

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL PARKS CONSERVATION
ASSOCIATION
1300 19th Street, NW Suite 300
Washington, DC 20036

Plaintiff,

v.

DIRK KEMPTHORNE, in his official
capacity as Secretary of the United States
Department of the Interior,
1849 C Street, NW, Washington, D.C.
20240,

BRENT WAHLQUIST, in his official
capacity as Director of the United States
Office of Surface Mining Reclamation
and Enforcement,
1951 Constitution Ave., NW,
Washington, D.C. 20240, and

STEPHEN L. JOHNSON, in his official
capacity as Administrator of the United
States Environmental Protection Agency,
Ariel Rios Bldg., 1200 Pennsylvania
Ave., NW, Washington, D.C. 20460,

Defendants

Civil Action No. 1:09-cv-00115

**AMENDED COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

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COMPLAINT

NATURE OF ACTION

1. This action challenges the promulgation on 12 December 2008 by the United States Office of Surface Mining Reclamation and Enforcement (“OSM”) of the Final Rule for “Excess Spoil, Coal Mine Waste, and Buffers for Perennial and Intermittent Streams,” 73 Fed. Reg. 75,814 (12 Dec. 2008) (“stream buffer zone” or “SBZ” “Final Rule”). This action also challenges the written determination of the United States Environmental Protection Agency (“EPA”), issued on 2 December 2008, concurring in OSM’s promulgation of the SBZ Final Rule. The rule took effect on 12 January 2009.

2. OSM’s action reverses the agency’s long-standing policy and stream buffer zone rule, in effect since 1983 (“1983 SBZ rule”). The 1983 SBZ rule prohibited disturbances in or within 100 feet of a perennial or intermittent stream by surface mining activities (“100-foot buffer” or “buffer” “requirement”) unless the regulatory authority specifically authorized surface mining activities closer to, or through, such a stream, and only upon finding that the surface mining activities would not cause or contribute to the violation of state or federal water quality standards, and would not adversely affect the water quantity and quality or other environmental resources of the stream. 30 C.F.R. §§816.57(a)(1), 817.57(a)(1).

3. The SBZ Final Rule significantly alters the 1983 SBZ rule by, inter alia, exempting from the 100-foot buffer requirement valley fills and other mining activities in or adjacent to streams merely upon a showing by the operator that avoidance is not reasonably possible. See SBZ Final Rule §§780.25(d) and 784.16(d)(coal mine waste impoundments and refuse piles); §§780.35(a)(3) and 784.19(a)(3)(disposal of excess spoil); §§780.28(a)-(e), 784.28(a)-(e),

816.57(a),(b), and 817.57(a),(b)(mining activities in or adjacent to perennial or intermittent streams); see also 73 Fed. Reg. 75,876-85. The Rule further eliminates the requirement that the regulatory authority must find that such activities do not cause or contribute to violations of water quality standards and do not adversely impact water quantity and quality and the environmental values of the stream. §§816.57(a),(b); 817.57(a),(b); 73 Fed. Reg. 75,818, 75,883-85.

4. The SBZ rule change will have significant negative effects on water quality and stream health by condoning mining operations that have already devastated Appalachian streams in part through lack of enforcement of the 1983 SBZ rule. Mountaintop mining operations that occurred between 1992 and 2002, including valley fills and other permitted activities, directly impacted 1,208 miles of streams in the coal fields of central Appalachia. See OSM, Excess Spoil Minimization Stream Buffer Zones, Final Environmental Impact Statement at IV-145 (Sept. 2008) [hereinafter SBZ FEIS]; U.S. EPA, Mountaintop Mining/Valley Fills in Appalachia Draft Programmatic Environmental Impact Statement, at IV B-I (2003) [hereinafter MTM/VF DEIS]. Between 1985 and 2001, valley fills, in particular, annihilated an estimated 724 stream miles. SBZ FEIS at IV-145; see also MTM/VF DEIS at B-II. EPA predicted in 2003 that if mining operations continue at these rates, an additional 4.1% of the streams in central Appalachia would suffer direct impacts over the course of ten years, and that an additional 724 miles of headwater streams would be lost by 2013. SBZ FEIS at IV-145; 73 Fed. Reg. 75,875.

5. The changes to the 1983 stream buffer zone rule will only exacerbate these conditions, in violation of the environmental protection provisions set forth in the Surface Mining Control

and Reclamation Act of 1977 (“SMCRA”), 30 U.S.C. §1201 et seq., and the Clean Water Act, 33 U.S.C. §1251 et seq. (“CWA”).

6. The change in the SBZ rule also constitutes agency “action” that “may affect” threatened and endangered species and critical habitat of aquatic species, within the meaning of the Endangered Species Act (“ESA”), 16 U.S.C. §§1531-1544, triggering the requirement to initiate formal consultation with the United States Fish and Wildlife Service (“FWS”) before promulgating the rule. See 50 C.F.R. §402.14(a)(requirement for formal consultation); id. §402.02(b)(defining agency action expressly to include the promulgation of rules).

Additionally, under SMCRA regulations, no surface mining activity shall be conducted which is likely to jeopardize the continued existence of endangered or threatened species or which is likely to result in the destruction or adverse modification of designated critical habitats of such species in violation of the ESA. 30 C.F.R. §816.97(b).

7. OSM unlawfully refused to initiate formal consultation, relying on an invalid biological opinion issued by the FWS in September 1996 to evade its legal obligations. FWS, Formal Section 7 Biological Opinion and Conference Report on Surface Coal Mining and Reclamation Operations Under the Surface Mining Control and Reclamation Act of 1977 (24 Sept. 1996) [hereinafter 1996 BiOp], *available at* <http://www.osmre.gov/guidance/docs/biologicalopinion.pdf>.

8. In the 1996 BiOp, the FWS summarily concluded that SMCRA and its regulations provided a sufficient level of protection such that their “requirements will avoid jeopardizing any listed species or adversely modifying any designated critical habitat in violation of the [ESA].” 1996 BiOp at 10. The 1996 BiOp has been wholly inadequate to prevent jeopardy to threatened and endangered species, as evidenced by the new listings of species and designation

of critical habitat and the numerous scientific studies since the issuance of the 1996 BiOp showing the adverse impacts on listed species from surface mining. Moreover, the conclusion in the 1996 BiOp was premised on the Act and regulations in place at the time, including the 1983 SBZ rule. Because the SBZ Final Rule changes these assumptions, OSM's reliance on the BiOp to evade its formal consultation requirements under 50 C.F.R. §§402.14(a) and 402.02 is unlawful. Likewise, EPA was obligated to initiate formal consultation with the FWS before concurring in OSM's promulgation of the rule, which it failed to do.

