsuperscript{43} By accelerating the damage to Appalachian streams and fish populations, the proposed rule would potentially reduce tourism dollars associated with fishing activities in West Virginia as well as the other affected states.

In sum, OSM’s proposed rule, which would allow an increase in certain types of mining activities within 100 feet of Appalachian streams, will severely impair headwater streams and fish populations—especially the Eastern brook trout. If it goes forward, the new rule will decrease aquatic biodiversity throughout Appalachian watersheds, increase selenium levels in streams, and negatively impact important economic revenue from fishing activities.

III. The Proposed Rule Violates SMCRA

A. The Proposed Rule Contradicts Numerous Provisions of SMCRA

When OSM first promulgated the current SBZ rule in 1983, it struck the appropriate balance between mining activities and environmental protection necessary to achieve the environmental performance standards required by SMCRA. While the current rule has not always been enforced to the degree it should be, OSM made the correct initial decision under SMCRA in 1983 by reserving a 100 foot buffer zone to protect streams near mountaintop removal mining activities. The current rule strictly limits, but does not totally prohibit, mining activities within the buffer zone. Given the destructive effects of such activities, the SBZ rule represents the minimum level of protection required by SMCRA’s key environmental protection standards. The proposed rule, which rolls back key protections afforded under the current rule, is inconsistent with several of SMCRA’s environmental performance standards, including the statutory mandate that (1) mining operations “minimize the disturbances to the prevailing hydrologic balance at the mine-site…and to the quality and quantity of water in surface and ground water systems,” and (2) “minimize disturbances and adverse impacts of the operation of fish, wildlife and related environmental values.”\textsuperscript{44} Under SMCRA, treatment and disposal of debris from mining operations must also be done “in a manner designed to prevent contamination of ground or surface waters.”\textsuperscript{45} Implementation of the proposed rule would violate each of these key SMCRA requirements.

First, by repudiating the buffer zone requirement, the proposed rule directly conflicts with SMCRA’s express mandate to minimize disturbances to the hydrologic balance at the mining site and to minimize disturbances to the quality and quantity of water in streams. By permitting a broad range of mining activities within the buffer zone, the proposed rule promotes the introduction of excess fill and mining overburden into streams, potentially maximizing disturbances to the hydrologic balance and to the quality and quantity of water in streams near mining sites. Secondly, removing the buffer zone requirement with respect to the proposed laundry-list of mining activities will dramatically increase impacts on fish, wildlife and other

\textsuperscript{43} EPA DEIS, \textit{supra} note 13, at III. T-4.
\textsuperscript{44} 30 U.S.C. §§ 1265(b)(10)(B)i), (b)(24).
\textsuperscript{45} 30 U.S.C. § 1265(b)(14).
environmental values when compared with the current restrictions, which operate to provide a clear, delineated buffer zone within which most mining activities may not take place. Finally, the proposed rule would allow increased contamination of surface and ground waters when compared with the current SBZ rule by allowing more mining activities within 100 feet of streams.

SMCRA also requires regulatory authorities to insure that “no damage will be done to natural watercourses” when granting a surface mining permit that contains a mountaintop removal variance. Put simply, removing the buffer zone requirement with respect to excess spoil fills, coal waste facilities (including refuse piles and slurry impoundments), sedimentation ponds, road crossings, and some forms of coal extraction will certainly damage natural watercourses, in contradiction to SMCRA’s express provision. Furthermore, federal courts consistently strike down administrative narrowing of clear statutory mandates. The “no damage” mandate of SMCRA is extremely clear. OSM should not be allowed to narrow SMCRA’s statutory mandate by providing that the buffer zone requirement does not apply to certain major surface mining activities.

B. The Proposed Rule Runs Contrary to SMCRA’s Purpose and Legislative Intent

SMCRA expressly states that “surface and underground coal mining operations…should be conducted in an environmentally sound manner.” Wholesale exemption of certain types of harmful surface mining activities (including excess spoil fills, sedimentation ponds, coal waste facilities, road crossings and some forms of coal extraction) from the 100 foot buffer zone requirement does not constitute surface coal mining “in an environmentally sound manner.” When compared with the proposed rule, the current rule, which severely limits the circumstances under which most mining activities can take place near streams, represents a much more environmentally sound approach.

One of the express purposes of SMCRA is “to establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations” and “to assure that surface coal mining operations are so conducted to protect the environment.” Revoking the buffer zone requirement with respect to major mining activities violates the purposes of the Act by stripping away protections for streams and waterways in Appalachia.

Relevant legislative history furthermore indicates that Congress, in passing SMCRA, intended to limit valley fills to the absolute minimum extent possible. A key House report involved in the initial passage of the legislation recognizes that “[s]erious problems are presented...by operations using...valley fill. For such operations, it is uncertain whether spoil can be placed in an environmentally sound manner.” Certainly the current SBZ rule more

47 Sierra Club v. EPA, 129 F.3d 137, 140 (D.C. Cir. 1997). See also North Carolina v. FERC, 112 F.3d 1175, 1186 (4th Cir. 1997); NRDC v. EPA, 824 F.2d 1211 (D.C. Cir. 1987); Minnehaha Creek Watershed Dist. v. Hoffman, 597 F.2d 617, 624-27 (8th Cir. 1979).
adequately addresses this concern than the proposed rule. In addition, Congress expressly indicated that "strong spoil placement standards are needed to insure that there will be no offsite damages." When comparing the two rules, the current SBZ rule comports more closely to the original legislative intent, as it more effectively insures that there are no offsite damages in streams within 100 feet of mining activities.

