

**Earthjustice ♦ Natural Resources Defense Council ♦ American Rivers ♦
Friends of the Earth ♦ National Audubon Society ♦ National Wildlife Federation ♦
Sierra Club ♦ Shagbark ♦ Valley Watch ♦ West Virginia Citizen Action ♦
West Virginia Environmental Council ♦ West Virginia Rivers Coalition**

January 6, 2004

Mr. John Forren
U.S. EPA (3EA30)
1650 Arch Street
Philadelphia, PA 19103

Delivered via U.S. Mail and Email (mountaintop.r3@epa.gov)

Dear Mr. Forren:

These comments are submitted by Earthjustice, the Natural Resources Defense Council, American Rivers, Friends of the Earth, National Audubon Society, National Wildlife Federation, Sierra Club, Shagbark, Valley Watch, West Virginia Citizen Action, West Virginia Environmental Council, and West Virginia Rivers Coalition in response to the request for comment on the Draft Programmatic Environmental Impact Statement (“DEIS”) on mountaintop removal coal mining and associated valley fills in Appalachia, published at 68 Fed. Reg. 32487 (May 30, 2003) by the U.S. Environmental Protection Agency (EPA), U.S. Army Corps of Engineers (COE), U.S. Fish and Wildlife Service (FWS), U.S. Office of Surface Mining (OSM) and West Virginia Department of Environmental Protection (W.V. DEP) (hereinafter “the agencies”). We hereby incorporate by reference all documents cited in these comments.

In mountaintop removal coal mining, vast areas of forest are stripped from the land and the tops of mountains are blasted apart and removed to extract thin seams of coal within the mountains. The waste rock, or “excess spoil,” from this process is usually disposed of in nearby valleys, creating enormous “valley fills” that have already buried and destroyed hundreds of miles of Appalachian streams. Generations-old communities are forced from their homes by the blasting, flooding, and environmental destruction. Fish and wildlife habitat is damaged or destroyed, including habitat of threatened and endangered species. An environmentally, socially, economically, and historically important region of this country is being leveled by mountaintop removal coal mining. It is no overstatement to call this an environmental apocalypse – it is certainly one of the worst examples of plundering the environment occurring anywhere in this country today.

The original purpose of the mountaintop removal programmatic EIS was to develop policies and procedures to “**minimize, to the maximum extent practicable, the adverse environmental effects to waters of the United States and to fish and wildlife resources from mountaintop [removal] mining operations, and to environmental resources that could be affected by the size and location of fill material in valley fill sites.**”¹ **The May 30, 2003 DEIS has completely abandoned this purpose. It contains no meaningful, substantive alternatives or**

¹ See 64 Fed. Reg. 5830 (February 29, 1999) (emphasis added).

recommendations that would minimize to any degree the environmental harm caused by mountaintop removal coal mining, let alone policies or procedures to reduce these harms to “the maximum extent practicable.”²

Instead, the only alternatives offered by the DEIS all involve changes to the federal permitting process that are calculated to “streamline” agency decision making to make it easier for coal companies to continue mountaintop removal strip mining, and weaken existing environmental safeguards that are designed to reduce the environmental destructiveness of mountaintop removal and valley fills. All of the DEIS’ alternatives (even the so-called “No Action” alternative) propose gutting the surface mining law’s Buffer Zone rule that currently prohibits mining activities from disturbing areas within 100 feet of larger streams.

Unlike the DEIS released by the Bush administration, earlier drafts of the programmatic EIS **did** consider alternatives that would substantially reduce the harm caused by mountaintop removal, most significantly by limiting the size of valley fills. The January 2001 Preliminary Draft evaluated four options, including two that would have restricted the size and placement of valley fills in certain types of streams.³ But these and similar alternatives for limiting the size and location of mountaintop removal and valley fill operations have been completely eliminated from the May 30 DEIS, despite the fact that the studies accompanying the DEIS fully support options to limit mountaintop removal and valley fills.⁴

In sum, the DEIS ignores the scientific and economic studies it was supposed to be based upon, contravenes the very purpose of the EIS, violates the National Environmental Policy Act (NEPA), and demonstrates a startling disregard of the agencies’ legal duties to protect the natural resources and people of Appalachia and the rest of the country. This approach is not supported by law, policy, science, common sense, or humanity. The studies accompanying the DEIS confirm that mountaintop removal is wiping out an entire region of the United States – hundreds of square miles of communities, wildlife resources, streams, mountains, and forests – human communities and natural resources that can never be replaced.