9. OSM and EPA's failure to initiate formal consultation before promulgating and concurring in, respectively, the SBZ Final Rule violates the agencies' procedural and substantive duties under section 7(a)(2) of the ESA, 16 U.S.C. §1536(a)(2), and under the SMCRA regulations, 30 C.F.R. §816.97(b). Their actions constitute violations of the ESA within the meaning of the citizen suit provision, 16 U.S.C. §1540(g)(1), and are also arbitrary, capricious, an abuse of discretion, and otherwise inconsistent or not in accordance with law in violation of SMCRA, 30 U.S.C. §1276, and the Administrative Procedure Act ("APA"), 5 U.S.C. §706.

10. Plaintiff asks the Court to: (1) declare that the SBZ Final Rule is in violation of the ESA, 16 U.S.C. §1536(a)(2), and is arbitrary and capricious, an abuse of discretion, and otherwise inconsistent or not in accordance with law in violation of the APA, 5 U.S.C. §706, and SMCRA, 30 U.S.C. §1276; (2) declare that OSM violated SMCRA, 30 U.S.C. §§1202(a), (d), 1265(b)(10), (b)(22), (b)(24), (c)(4), and 1266(b)(11); (3) declare that OSM violated §7(a)(2) of the ESA, 16 U.S.C. §1536(a)(2), by failing to initiate consultation with the FWS to insure that the SBZ rule change would not jeopardize listed species; (4) declare that EPA's written concurrence under SMCRA §501, 30 U.S.C. §1251, violated §§101, 303 of the CWA,

33 U.S.C. §§1251, 1313 and implementing regulations, 40 C.F.R. §§131.5, 131.12, 230.10(b)-(c), and §7(a)(2) of the ESA, 16 U.S.C. §1536(a)(2); (5) declare that the 1996 BiOp is invalid; (6) vacate the SBZ Final Rule; (7) vacate EPA's concurrence in the SBZ Final Rule; (8) vacate the 1996 BiOp; (9) award to the Plaintiff its costs and expenses of this action, including reasonable attorneys' fees; and (10) grant such other relief as the Court deems just and proper.

JURISDICTION AND VENUE

11. This action arises under SMCRA, 30 U.S.C. § 1201 et seq., the CWA, 33 U.S.C. §1251 et seq., the ESA, 16 U.S.C. §1531 et seq., and the APA, 5 U.S.C. §700 et seq. This Court has jurisdiction over the action pursuant to 28 U.S.C. §1331 (federal question jurisdiction), 28 U.S.C. §2201 and §2202 (declaratory and injunctive relief), 16 U.S.C. §1540(g)(1) (ESA citizen suit), and 30 U.S.C. §1276(a) (1) (SMCRA judicial review). Venue is proper in this Court pursuant to 30 U.S.C. §1276(a)(1), 5 U.S.C. §703, and 28 U.S.C. §1391(e).

PARTIES AND STANDING

12. Plaintiff National Parks Conservation Association ("NPCA") is an independent, nonprofit, membership organization that was founded in 1919. It is the only such organization specifically dedicated to the protection of the country's national park system. NPCA's Southeast Regional office in Knoxville works to protect National Park Service ("NPS") managed lands throughout the southeast, including the Big South Fork National River and Recreation Area ("NRRA") in Tennessee.

13. Because of its biodiversity, the Big South Fork NRRA provides habitat for world-class freshwater mussel assemblage and is an important refuge for many endangered mussel species. The Big South Fork NRRA has more extant federally endangered fish and imperiled mussel species than any other park service unit in the country, and these species are at risk from

destructive coal mining practices in the headwaters of the Big South Fork NRRRA. NPCA is working to protect the park's aquatic diversity from threats from active coal mining.

14. Over 5,400 of the NPCA's 337,000 members live in Tennessee; more than 11,000 members live in Virginia; and approximately 3,000 and 1,300 members live in Kentucky and West Virginia, respectively. NPCA's Southeast Regional office serves Tennessee and Kentucky, and its Mid-Atlantic Regional Office, located in Arlington, Virginia, serves Virginia and West Virginia. Plaintiff's Mid-Atlantic Regional Office works to protect the Gauley River National Recreation Area and the New River Gorge National River in West Virginia that are also threatened by surface mining, including mountaintop removal mining.

15. Plaintiff's members live, recreate, use, and/or enjoy the National Park Service managed lands near mining areas. Their use and enjoyment of these areas is reduced by mining activities. NPCA's members will suffer injuries to their aesthetic, recreational, environmental and/or economic interests by stream filling and disturbances related to mining activities that are authorized pursuant to the SBZ Final Rule. These activities devastate the landscape, bury miles of streams, obliterating all life within the stream, and result in downstream pollution and harm to aquatic species, including federally listed mussel and fish species in the Big South Fork NRRRA and other Appalachian river systems.

16. Plaintiff NPCA participated in the administrative proceedings by submitting oral and written comments to OSM and EPA on the proposed SBZ rule change. See Letter to OSM from Southern Environmental Law Center ("SELC") (23 Nov. 2007); Letter to EPA from SELC (21 Nov. 2008). On 15 January 2008, Plaintiff, along with other petitioners represented by SELC, also submitted a petition to OSM and FWS requesting that OSM carry out its duty to reinstate consultation based on triggers set forth in the ESA regulations, which OSM declined

to do. See Petition Before the U.S. Fish & Wildlife Service and the Office of Surface Mining Reclamation and Enforcement to Reinitiate Formal Consultation on All Surface Mining Activities Conducted Under the Authority of the Surface Mining Control and Reclamation Act of 1977 [hereinafter Petition to Reinitiate](Exhibit 1 to initial Complaint filed 16 January 2009 (“initial Complaint”).

17. Plaintiff sent the defendants OSM and EPA written notice, dated 12 December 2008, of defendants’ ESA violations for failure to initiate formal consultation with the FWS before promulgating and concurring in, respectively, the SBZ Final Rule. In the written notice to OSM, Plaintiff also notified OSM that its reliance on the 1996 BiOp was unlawful and did not satisfy OSM’s duty to consult under §7(a)(2), 16 U.S.C. §1540(a)(2). According to certified mail receipts, defendants received written notice on 15 December 2008. Pursuant to 16 U.S.C. §1540(g)(2), Plaintiff waited 60 days before filing this Amended Complaint.