IV. OSM’s Justifications For the Proposed Rule are Inadequate

OSM’s justifications for the proposed rule change are inadequate. While OSM claims that the proposed rule change is an attempt to clarify the requirements to ensure that regulated parties “have a common understanding of what the stream buffer zone rules do and do not require, consistent with underlying statutory authority,” this explanation does not hold water. Any need to clarify the rule simply does not justify the proposal’s weakening of the rule. To the extent the rule needs clarification, it would be far more consistent with SMCRA to clarify the rule in a way that maintains or extends existing protections.

While OSM claims that it and the state regulatory authorities charged with implementing SMCRA’s provisions have consistently applied the SBZ rule since 1983, it insists that clarification is necessary in light of the confusion stemming from conflicting federal court pronouncements on the rule, including the Fourth Circuit’s ruling in Kentuckians for the Commonwealth, Inc. v. Rivenburgh. But the reality is that OSM can still enforce the current stream buffer requirements within the parameters of the court’s decision.

Rivenbergh merely rejected a federal district court’s interpretation of SMCRA that completely prohibited the disposal of overburden waste from mining activities in streams. In Rivenburgh, the Fourth Circuit acknowledged that SMCRA “recognizes the possibility of placing excess spoil material in waters of the United States.” Contrary to what OSM suggests, at no point does the Fourth Circuit indicate that SMCRA prohibits enforcement of the current SBZ rule. It would be completely consistent with Rivenburgh for OSM to enforce the 100 foot buffer zone requirement so that excess spoil material might still be introduced into intermittent and perennial streams, but only in a narrow set of circumstances if the rule’s criteria are met. OSM can keep the current SBZ rule under Rivenburgh as long as it does not interpret the rule as completely prohibiting any introduction of mining waste overburden into Appalachian streams. Rather than adopting the new rule, OSM should take a closer look at Rivenburgh and implement a strategy for enforcing the current rule within the meaning of the Fourth Circuit’s decision. Rather than expanding the types, amount and intensities of mountaintop removal mining activities allowed near streams, OSM should make clear that the SBZ protections apply, and that

51 Id. at 688-89.
53 Id.
54 Id.
55 Id.
57 Id. at 443.
only the most-narrow range of mountaintop removal mining activities are allowed in and near streams if clear environmental protection criteria are met.

OSM also claims that the existing SBZ rule “manifests an assumption that maintenance of an undisturbed 100 foot buffer around perennial and intermittent streams is the best technology currently available (BTCA) to achieve the sediment control and fish and wildlife protection requirements” of SMCRA, when in reality the concept of BTCA is “inherently flexible” and appropriate measures will vary site-to-site and change over time in conjunction with advances in technology and scientific knowledge.\(^5^8\) Indeed, BTCA may be an inherently flexible concept, but broad protections, such as the 100 foot buffer zone requirement, are appropriate when necessary to meet the mandates of the statute. BTCA can still be flexibly applied to activities outside the stream buffer zone, and as a means of protecting streams in those narrow instances where activities are allowed in the buffer zone.

Basing most of its justification for the proposed rule off of one environmental performance standard, OSM argues that the fact that SMCRA specifically permits disposal of excess spoil in seeps and springs in certain circumstances,\(^5^9\) and that the definition of “intermittent stream” can encompass both springs and seeps indicates that SMCRA contemplates the placement of excess spoil in intermittent and perennial streams.\(^6^0\) But the fact that Congress may have envisioned the placement of excess spoil in certain streams under certain circumstances does not necessarily mean that Congress expected this to be the norm, and it does not justify revoking the 100 foot buffer zone requirement, which aims to minimize harm to streams.

Finally, OSM relies on two sections of the statute that govern the construction of coal refuse piles not used as dams or embankments, concluding that because these sections do not explicitly prohibit the construction of refuse piles in watercourses, they may be constructed in waters of the United States.\(^6^1\) But SMCRA could just as easily be interpreted as not allowing refuse piles in watercourses, because the language in the two sections does not specifically permit such construction. It is just as feasible to conclude that Congress intended that such coal refuse piles not be allowed in watercourses.

V. Conclusion

Appalachian streams and fish populations are already reeling from decades of destructive mountaintop removal mining activities. A rule change that makes it easier for surface coal mining operations to damage adjacent mountain streams and rivers is unacceptable from an ecological, economic, and legal standpoint. Implementation of the proposed rule will only accelerate damage to Appalachian streams and fish populations, working against the efforts of state and federal fish and wildlife agencies and conservation organizations such as TU to protect

\(^{58}\) 72 Fed. Reg. 48890, 48902.

\(^{59}\) SMCRA requires that excess spoil disposal sites “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).

\(^{60}\) 72 Fed. Reg. 48890, 48892-93.

and restore riparian habitat and imperiled species like the brook trout. The proffered justifications for the proposed rule are inadequate, and the proposed rule runs counter to several express provisions of SMCRA. For all of these reasons, TU strongly opposes this rule change—its adoption would directly contradict our mission to conserve, protect and restore North America’s coldwater fisheries and their watersheds.

Thank you for the opportunity to comment.

Sincerely,

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