The approach taken by the DEIS is particularly unconscionable given the permanent and pervasive environmental devastation caused by mountaintop removal coal mining documented by the approximately 5000 pages of scientific studies accompanying the DEIS.

These studies not only confirm the obvious conclusion that blowing up mountains, wiping out forests, and burying streams under millions of tons of rubble has irreversible and extensive environmental consequences, but also that a failure to impose meaningful limits on such practices will more than double the widespread damage that has already been done to resources of regional and national importance. The failure of the DEIS to even consider, let alone select,

² The DEIS states that its purpose is to “evaluate options for improving agency programs . . . that will contribute to reducing the adverse environmental impacts of mountaintop [removal] mining operations and excess spoil valley fills (MTM/VF) in Appalachia,” DEIS ES-1, an overly optimistic description given the actual content of the DEIS, but a purpose that falls far short of minimizing such impacts to the “maximize extent practicable.”

³ Mountaintop Mining / Valley Fill EIS, Preliminary Draft, January 2001, at ES-6.

⁴ The studies in the DEIS supported the contention that limiting the size and placement of valley fills was environmentally preferable to alternatives such as those contained in the DEIS which contain no such limits. The option of eliminating valley fills altogether – likely the most environmentally beneficial option of all – was not evaluated by these studies.

alternatives to reduce this environmental catastrophe being inflicted on Appalachia by the coal mining industry is nothing short of stunning.

In order to fulfill the purpose of the EIS, be consistent with the findings of the studies on mountaintop removal, and meet the agencies' obligations under NEPA and other federal laws, the DEIS must be rewritten to consider substantive alternatives that would minimize the environmental harm caused by mountaintop removal and select a preferred alternative that would truly protect the resources and people of the region.

A. The Evidence of Devastation Caused By Valley Fills Is Overwhelming and Claims That Valley Fills Cause No Harm to the Environment and Human Communities Are False

The DEIS attempts to deny or minimize the significance of the environmental harm caused by mountaintop removal mining and valley fills, both by downplaying the magnitude of the harm documented in the scientific studies accompanying the DEIS and by failing to recommend meaningful ways to limit the damage.⁵ But the evidence presented throughout the document's appendices illustrates the devastating impacts to streams, forests, wildlife habitat and human communities that has already occurred and that is projected to continue for the foreseeable future if restrictions on mountaintop removal are not implemented. The DEIS' recommendation for "action alternatives" is not supported by the record of harm included in the technical and scientific studies accompanying the decision document.⁶

To begin with, there is the matter of permanent and irreversible loss of streams mined or buried under hundreds of millions of tons of rubble and waste rock. Incredibly, "direct" stream impacts such as these are not included in the DEIS calculation of whether or not valley fills cause environmental harm. While this omission may be convenient for the purpose of twisting the DEIS analysis to fit a desired outcome, the fact remains that the DEIS' own studies conclude that more than 1,200 miles of headwater streams in Appalachia have already been buried or destroyed, with another 1,000 miles projected for burial and destruction in the next ten years if limits are not placed on mountaintop removal operations.⁷ The functions and values of those streams, as well as any wildlife that were unlucky enough to be present when the mountaintops were blown away, are lost forever. The studies found that no scientific basis could be

⁵ For example, the DEIS incorrectly claims that "[w]atershed impacts directly attributable to mining and fills could not be distinguished from impacts due to other types of human activity," DEIS II.C-74, and "the EIS studies did not conclude that impacts documented below MTM/VF operations cause or contribute to significant degradation of waters of the U.S." DEIS II.D-9. Such claims are irrefutably contradicted by the data contained in the EIS studies.

⁶ The studies accompanying the May 30 DEIS – the technical, scientific and economic studies contained in the appendices – were prepared for as used as the basis of the January, 2001 Preliminary EIS. These findings of these studies fully support action alternatives to limit mountaintop removal and valley fills. As discussed further below, while these studies form the appendices of the May 30 DEIS, they do not provide a basis of support for the DEIS' action alternatives.