18. The initial Complaint was brought against Defendant Dirk Kempthorne, in his official capacity as then-Secretary of the Interior. OSM is part of the Department of the Interior. The Secretary has the ultimate authority under §501(b) of SMCRA, 30 U.S.C. §1251(b), to issue rules for surface coal mining activities. The Secretary of the Interior is now Ken Salazar.

19. The initial Complaint was brought against Defendant Brent Wahlquist, in his official capacity as then-Director of OSM. In enacting SMCRA, Congress created OSM “to administer the programs for controlling surface coal mining operations which are required by this Act.” 30 U.S.C. §1211. OSM has the authority to “publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions” of SMCRA. 30 U.S.C. §1211(c). Mr. Wahlquist caused the SBZ Final Rule to be promulgated on 12

December 2008, with an effective date of 12 January 2009. Glenda Owens is now the Acting Director of OSM.

20. The initial Complaint was brought against Defendant Stephen Johnson, in his official capacity as then-Administrator of EPA. The Administrator is charged by §501(b) of SMCRA, 30 U.S.C. §1251(b)[incorporating §501(a)(B)], with making a concurrence determination before the Secretary of the Interior or OSM may promulgate any regulation that relates to air or water quality standards. The Administrator is also charged with administering and carrying out the purposes and provisions of the CWA, 33 U.S.C. §1251 et seq. On 2 December 2008 Mr. Johnson concurred in the promulgation of the SBZ Final Rule. The Administrator of EPA is now Lisa Jackson.

FACTUAL AND STATUTORY BACKGROUND

The Surface Mining Control and Reclamation Act of 1977

21. Under SMCRA, OSM has responsibility for “the establishment of appropriate standards to minimize damage to the environment . . . and to protect the health and safety of the public.” 30 U.S.C. §§ 1201(d), 1211(c). SMCRA establishes various requirements intended to minimize impacts on the environment from mining operations. These include, among others, requirements that mining operations will “minimize disturbances and adverse impacts . . . on fish, wildlife, and related environmental values,” 30 U.S.C. §1265(b)(24); will “minimize the disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas” and minimize disturbances “to the quality and quantity of water in surface and ground water,” 30 U.S.C. §1265(b)(10); and that “no damage will be done to natural watercourses,” 30 U.S.C. §1265(c)(4)(D). These and other requirements apply to the disposal of excess rock that

is created from surface mining operations, typically referred to as “excess spoil,” and to coal mine waste.

22. Additionally, under SMCRA regulations, “[n]o surface mining activity shall be conducted which is likely to jeopardize the continued existence of endangered or threatened species . . . or which is likely to result in the destruction or adverse modification of designated critical habitats of such species in violation of the [ESA].” 30 C.F.R. §816.97(b).

The Endangered Species Act

23. The ESA was enacted in 1973, in order 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). Section 7(a)(2) of the ESA requires administering agencies to seek consultation to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of designated critical habitat for the species. 16 U.S.C. §1536(a)(2). In making this determination, agencies must “use the best scientific and commercial data available.” *Id.*

24. Formal consultation must take place for agency “actions” that “*may* affect listed species or critical habitat.” 50 C.F.R. §402.14(a)(emphasis added). Under the ESA regulations, “[a]ction means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies” including “the promulgation of regulations,” 50 C.F.R. §402.02(b), and actions “directly or indirectly causing modifications to the land, water, or air,” 50 C.F.R. §402.02(d).

25. During formal consultation the FWS must formulate and provide the federal agency with its biological opinion regarding whether the action, along with cumulative effects, is likely to “jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat.” 50 C.F.R. §§402.14(h), 402.14(g)(4). The biological opinion is required to include “[a] summary of the information” that it is based upon, “[a] detailed discussion of the effects of the action on listed species or critical habitat,” and any “reasonable and prudent alternatives” to the action. 50 C.F.R. §402.14(h). If the FWS finds that it is likely to jeopardize a species or its habitat, the opinion is referred to as a “jeopardy biological opinion”; if the FWS determines that the action will not likely jeopardize a species or its habitat, then the opinion is a “no jeopardy opinion.” *Id.* §402.14(h)(3).

26. Additionally, a federal agency must reinitiate formal consultation with the FWS “where discretionary Federal involvement or control over the action has been retained or is authorized by law” and at least one of the following four criteria is met:

- (a) If the amount or extent of taking specified in the incidental take statement is exceeded;
- (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
- (c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or
- (d) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. §402.16.

The Clean Water Act

27. The purpose of the CWA “is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” CWA §101(a), 33 U.S.C. §1251(a). To that end, the Act establishes water quality standards in order to protect public health and water supplies,

the propagation of fish, shellfish, and wildlife, and to provide for recreation in and on the waters. Id. §1251(a)(2); see generally CWA §303, 33 U.S.C. §1313. The Act charges EPA with the duty to approve state standards or disapprove and promulgate federal standards, which must ensure, at a minimum, that existing instream water uses and the level of water quality necessary to protect those uses shall be maintained and protected. Id.; 40 C.F.R. §§131.5, 131.12. The Act also sets as a national goal the elimination of the discharge of pollutants into waters of the United States, CWA §101(a)(1), 33 U.S.C. §1251(a)(1), and prohibits discharges that will jeopardize the continued existence of threatened or endangered species. See, e.g., 40 C.F.R. § 230.10(b)-(c)(restrictions on discharge of dredged or fill material).

The Stream Buffer Zone Rule

28. The 1983 SBZ rule provides: “No land within 100 feet of a perennial stream or an intermittent stream shall be disturbed” by underground or surface mining activities, “unless the regulatory authority specifically authorizes . . . mining activities closer to, or through, such a stream. The regulatory authority may authorize such activities only upon finding that . . . mining activities will not cause or contribute to the violation of applicable State or Federal water quality standards and will not adversely affect the water quantity and quality or other environmental resources of the stream.” 30 C.F.R. §§816.57(a)(1), 817.57(a)(1).

