



of Count II of plaintiff's amended complaint, Doc. No. 6, and that dismissal is without prejudice as to plaintiff's remaining claims in Count I and Counts III through VII of the amended complaint.

The SBZ Rule significantly alters the stream buffer zone rule that has been in effect since 1983. 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 a 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. See Amended Complaint ¶ 2 (citing 30 C.F.R. §§816.57(a)(1), 817.57(a)(1)), Doc. No. 6. The SBZ Rule at issue exempts valley fills (and other mining activities in or adjacent to streams) from this 100-foot buffer requirement merely upon a showing by the operator that avoidance is not reasonably possible. See Amended Complaint, ¶ 3, Doc. No. 6. The SBZ 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. Id.

The SBZ Rule change would have significant negative effects on water quality and stream health by condoning mining operations that have already devastated Appalachian streams as a result, in part, of the lack of enforcement of the 1983 SBZ rule. As documented in plaintiff's amended complaint, 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. Between 1985 and 2001, valley fills, in particular,

annihilated an estimated 724 stream miles. EPA predicted in 2003 that if mining operations continued 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. See Amended Complaint, ¶ 4 (citing OSM, Excess Spoil Minimization Stream Buffer Zones, Final Environmental Impact Statement at IV-145 (Sept. 2008); U.S. EPA, Mountaintop Mining/Valley Fills in Appalachia Draft Programmatic Environmental Impact Statement, at IV B-I-II (2003)), Doc. No. 6.

Plaintiff alleged in Count II of the amended complaint that the SBZ Rule is agency “action” that “may affect” threatened and endangered aquatic species in the Appalachian coal mining region, within the meaning of the Endangered Species Act, requiring OSM to have initiated formal consultation with the U.S. Fish and Wildlife Service (FWS) under §7 (a)(2) of the ESA, 16 U.S.C. §1536(a)(2), before promulgating the SBZ Rule.<sup>1</sup> It is undisputed that OSM failed to initiate consultation. Thus, judgment is properly entered in plaintiff’s favor on Count II of the amended complaint.<sup>2</sup>

In Count III, plaintiff alleges that OSM’s reliance in the Final EIS on a 1996 biological opinion to avoid formal consultation with the FWS was unlawful. Amended Complaint, Count III, Doc. No. 6. In the 1996 biological opinion, the FWS summarily concluded that the Surface Mining Control and Reclamation Act and regulations provided a sufficient level of protection

---

<sup>1</sup> The original complaint alleged that such failure was arbitrary, capricious, an abuse of discretion, and not in accordance with law in violation of the Administrative Procedure Act (“APA”), 5 U.S.C. §706. The amended complaint alleged in the alternative that OSM’s failure to initiate consultation is a violation of the ESA within the meaning of the ESA citizen suit provision, 16 U.S.C. §1540(g)(1).

<sup>2</sup> Defendant-Intervenor National Mining Association (NMA) faults the Secretary of the Interior Ken Salazar’s statement, Doc. 10-2, attached to the federal defendants’ Motion for Voluntary Remand and Vacatur, Doc. No. 10, for failing to specify the legal defect in the SBZ rule. Opp. of Defendant-Intervenor NMA to Defendants’ Motion for Voluntary Remand and Vacatur at 5, Doc. No. 13. Paragraph 4 of the federal defendants’ motion, however, plainly states that OSM “erred in failing to initiate consultation with the U.S. Fish and Wildlife Service under the ESA to evaluate possible effects of the SBZ Rule on threatened and endangered species.” ¶ 4, Doc. No. 10.

such that their “requirements will avoid jeopardizing any listed species or adversely modifying any designated critical habitat in violation of the [ESA].” 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), *available at* <http://www.osmre.gov/guidance/docs/biologicalopinion.pdf>; Amended Complaint ¶ 33. FWS’s sweeping conclusion, however, was made without reference to any individual species that may be impacted; yet the opinion 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. Biological Opinion at 6; Amended Complaint ¶ 34.

The biological opinion has been wholly inadequate to prevent jeopardy to threatened and endangered species, as evidenced by, among other things, the new listings of species as endangered and designation of critical habitat, and the numerous scientific studies showing the adverse impacts on listed species from surface mining since the issuance of the 1996 biological opinion. In just the Clinch and the Powell Rivers in Virginia, and the Big South Fork of the Cumberland Rivers in Tennessee, critical habitat has been designated for five new mussel species listed as endangered since 1996 as a result in part from upstream coal mining operations. See 62 Fed. Reg. 1,647 (10 Jan. 1997)(listing of species as endangered); 69 Fed. Reg. 53,136 (31 Aug. 2004)(designation of critical habitat); Amended Complaint ¶ 45. Because the listing of new species and designation of critical habitat require reinitiation of consultation on the biological opinion, Amended Complaint Count IV, OSM’s reliance on the biological opinion to avoid consultation in this case was unlawful, Amended Complaint, Count III.<sup>3</sup>

---

<sup>3</sup> Moreover, the “no jeopardy” conclusion of the biological opinion was premised on the Surface Mining Control and Reclamation Act and regulations in place at the time, including the 1983 SBZ rule. Therefore, OSM’s reliance on the biological opinion to avoid formal consultation in this case is unlawful on that basis as well. Amended Complaint, Count III.

Lastly, plaintiff states that it is in agreement with the federal defendants' Motion for Voluntary Remand and Vacatur, Doc. No. 10. While this motion seeks to reinstate the original 1983 SBZ rule, the Secretary of the Interior has also represented that OSM expects to issue guidance regarding application of the original rule and to solicit comment on the potential development of a comprehensive new stream buffer zone rule. See Statement of Secretary Salazar, Exhibit 1 to defendants' Motion for Voluntary Remand and Vacatur at 1, Doc. No. 10-2. It is critical that OSM properly interpret the SBZ rule to prevent the large-scale destruction of Appalachian streams that has already occurred and instead to "adequately [protect] water quality and stream habitat." Id. at 1.

Respectfully submitted this 19th day of May 2009.

*/s/ Deborah M. Murray*  
Deborah M. Murray (D.C. Bar No. 362563)  
Senior Attorney  
Southern Environmental Law Center  
201 West Main Street, Suite 14  
Charlottesville, VA 22902  
(434) 977-4090 Telephone  
(434) 977-1483 Fax  
Counsel for Plaintiff  
National Parks Conservation Association