⁷ It is important to note that many studies indicate that these reported stream impacts are likely to be a gross underestimation of the stream miles filled in the study area. The inventories used in the EIS rely heavily on topographical maps that often do not map smaller headwater streams, despite their ecological importance. *See* Testimony of J. Bruce Wallace, Professor, University of Georgia, before the US Senate Committee on Environment and Public Works, June 6, 2002.

established for arriving at an environmentally “acceptable” amount of stream loss and it is “difficult if not impossible to reconstruct free flowing streams on or adjacent to mined sites.”⁸

Attempts to minimize the downstream or “indirect” environmental impacts of valley fills are similarly unavailing. For example, available evidence strongly points toward valley fills causing significantly elevated levels of selenium, a highly toxic bioaccumulant. DEIS studies found elevated levels, with 66 violations of stream water quality criteria, below valley fills and none found at test sites without valley fills upstream.⁹ In addition, the studies found that numerous other indirect impacts to streams, including the reduced ability of headwater streams to maintain their nutrient cycling function, increased sedimentation, reduced floodwater attenuation potential, and temperature changes, are of great concern. The Cumulative Impact Study found that “[f]or both direct and indirect impacts to ecological processes resulting from alterations in hydrologic patterns, [mountaintop removal and valley fills] would appear to be the major impact producing activity in the study area.”¹⁰

Moreover, the DEIS shoves to one side the environmental implications of massive deforestation in Appalachia. The studies accompanying the DEIS found that when adding past, present and future terrestrial disturbances, the estimated area that will be stripped and flattened encompasses 1,408,372 acres of forest resources – which roughly equates to 11.5% of the entire study area,¹¹ – an area larger than the entire state of Delaware. The destruction of these nearly 1.5 million acres of some of the most diverse temperate forest in the country has widespread environmental, economic and social consequences for the region and the nation. It is extremely unlikely that even a small portion of this forest will be restored, and the timeline for even that minute level of restoration is hundreds, if not thousands of years.¹²

In evaluating whether there are significant impacts to the environment from mountaintop removal and valley fills, the primary authors of the DEIS ignore the catastrophic impact to wildlife that has already occurred or is projected to occur in the near term as documented in the appendices. For example, as is noted in the EPA’s Cumulative Impact Study:

The southern Appalachians have been identified by the Nature Conservancy as one of the hot spot areas in the United States for rarity and richness. This region is known to have the highest regional concentration of aquatic biodiversity in the nation. For this reason, it is hypothesized that impacts which result in decreases in genetic diversity, as measured

⁸ See MTM/VF EIS Steering Committee, “Problems Identified/Confirmed/Inferred by Technical Studies,” August 15, 2002 working draft.

⁹ EPA’s stream chemistry study found that “The selenium data clearly show ‘hot spots’ with higher concentrations of selenium in each of the five watersheds [that were studied] and located downstream of ‘Filled’ sites ONLY. There are 66 violations of the stream water quality criteria identified and each is at a filled site. No other category of site had violations of selenium!” Email from Gary Bryant (EPA WV) to William Hoffman (EPA Region 3), March 27, 2002 (capitalization and exclamation point in original).

¹⁰ DEIS App. I at 75.

¹¹ DEIS IV.C-1.

¹² Email from Cindy Tibbott, FWS, re: MTM/VF EIS cumulative impact assessment, June 26, 2001 (“even if hardwood forests can be re-established, it should be intuitively obvious that they’ll be a drastically different ecosystem from pre-mining forests for generations, if not thousands of years”).

by loss of species, loss of populations or loss of genetic variants, would have a disproportionately large impact on the total aquatic genetic diversity of the nation.¹³

The Cumulative Impact Study further explains:

Riparian habitats are generally ecologically diverse and they often provide habitat for unique, or ecologically important species...The projected potential adverse impacts in the West Virginia study area is 7,591 acres, or 3.2%. Approximately 55% of the projected riparian habitat impacts occur in first and second order streams which are important habitats to many species of...wildlife.¹⁴

[F]orest loss in the West Virginia portion of the study area has the potential of directly impacting as many as 244 vertebrate wildlife species.¹⁵

Assuming that 80% of the salamanders are lost in the projected forest impact areas, approximately 1,232,972,280 have the potential of being adversely impacted.¹⁶

The DEIS states that:

[T]his EIS describes biotic interactions common in headwater streams and various vertebrate species including birds, salamanders (including newts), and mammals which require interactions with the aquatic environment in order to maintain their life cycle...Filling would eliminate all aquatic and aquatic-dependant interactions that would formerly have occurred in the filled area...[T]he permanent nature of filling would suggest that MTM/VF impacts to biotic interactions in headwater stream systems...may constitute a[n] irreversible impact to this system in the study area.¹⁷

The widespread deforestation of Appalachia will also have detrimental impacts on forest birds, particularly fragmentation-sensitive species including the cerulean warbler, Louisiana waterthrush, worm-eating warbler, black-and-white warbler and the yellow-throated vireo. The DEIS found that the potential adverse impact of loss of habitat for forest interior bird species “has **extreme ecological significance** in that habitats required by these species for successful breeding are limited in the eastern United States.”¹⁸

As succinctly summarized in the Cumulative Impact Study:

Mountaintop mining and valley fill activities significantly affect the landscape mosaic. Landcover changes occur as forests are removed, the topography and hydrology is altered, and vegetation is eventually re-established. **The result is an area drastically**

¹³ DEIS App. I, p.78.