29. The rule was adopted to carry out the environmental protection requirements set forth in SMCRA. Under the 1983 SBZ rule, filling or mining through streams by means such as valley fills and heads-of-hollow fills, and placement of mine waste disposal facilities, could only be permitted upon the required finding that they would not violate water quality standards or adversely affect the water quantity and quality or other environmental resources of the stream. 30 C.F.R. §§ 816.57(a)(1), 817.57(a)(1). The SBZ Final Rule expressly excludes

excess spoil fills and coal mine waste disposal facilities in a perennial or intermittent stream from the buffer requirement if avoidance “is not reasonably possible,” §§780.25(d); 780.35(a)(3), 784.16(d); 784.19(a)(3); and it requires no finding that such activities will not adversely affect the water quantity and quality and related environmental resources of the stream. See 73 Fed. Reg. 75,818, 75,853.

30. The SBZ Final Rule significantly changes the 1983 rule and will result in significant harm to streams and aquatic life. As Judge Haden, Chief Judge of the District Court for the Southern District of West Virginia, stated:

When valley fills are permitted in intermittent and perennial streams, they destroy those stream segments. The normal flow and gradient of the stream is now buried under millions of cubic yards of excess spoil waste material, an extremely adverse effect. If there are fish, they cannot migrate. If there is any life form that cannot acclimate to life deep in a rubble pile, it is eliminated. No effect on related environmental values is more adverse than obliteration. Under a valley fill, the water quantity of the stream becomes zero. Because there is no stream, there is no water quality.

Bragg v. Robertson, 72 F. Supp. 2d 642, 661-62 (S.D. W. Va. 1999). Judge Haden found that the 1983 SBZ rule prohibited the burial of intermittent and perennial streams under valley fills of excess mining spoil. Id. Judge Haden’s decision was overturned on jurisdictional grounds, but the substance of his ruling was not addressed by the Court of Appeals. See Bragg v. W. Va. Coal Ass’n, 248 F.3d 275 (4th Cir. 2001).

The 1996 Biological Opinion

31. On 21 March 1995, the OSM made a request to the FWS for formal ESA §7 consultation regarding “the approval and conduct of surface coal mining and reclamation operations under State and Federal regulatory programs adopted pursuant to SMCRA where such operations may adversely affect threatened or endangered species.” 1996 BiOp at 3.

32. “Surface mining” under SMCRA includes all above-ground mining activity, including above-ground impacts of underground mines, as well as coal processing facilities located on site of mining operations. See generally 30 U.S.C. §1201 et seq.

33. On 24 September 1996, after consulting with the OSM, the FWS issued a “no jeopardy” biological opinion, the 1996 BiOp, as well as an Incidental Take Statement (“ITS”). See 1996 BiOp. In the mere 15-page BiOp and ITS, the FWS summarily concluded that SMCRA and its regulations provided a sufficient level of protection such that their “requirements will avoid jeopardizing any listed species or adversely modifying any designated critical habitat in violation of the [ESA].” Id. at 10. The FWS specifically found that “surface coal mining and reclamation operations conducted in accordance with properly implemented Federal and State regulatory programs under SMCRA are not likely to jeopardize the continued existence of listed or proposed species, and are not likely to result in the destruction or adverse modification of designated or proposed critical habitats.” Id.

34. The 1996 BiOp applies to all coal mining throughout the country and to all threatened and endangered species and critical habitat, whether listed or designated at the time or in the future. Id. at 6. FWS’s sweeping conclusions were made with very little reference to studies or data, with no reference to individual species that may be impacted, and with no discussion of any difference of methods of mining and impacts across the country.

35. The 1996 BiOp has been wholly inadequate to prevent jeopardy to threatened and endangered species as evidenced by the new listings of species and designation of critical habitat and the numerous scientific studies since the issuance of the 1996 BiOp showing the adverse impacts on listed species from surface mining. See infra ¶¶ 36-46.

The Impacts from Surface Mining Activities on Appalachian Streams and Aquatic Life

36. It is undisputed that the direct impacts of valley fills and heads-of-hollow fills are the obliteration of those streams buried under the excess spoil. As OSM admits, filling or mining through streams results in the complete destruction of “all biota living in the footprint of the fill or in the mined area.” SBZ FEIS at IV-152. Valley fills and head-of-hollow fills also adversely impact downstream water quality and fish and mussel populations, as well as other aquatic organisms. See, e.g., Letter to Brent Wahlquist and David Hartos, OSM, from Frank McCormick, American Society of Ichthyologists and Herpetologists (2007), reprinted in SBZ FEIS at B-163.

37. EPA’s own studies show that mountaintop removal mining has devastated aquatic life and water quality in the Appalachian region, resulting in the obliteration of 724 stream miles between 1985 and 2001. SBZ FEIS at IV-145; see also MTM/VF DEIS at B-II; SBZ FEIS at B-32 to B-33 (citing EPA, Wadeable Streams Assessment: A Collaborative Survey of the Nation’s Streams (2006)); Letter to David Hortos, OSM, from Virginia Department of Environmental Quality at 5-6 (16 Nov. 2007)(sediment load from mineral extraction one of “Top Ten” sources of stress on aquatic species in Virginia, including threatened and endangered species), reprinted in SBZ FEIS at B-32 to B-33. A 2008 monitoring study of West Virginia watersheds by EPA staff shows that coal mining operations are “strongly related to downstream biological impairment,” resulting in numerous adverse impacts downstream.

Gregory J. Pond et al., Downstream Effects of Mountaintop Coal Mining: Comparing Biological Conditions Using Family- and Genus-Level Macroinvertebrate Bioassessment Tools, 27 J. N. Am. Benthol. Soc'y, 717-37 (8 July 2008)[hereinafter Pond 2008].

38. Aquatic communities downstream of mine sites are less diverse and more pollution-tolerant because of increased sedimentation and increased water contamination and toxicity. See MTM/VF DEIS at IV B-4 to B-5. In addition, sites below valley fills have substantially higher conductivity levels than sites below unmined areas. *Id.* at IV B-4. High conductivity, and other water quality characteristics found downstream from mined sites, adversely affect biological integrity. See *id.* at IV B-4 to B-5; SBZ FEIS at IV-156.

The Clinch, Powell, New River and Big South Fork of the Cumberland Rivers, and Impacts on Threatened and Endangered Species From Surface Mining Activities

39. Although numerous watersheds in Appalachia contain at risk aquatic species that are adversely affected by surface mining operations, Plaintiff focuses specifically on the Clinch and Powell watersheds in Virginia and Tennessee and the New River and Big South Fork of the Cumberland River in Tennessee as examples.

40. The Clinch and Powell Rivers are part of the Tennessee River system and flow from the coalfields of southwest Virginia into eastern Tennessee. The Big South Fork of the Cumberland River is formed by the confluence of the New River, which begins in the coal mining region of northeast Tennessee, and Clear Fork in Tennessee. The Big South Fork in Tennessee forms the Big South Fork NRR in Tennessee, administered by the NPS. These rivers are among the most diverse temperate rivers in North America. They are also in peril from coal mining operations. See, e.g., S.A. Ahlstedt et al., *Long-Term Trend Information for Freshwater Mussel Populations at Twelve Fixed-Station Monitoring Sites in the Clinch and Powell Rivers*, Final Report, U.S. Fish & Wildlife Service, Cookeville, TN, at 2

(2005)[hereinafter Ahlstedt 2005 Report] (Petition to Reinitiate, Exhibit 1 to initial Complaint, Att. 7)(“[L]ong-term trend monitoring of mussel populations since 1979 are showing that mussel population densities and species composition are rapidly declining in the Clinch especially in Virginia and the Powell River.”); S.A. Ahlstedt et al., *Current Status of Freshwater Mussels in the Big South Fork National River and Recreation Area*, 14 *Walkerana* 33, 42, 74 (2003-04)[hereinafter Ahlstedt 2003-04 Mussel Status](Petition to Reinitiate, Exhibit 1 to initial Complaint, Att. 16)(2003 survey of the Big South Fork identified continued deposition of silt and coal fines from mining outside of the park as a significant negative factor for imperiled species).

41. According to a 2000 report on biodiversity in the United States, the “upper Clinch River on the Virginia-Tennessee border surpasses all other watersheds in the country.” S.J. Chaplin et al., *The Geography of Imperilment*, in *Precious Heritage: The Status of Biodiversity in the United States* 159, 181 (B.A. Stein et al., eds. 2000)(Petition to Reinitiate, Exhibit 1 to initial Complaint, Att. 5). The Clinch River is home to over 44 species of mussels, Ahlstedt 2005 Report at 8, and 126 extant native fish species, U.S. Geological Survey, P.S. Hampson et al., *Water Quality in the Upper Tennessee River Basin*, Circ. 1205, at 6 (2000)[hereinafter USGS 2000 Report], available at <http://pubs.usgs.gov/circ/circ1205/introduction.htm> (Petition to Reinitiate, Exhibit 1 to initial Complaint, Att. 6).

42. The Clinch River is also considered one of the most biologically threatened rivers in the country, because more than one-fourth of its native fish and mussel species are at-risk. USGS 2000 Report at 6. Of the river’s vulnerable species, two fish are federally listed as endangered, two fish as threatened, fourteen mussels as endangered, and four mussels as candidates for listing. Letter to Paul Davis, Tennessee Department of Environment and

Conservation (“TDEC”), from Lee Barclay, FWS at 1 (17 Apr. 2007) [hereinafter Barclay 2007 Letter](Petition to Reinitiate, Exhibit 1 to initial Complaint, Att. 9); see also 71 Fed. Reg. 53,756, 53,788-89 (12 Sept. 2006) and 69 Fed. Reg. 24,876, 24,878 (4 May 2004)(identifying candidate species). Studies of the Clinch River have found that mussel distribution and abundance are negatively affected by proximity to mining activity and that the toxicity of coal mining-related effluents is one of the causal factors for mussel population declines. Ahlstedt 2005 Report at 8 (resurgence of coal mining in Clinch and Powell drainages “has set a course for major catastrophic damage that may be irreversible”).

43. The Powell River was once home to over 41 species of mussels and numerous species of fish. Barclay 2007 Letter at 1. It is now home to two threatened fish species, seven endangered mussel species, and two candidate species of mussels. Barclay 2007 Letter at 1. As is the case in the Clinch, impacts to downstream water quality from mining activities is one of the reasons for the significant population declines and is a factor preventing species recovery. See 2005 Ahlstedt Report at 2, 10; FWS, *Recovery Plan for Cumberland Elktoe, Oyster Mussel, Cumberland Combshell, Purple Bean, and Rough Rabbitsfoot*, 35-39 (7 July 2004)(describing coal mining impacts on mussel species)[hereinafter 2004 Recovery Plan], available at http://ecos.fws.gov/docs/recovery_plans/2004/040524.pdf; S.A. Ahlstedt & J.M. Tuberville, *Quantitative Reassessment of the Freshwater Mussel Fauna in the Clinch and Powell Rivers, Tennessee and Virginia*, in *Conservation and Management of Freshwater Mussels II* (K.S. Cummings et al. eds. 1997)(determining that 15-year decline in certain mussel species in the Powell River primarily attributable to coal mining in the area)(cited in 2004 Recovery Plan at 35); USGS 2000 Report at 20 (finding that polycyclic aromatic compounds, which are indicative of coal fines and toxic to aquatic life including mussels, were high in the

upper portions of the Clinch and Powell Rivers)(cited in 2004 Recovery Plan at 35); see also Memorandum of Understanding Among EPA Regions III and IV, TDEC, Virginia Department of Environmental Quality, and the Virginia Department of Mines, Minerals, and Energy, Concerning the Clinch and Powell Rivers (signatures from 11 Dec. 2007 to 7 Jan. 2008)(acknowledging decline in mussel and fish species in the rivers).

44. The Big South Fork of the Cumberland is also known for its aquatic diversity. It is home to at least 68 fish species and 23 species of mussels. NPS, *The Big South Fork General Management Plan and Environmental Impact Statement* 209 (2005) [hereinafter BSF GMP], available at <http://www.nps.gov/biso/parkmgmt/upload/chapter4.pdf> (Petition to Reinitiate, Exhibit 1 to initial Complaint, Att. 14). As the NPS stated, “[f]ew other river systems support this level of mussel diversity.” BSF GMP at 19. It provides “habitat for a world-class freshwater mussel assemblage” and is “an important refuge for many endangered mussel species.” Id. Six of its mussel species are federally listed as endangered, and in the spring of 2008, two additional endangered mussel species and two candidate species were re-introduced, for a total of ten protected mussel species. Interview with Steve Bakaletz, Wildlife Biologist, Big South Fork NRRRA (14 Jan. 2009). The Big South Fork River also supports at least three species of federally protected fish: the duskytail darter (endangered), Palezone shiner (endangered), and blackside dace (threatened). See BSF GMP at 210; see also D.A. Etnier, *Fish Faunas of the Big South Fork of the Cumberland River and the Upper Cumberland River Drainage, Tennessee and Kentucky*, 1, 2, 4 University of Tennessee, Knoxville (10 Oct. 2005) [hereinafter Etnier 2005](Petition to Reinitiate, Exhibit 1 to initial Complaint, Att. 15). Deposition of silt and coal fines from mining outside of the park significantly affects imperiled species in the Big South Fork NRRRA. Ahlstedt 2003-04 Mussel Status at 33, 42, 74; 2004