¹⁴ DEIS App. I, p. vi.

¹⁵ Id. at 86.

¹⁶ Id. at 92-93.

¹⁷ DEIS IV.D-4 – 5.

¹⁸ DEIS App. I, at 90 (emphasis added).

different from its pre-mining condition. Soil qualities are different, the vegetative community has a different structure and composition, and habitats are altered.¹⁹

Finally, but no less importantly, the DEIS also downplays and dismisses the damage caused to the human communities living within the shadow of mountaintop removal operations.²⁰ For example, the blasting involved in mountaintop removal coal mining causes significant harm to local residents, including structural damage to their homes, excessive noise and dust, damage to wells, and psychological harm from the very real fear of flying rock and other debris. A report by West Virginia's legislative auditor found that "[c]itizens . . . could be living in hazardous conditions due to damage sustained in a blasting incident."²¹ The DEIS admits that blasting "will continue to have periodic adverse effects on the quality of life of residents living in close proximity to the mine sites."²² Yet, instead of evaluating reasonable steps that could be taken to reduce or eliminate these adverse effects, the DEIS cavalierly suggests that coalfield residents can file lawsuits to abate the nuisance.²³ This failure to address one of the important problems identified by local residents is not only illegal but also insulting to the communities who are forced to live near these mining sites.

In sum, the DEIS' conclusion that there is insufficient evidence to link mountaintop removal mining and valley fills with substantial and permanent environmental harm to streams, forests, wildlife and people is unsupported by the record and violates NEPA.

B. The DEIS Must Consider Alternatives to Minimize the Environmental Impacts of Mountaintop Removal Coal Mining and Document the Impacts of Alternatives, Including the "Preferred Alternative"

The May 2003 DEIS fails to conclude that mountaintop removal mining should be curtailed or that its impacts should be reduced, despite overwhelming evidence to the contrary provided by the DEIS' own studies. **In fact, through the DEIS, the Bush administration is actually calling for easing existing environmental restrictions on this damaging mining method in direct contradiction to the findings of the scientific and technical studies.**

The DEIS contains "four alternatives" – a "No Action" alternative that purports to maintain current regulatory programs, policies, and coordination processes²⁴ and three "Action" alternatives, each of which only considers making administrative changes in the permitting process. None of the "alternatives" considered in the DEIS would impose new limits or clear, objective, substantive restrictions on mountaintop removal operations.

¹⁹ DEIS App. I, at 23 (emphasis added).

²⁰ See DEIS III, W-1 *et seq.*, "Blasting and the Local Community."

²¹ West Virginia Legislative Auditor, Preliminary Performance Review, "The Office of Explosives and Blasting Is Not Meeting All Required Mandates," p. 15-16 (December 2002).

²² DEIS III.W-6.

²³ *Id.*

²⁴ As noted below in Section C of these comments, even the so-called "No Action" alternative inexplicably contemplates amending the existing stream Buffer Zone rule.

The Bush administration's "Preferred Alternative" in the DEIS suggests changes to "streamline" the permitting process and shuffle authority between the agencies – often in violation of federal law – while setting no meaningful limits on the size, location, or impacts of mountaintop removal operations, including valley fills. The DEIS' "Preferred Alternative" would attempt to combine the Surface Mining Reclamation and Control Act (SMCRA) and Clean Water Act (CWA) permitting processes in the name of bureaucratic efficiency. However, many of the intended benefits of both laws would be largely undermined by this proposed approach, which would give the OSM a greater role in Clean Water Act permitting decisions – a responsibility Congress entrusted to EPA, not the Office of Surface Mining. In addition, all of the DEIS alternatives assume the federal government will rewrite and weaken the SMCRA Buffer Zone rule, a long-standing law adopted to protect streams from coal mining activities.

The Bush administration's policy recommendations in the DEIS are completely at odds with the scientific studies. A January 2001 Preliminary Draft EIS²⁵ more accurately (though still imperfectly) reflected the Cumulative Impact Study's analysis of the effects on aquatic and terrestrial resources and species of several different scenarios for future mountaintop removal mining. The studies accompanying the Preliminary Draft EIS looked at alternatives including: 1) no limits on the size of valley fills, 2) a 250 acre limit, 3) a 150 acre limit, 4) a 75 acre limit and 5) a 35 acre limit on the size of fills.²⁶ Not surprisingly, the cumulative impact report found that the most restrictive alternative studied – the 35-acre limit – would result in the fewest environmental impacts on streams, forested areas, and species. The study noted that there would still be significant environmental damage even under this scenario, especially to headwater streams. Each of these preliminary alternatives assumed continuation of existing environmental protections, such as the stream Buffer Zone rule that limits mining damage within 100 feet of streams.

The Preliminary Draft EIS contained three action alternatives that restricted valley fills to ephemeral or intermittent streams and retained the 100-foot stream Buffer Zone (SBZ) rule, and a "No Action" alternative. The uncontrolled "No Action" scenario was shown to have the worst environmental impacts. Nonetheless, that is what the Bush administration essentially proposes in its May 2003 DEIS as the "Preferred Alternative" – a proposal that does not even consider, let alone recommend, any "bright line," objective acreage limits on valley fills. The May 2003 Bush administration "Preferred Alternative" also fails to propose an end to the use of Clean Water Act §404 general permits to authorize valley fills or any other meaningful limit on valley fills, regardless of whether an individual or general permit is used, despite the fact that limits on the size of valley fills is what the cumulative impacts study evaluated.

The May 30 DEIS itself confesses that there is little substantive difference between the alternatives considered. For example, the document states that "**[a]ll alternatives ... are based on process differences and not directly on measures that restrict the area of mining.**"²⁷ The DEIS states that "[t]he environmental benefits of the three action alternatives are very similar,"²⁸ and further acknowledges that "[t]he regulatory responsibilities ... are common to all the

²⁵ Mountaintop Mining/Valley Fill EIS, Preliminary Draft, January 2001.

²⁶ Gannett-Fleming, "Landscape Scale Cumulative Impact Study of Future Mountaintop Mining Operations."

²⁷ DEIS IV.G-3 (emphasis added).

²⁸ DEIS II.B-13.

alternatives However, the lead agency for each responsibility under the action could vary under each alternative.”²⁹ The DEIS further admits that “[t]he proposed action alternatives are largely administrative and as a result, accurately projecting their environmental consequences is difficult.”³⁰

These stark but perhaps unavoidable admissions demonstrate that the DEIS does not really consider any real limitations on mountaintop removal or action alternatives that would minimize, to the maximum extent practicable, the environmental effects of this destructive mining practice.³¹

The dramatic shift from the Preliminary Draft to the May 2003 DEIS appears to be primarily due to the influence of the Office of Surface Mining (OSM) on the development of the EIS under the Bush administration. Under the previous administration, meaningful limits on the effects of mountaintop removal coal mining were at least being studied and considered. But in October 2001, J. Steven Griles, a former coal industry executive and lobbyist appointed to the post of Deputy Secretary of the U.S. Department of the Interior, issued a letter to the CEQ, Office of Management and Budget (OMB), EPA, and COE, stating in pertinent part:

We believe the [mountaintop removal/valley fill] EIS is the logical vehicle to address environmental protection and promote government efficiency, while meeting the nation’s energy needs. . . . We do not believe that the EIS, as currently drafted, focuses sufficiently on these goals. We must ensure that the EIS lay (sic) the groundwork for coordinating our respective regulatory jurisdiction in the most efficient manner. **At a minimum, this would require that the EIS focus on centralizing and streamlining coal mine permitting**, and minimizing or mitigating environmental impacts.³²

This was a none-too-subtle directive to the other federal agencies to shift the EIS’s focus away from minimizing environmental effects in favor of permit streamlining and, at best, trying to “mitigate” the destruction of mountaintop removal, rather than avoiding it. A follow-up email from OSM’s Mike Robinson explained to the other agencies that:

²⁹ DEIS II.C-25.

³⁰ DEIS IV.A-1.

³¹ See also DEIS IV. A-5 (“The No Action Alternative and action alternatives will not eliminate the loss of stream segments and reduction in organic matter transported downstream”); DEIS IV. A-D7 (“There are no significant differences among the No Action Alternative and Alternatives 1, 2, and 3 in terms of their ability to protect [threatened and endangered] species”); DEIS IV. G-3 (“All alternatives may continue to displace local communities in essentially equal amounts, since the alternatives are based on process differences and not directly on measures that restrict the area of mining. . . . all alternatives will produce indistinguishable indirect impacts in this regard”); DEIS IV.I-1 (Social Conditions) (“Since all of these actions would be implemented in Alternatives 1, 2, or 3, no distinction can be made between and among these alternatives as they affect social impacts”).