Recovery Plan at 35-39; NPS and Department of Interior, 1997 Water Resources Management Plan for the Big South Fork of the Cumberland River at 15 (Sept. 1997)(“main cause of impacts to the mussel community are pollutants and sediment associated with coal mining”), available at http://www.nature.nps.gov/water/management_plans/big_south_fork_screen.pdf; Tennessee Wildlife Resources Agency (“TWRA”), Tennessee’s Comprehensive Wildlife Conservation Strategy at 134-36 (Sept. 2005)(identifying coal mining as having one of the worst water quality impacts for the Cumberland River drainage), available at <http://www.state.tn.us/twra/cwcs/tncwcs2005.pdf>; Etnier 2005 at 1, 2, 4 (concluding that increased coal mining could adversely affect federally protected fish species in the Big South Fork and upper Cumberland system)(Petition to Reinitiate, Exhibit 1 to initial Complaint, Att. 15); see also R.B. Evans, Distribution of Fishes and Changes in Biotic Integrity in the New River, Tennessee (1998)(unpublished M.S. Thesis, University of Tennessee, Knoxville)(finding New River significantly affected by acid mine drainage and siltation).

45. On 10 January 1997, the FWS listed five new mussel species as endangered. 62 Fed. Reg. 1,647 (10 Jan. 1997). These are the Cumberland elktoe (*Alasmidonta atropurpurea*); Oyster mussel (*Epioblasma capsaeformis*); purple bean (*Villosa perpurpurea*); rough rabbitsfoot (*Quadrula cylindrical stigillata*); and Cumberlandian combshell (*Epioblasma brevidens*). In 2004, the FWS formally designated portions of the Clinch, the Powell, and the Big South Fork of the Cumberland Rivers as critical habitat for these five species. 69 Fed. Reg. 53,136 (31 Aug. 2004). In the Recovery Plan for these species, the FWS stated that adverse impacts from upstream coal mining (such as increased sedimentation, heavy metal pollution, and low pH) threaten the populations of these species living in the critical habitat designated areas. 2004 Recovery Plan at 35-39.

46. In sum, numerous recent studies since 1996 show that water quality degradation from active mining will jeopardize populations of threatened and endangered species in the Clinch, Powell, New, and Big South Fork of the Cumberland Rivers. Because the SBZ Final Rule legalizes the devastating in-stream mining activities that have already caused significant degradation to water quality and adversely affected listed fish and mussel species in these and other Appalachian rivers, the SBZ Final Rule constitutes an agency action that “may affect” listed species.

Failure to Initiate Formal Consultation with the FWS

47. Although the SBZ rule change “may affect” federally listed species and critical habitat within the meaning of the ESA and implementing regulations, OSM and EPA failed to initiate formal consultation with the FWS before promulgating and concurring in, respectively, the SBZ Final Rule, as required by the ESA. OSM maintained in the FEIS that the rule change does not implicate its formal §7 duties under the ESA on two grounds: that the rule change would have no “net effect” on threatened and endangered species, see SBZ FEIS at IV-162 to -163, and that its §7 ESA duties have been fulfilled by its past consultation with the FWS under the 1996 BiOp. See id. at IV-162 (“[t]he regulatory protections identified in the 1996 [BiOp] continue to ensure the protection of listed endangered and threatened species, proposed species, and their critical habitats.”) Neither assertion is correct.

48. First, OSM asserts that the changes would result in slight positive effects because it incorporates changes to reduce the adverse impacts of coal mine waste disposal facilities (refuse piles and slurry impoundments) on fish, wildlife, and related environmental values, and because of the combination of the excess spoil and coal mine waste provisions. 73 Fed. Reg. 75,875. These latter two provisions require permittees to avoid placement of excess spoil or

coal mine waste in or within 100 feet of a perennial or intermittent stream to the extent possible and, if avoidance is not possible, to select the alternative with the least overall adverse impact on fish, wildlife, and related environmental values. 30 C.F.R §§780.25(d), 780.35(a)(3). SMCRA already requires that impacts be minimized; see SMCRA §§ 515 (b)(10)(B)(i), and (b)(24). Thus, adding this requirement to the SBZ Final Rule does not afford additional protection nor constitute a change that would result in “slight positive” effects. Additionally, OSM’s assertion that the rule changes would have positive impacts is belied by its own admissions regarding the adverse impacts from mining activities in or through streams on aquatic species, see, e.g., SBZ FEIS at IV-152, MTM/VF DEIS at IV B-4 to B-5, and the large body of scientific evidence to the contrary, see, e.g., Pond 2008; supra ¶¶ 36-46.

49. Notably, as OSM admitted, the FWS stated that OSM was adopting a less protective standard by changing the 1983 SBZ rule’s required finding that the activity “will not adversely affect the water quantity and quality and related environmental resources of the stream” to a requirement that the activity use the best technology currently available to minimize adverse impacts to fish, wildlife, and related environmental values to the extent possible. OSM stated: “We do not dispute this characterization.” 73 Fed. Reg. 75,853.

50. Second, OSM may not lawfully rely on the 1996 BiOp to evade its formal consultation duty. The ESA regulations expressly include the promulgation of rules as an agency “action” that triggers the formal consultation requirement if the rule “may affect” threatened or endangered species or critical habitat. The “no jeopardy” conclusion in the 1996 BiOp was premised on the Act and regulations in place at the time, including the 1983 SBZ rule. Because the rule change necessarily undermines this premise, OSM’s reliance on the BiOp to

evade its formal consultation requirements under 50 C.F.R. §§402.14(a) and 402.02 is unlawful.

51. In addition, the listing of new species and designation of critical habitat, and new information, since the BiOp was issued obligated OSM to reinitiate consultation on the BiOp itself under 50 C.F.R. §§402.16(d) and 402.16(b), which OSM has failed to do. As Plaintiff's January 2008 Petition to Reinitiate set forth, OSM has a duty to reinitiate consultation based on these and other triggers set forth in the ESA regulations. See Petition to Reinitiate (Exhibit 1 to initial Complaint).

52. Moreover, OSM's reliance on the 1996 BiOp is unlawful because the 1996 BiOp fails to satisfy the fundamental requirements for a biological opinion and is therefore legally invalid.

CLAIMS FOR RELIEF

Count I

(OSM's Violation of SMCRA Environmental Protection Standards)

53. Paragraphs 1 through 52 are incorporated herein by reference.

54. The SBZ Final Rule violates the environmental protection standards OSM is charged with enforcing under SMCRA, including 30 U.S.C. §§1202(a),(d), 1265(b)(10), (b)(22), (b)(24), (c)(4), and 1266(b)(11), and implementing regulations set forth at 30 C.F.R. Parts 700-800. OSM's rationale for overturning the 1983 SBZ rule is arbitrary and capricious and contrary to the evidence before the agency.

55. The SBZ Final Rule is therefore arbitrary, capricious, or otherwise not in accordance or inconsistent with law in violation of the APA, 5 U.S.C. §706, and SMCRA, 30 U.S.C. §1276.

Count II

(OSM's Violation of its Duty to Initiate Formal Consultation Under the ESA)

56. Paragraphs 1 through 55 are incorporated herein by reference.

57. The SBZ Final Rule is agency "action" under 50 C.F.R. §402.02(b) that "may affect" threatened and endangered aquatic species in the Appalachian coal mining region, including in the watersheds of the Big South Fork of the Cumberland, the New River, and the Powell and Clinch Rivers. OSM's lack of enforcement of the 1983 SBZ rule has already resulted in substantial and irreversible losses of aquatic and terrestrial habitats. Memorandum from Regional Director, FWS Region 5 to Director, at 7. Studies have shown that water quality degradation from active mining is jeopardizing populations of threatened and endangered mussels in the Clinch, Powell, and Big South Fork of the Cumberland Rivers. See supra ¶¶ 36-46.

58. Under the changed rule, mining activities in and adjacent to streams will be permitted merely upon a showing by the operator that avoidance is not reasonably possible. Additionally, regulatory authorities are no longer required to ensure that mining activities through or within 100 feet of streams do not adversely impact water quantity and quality and the environmental values of the stream. Effectively, these changes eviscerate the stream buffer zone rule. The SBZ Final Rule will therefore cause further negative impacts to water quality and "may affect" the listed fish and mussel species in these rivers and other Appalachian streams.

59. OSM's failure to initiate formal consultation under 50 C.F.R §402.14 violates its duty under §7(a)(2) of the ESA, 16 U.S.C. §1536(a)(2), to consult with the FWS to assure that its

promulgation of regulations under SMCRA is not likely to jeopardize the existence of threatened or endangered species or result in the destruction or adverse modification of habitat.

60. Additionally, OSM's failure to initiate formal consultation violates the SMCRA requirement that no surface mining activity shall be conducted which is likely to jeopardize the continued existence of endangered or threatened species or which is likely to result in the destruction or adverse modification of designated critical habitats of such species in violation of the ESA. 30 C.F.R. §816.97(b).

61. OSM's promulgation of the SBZ Final Rule without initiating formal consultation with FWS is therefore arbitrary, capricious, or otherwise not in accordance or inconsistent with law in violation of the APA, 5 U.S.C. § 706, and SMCRA, 30 U.S.C. §1276.

62. In the alternative, OSM's failure to initiate formal consultation with FWS is a violation of the ESA within the meaning of the ESA citizen suit provision, 16 U.S.C. §1540(g)(1).

Count III

(OSM's Reliance on the 1996 Biological Opinion to Avoid Formal Consultation is Unlawful Under the ESA)

63. Paragraphs 1 through 62 are incorporated herein by reference.

64. The 1996 BiOp's no jeopardy conclusion is based on the SMCRA regulations in effect at the time, including the 1983 SBZ rule. The SBZ Final Rule significantly alters the 1983 rule. Therefore OSM's reliance on the 1996 BiOp to evade its formal consultation duties is unlawful.

65. In the alternative, the SBZ Final Rule constitutes a subsequent modification of the identified action "in a manner that causes an effect to the listed species or critical habitat that was not considered in the [1996 BiOp]," triggering OSM's legal requirement to reinitiate consultation under 50 C.F.R. §402.16(c), which it failed to do.

66. OSM's reliance on the 1996 BiOp is also unlawful because other events since the 1996 BiOp was issued have occurred that triggered OSM's duty to reinitiate consultation, rendering the 1996 BiOp invalid. See Count IV. Moreover, the 1996 BiOp itself was never valid in any event because it is insufficient under the ESA and implementing regulations. See Count V.

67. OSM's reliance on the 1996 BiOp to avoid formal consultation on the SBZ Final Rule is therefore arbitrary, capricious, or otherwise not in accordance or inconsistent with law in violation of the APA, 5 U.S.C. § 706, and SMCRA, 30 U.S.C. §1276.

68. In the alternative, OSM's reliance on the 1996 BiOp to avoid formal consultation with FWS is a violation of the ESA within the meaning of the ESA citizen suit provision, 16 U.S.C. §1540(g)(1).

Count IV

(OSM's Failure to Reinitiate Formal Consultation Renders the 1996 Biological Opinion Invalid Under the ESA)

69. Paragraphs 1 through 68 are incorporated herein by reference

70. OSM was obligated to reinitiate formal consultation on the 1996 BiOp under 50 C.F.R. §402.16(d) to consider the impacts from mining on newly listed species and critical habitats, including the five mussel species listed as endangered in 1997 and the designation in 2004 of critical habitat for these species noted above. See 62 Fed. Reg. 1,647; 69 Fed. Reg. 53,136. OSM's failure to do so renders the 1996 BiOp invalid.

71. The listing of new species since the 1996 BiOp also renders the ITS in the 1996 BiOp invalid.

72. The many studies published since the 1996 BiOp that reveal mining's effects on listed species and critical habitat in a manner or to an extent not considered in the BiOp likewise

obligated OSM to reinitiate consultation under 50 C.F.R. §402.16(b), rendering the 1996 BiOp invalid.

73. OSM's failure to reinitiate consultation on the 1996 BiOp to fulfill its ESA §7 obligations is arbitrary, capricious, or otherwise inconsistent with law in violation of the APA, 5 U.S.C. § 706, rendering the 1996 BiOp invalid.

74. In the alternative, OSM's failure to reinitiate consultation on the 1996 BiOp to fulfill its ESA §7 obligations is a violation of the ESA within the meaning of the ESA citizen suit provision, 16 U.S.C. §1540(g)(1).

Count V

(The 1996 Biological Opinion is Insufficient under the ESA and Implementing Regulations)

75. Paragraphs 1 through 74 are incorporated herein by reference.

76. The 1996 BiOp is insufficient under ESA §7(a)(2), 16 U.S.C. §1536(a)(2), and implementing regulations. The evidence overwhelmingly shows that FWS's conclusion that SMCRA "requirements will avoid jeopardizing any listed species or adversely modifying any designated critical habitat in violation of the [ESA]," 1996 BiOp at 10, is false. As OSM has admitted, the direct effect of filling or mining through streams is the complete destruction of "all biota living in the footprint of the fill or in the mined area." SBZ FEIS at IV-152. OSM has also recognized that coal mining activities have significant impacts on downstream water quality. See id. at IV-156. Further, scientific studies show dramatic declines in fish and mussel species in areas closest to active mining during the past decade, making recovery of federally protected species doubtful if current mining practices continue. See, e.g. Ahlstedt Report 2005 at 2, 8, 10; Etnier 2005 at 3-4.

77. The 1996 BiOp as adopted is also fundamentally flawed because, among other failings: (1) it is impermissibly broad; (2) its “no jeopardy” conclusion is inconsistent with its recitation of facts regarding the harm that mining causes to species and habitats; (3) it fails to include any discussion regarding recovery of listed species or habitat; and (4) it fails to meet the requirements for ITS. See 50 C.F.R. §402.14(g)-(i). In addition, FWS explicitly conditioned its “no jeopardy” conclusion and ITS on the development of species-specific measures to minimize anticipated take. 1996 BiOp at 13. No such measures have been adopted for most of the federally endangered and threatened aquatic species that are being harmed by mining in the watersheds of the Clinch, Powell, New, and Big South Fork of the Cumberland Rivers.

78. The 1996 BiOp is therefore unlawful under §7 of the ESA, and OSM’s reliance on it is arbitrary, capricious, or otherwise not in accordance with law in violation of the APA, 5 U.S.C. § 706.

Count VI

(EPA Violation of Clean Water Act)

79. Paragraphs 1 through 78 are incorporated herein by reference.

80. Section 501 of SMCRA provides that OSM cannot promulgate regulations on environmental protection standards unless it has “obtained the written concurrence” of EPA “with respect to those aspects” of federal regulations “which relate to air or water quality standards promulgated under the” Clean Water Act and the Clean Air Act. 30 U.S.C. §§1251(a)(B), 1251(b).

81. EPA provided its written concurrence in the SBZ Final Rule on 2 December 2008.

82. Because the SBZ Final Rule will cause permanent and irreversible damage to streams and aquatic life, EPA’s concurrence in the rule is plainly inconsistent with the CWA and the

Administrator's responsibilities under the CWA and implementing regulations, CWA §101(a), (d), 33 U.S.C. §1251(a), (d)(setting CWA goals and EPA duty to administer); CWA §303, 33 U.S.C. §1313 (governing water quality standards); 40 C.F.R. §§131.5 and 131.12 (governing antidegradation requirements and EPA duty to review); and id. § 230.10(b)-(c)(restricting discharges that jeopardize protected species).

83. EPA's written concurrence is therefore arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law in violation of the APA, 5 U.S.C. §706.

Count VII

(EPA's Written Concurrence in the SBZ Final Rule Violates Duty to Consult under the ESA)

84. Paragraphs 1 through 83 are incorporated herein by reference.

85. EPA's determination under SMCRA §501, 30 U.S.C. §1251, meets the definition of agency "action" under the ESA. Agency action encompasses "all activities or programs of any kind authorized . . . , in whole or in part, by Federal agencies," including "the promulgation of regulations . . . [and] actions directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. §402.02 (b), (d).

86. EPA's written concurrence is a necessary pre-condition to OSM's adoption of the regulation, and is therefore agency action that "authorize[s]" the "promulgation of regulation" under 50 C.F.R. §402.02(b). In addition, because the SBZ Final Rule will categorically allow the burying of Appalachian streams, EPA's concurrence is agency action that "directly or indirectly caus[es] modifications to the land, water, or air" under 50 C.F.R. §402.02(d).

87. Because the SBZ rule change "may affect" threatened and endangered species and critical habitat in Appalachian river systems, EPA violated its duties to consult with FWS

under §7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), before making its concurrence determination.

88. EPA's written concurrence is therefore arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law in violation of the APA, 5 U.S.C. §706.

89. In the alternative, EPA's failure to initiate formal consultation with FWS before issuing its written concurrence determination constitutes a violation of the ESA within the meaning of the ESA citizen suit provision, 16 U.S.C. §1540(g)(1).

PRAYER FOR RELIEF

Wherefore, Plaintiff respectfully requests that the Court grant the following relief:

(1) Declare that the SBZ Final Rule is in violation of the ESA, 16 U.S.C. §1536(a)(2), and is arbitrary and capricious, an abuse of discretion, and otherwise inconsistent or not in accordance with law in violation of the APA, 5 U.S.C. §706, and SMCRA, 30 U.S.C. §1276;

(2) Declare that OSM violated SMCRA, 30 U.S.C. §§1202(a), (d), 1265(b)(10), (b)(22), (b)(24), (c)(4), and 1266(b)(11);

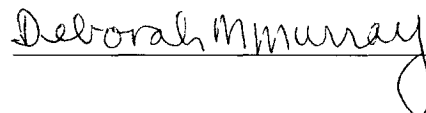
(3) Declare that OSM violated §7(a)(2) of the ESA, 16 U.S.C. §1536(a)(2), by failing to initiate consultation with the FWS to insure that the SBZ rule change would not jeopardize listed species;

(4) Declare that EPA's written concurrence under SMCRA §501, 30 U.S.C. §1251, violated CWA §§101, 303, 33 U.S.C. §§1251, 1313 and implementing regulations, 40 C.F.R. §§131.5, 131.12, 230.10(b)-(c), and §7(a)(2) of the ESA, 16 U.S.C. §1536(a)(2);

(5) Declare that the 1996 BiOp is invalid;

- (6) Vacate the SBZ Final Rule;
- (7) Vacate EPA's concurrence in the SBZ Final Rule;
- (8) Vacate the 1996 BiOp;
- (9) Award to the Plaintiff its costs and expenses of this action, including reasonable attorneys' fees; and
- (10) Grant such other relief as the Court deems just and proper.

Respectfully submitted this 13th day of February 2009.



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