³² Letter from J. Steven Griles to CEQ, OMB, EPA, and COE re: Mountaintop Mining/Valley Fills Issues, October 5, 2001. It is worth noting that Mr. Griles is a former coal industry executive and lobbyist who continues to receive annual payments of \$284,000 per year from the sale of his former lobbying firm, National Environmental Strategies. When appointed to his present post, Mr. Griles sold his lobbying firm and signed a recusal agreement pledging that while at Interior he would not be involved in “any particular matter involving specific parties in which any of my former clients is or represents a party.” Griles’ former clients include many coal companies that conduct mountaintop removal mining, as well as the National Mining Association, the industry trade group and a vocal advocate for weakening federal environmental laws to benefit the coal industry.

OSM has received some **executive direction** from the Department of the Interior on a[n] overall theme for the EIS to embrace... [T]he document was shared by Deputy Secretary Griles with many of the principals of our agencies this Monday at a meeting with the President's [CEQ].³³

Other federal agencies involved in the EIS appeared both shocked and dismayed by this turn in events. Several inter-agency communications obtained by Trial Lawyers for Public Justice under the Freedom of Information Act indicate that the change in the EIS from studying ways to limit the environmental effects of mountaintop removal into an exercise in permit streamlining to benefit the coal industry was received as unexpected and ill-advised by the other federal agencies. For example, Dave Densmore of the U.S. Fish and Wildlife Service (which, like the Office of Surface Mining, is part of the Department of the Interior) stated in an October 11, 2001 e-mail to Mike Robinson that:

Needless to say, this is not a shining example of our Department having “spoken with one voice,” since I can find no evidence of anyone at FWS having reviewed or concurred with this approach. Regardless, based on my initial review, **I find I cannot support this approach, if for no other reason than the record having amply demonstrated that it has been the absence of federal oversight, not its confounding influence, that has gotten us in the fix we are in now.**³⁴

This “all process, no substance”³⁵ approach was sharply criticized by others involved in developing the programmatic EIS. In a revealing internal critique, the FWS explained why the revised framework for the DEIS is completely inadequate:

Now that the basic concept has been more fully elaborated . . . **it is painfully obvious to us that there are no differences between the three action alternatives that can be analyzed in a NEPA context.** Table IV-2 (Comparison of Alternatives) underscores this fundamental shortcoming: Each of the three action alternatives offers only meager environmental benefits (thus a “two-star rating,” as with a budget hotel or B movie), and there is no difference between them -- even in their degree of meagerness. The relative economic effects of these alternatives are similarly indistinguishable. The reader is left wondering what genuine actions, if any, the agencies are actually proposing.³⁶

Apparently, the FWS was not the only agency that harbored such concerns. One week before the DEIS was issued, an EPA briefing statement anticipated that a major issue raised by the public

³³ Email from Mike Robinson, OSM, re: EIS Direction, October 10, 2001, (emphasis added).

³⁴ Email from Dave Densmore, FWS, re: EIS Direction, October 11, 2001.

³⁵ It is important to note that the only “substantive” changes proposed in the DEIS would weaken existing environmental standards, such as the Buffer Zone rule. See Section C, below.

³⁶ Email from Dave Densmore re: FWS Comments on Chapter IV, with Attachment: FWS Comments on 9/20/02 Draft of Chapter IV (Alternatives), September 30, 2002 (emphasis added).

would be: “Process v. Environmental Protection: Where’s the meat? What is being proposed that will improve environmental protection? What proposals will place limits on MTM/VF?”³⁷

Not only did the DEIS approach fail to meet the requirements of the original scope intended for the programmatic EIS, it completely ignored the millions of dollars and thousands of pages of technical and scientific studies that the agencies’ staff had been working on for years. As aptly explained by the FWS’s Mr. Densmore:

The EIS technical studies carried out by the agencies – at considerable taxpayer expense – have documented adverse impacts to aquatic and terrestrial ecosystems, yet the proposed alternatives presented offer no substantive means of addressing these impacts. **The alternatives and actions, as currently written, belie four years of work and the accumulated evidence of environmental harm, and would substitute permit process tinkering for meaningful and measurable change.**³⁸

The DEIS’ failure to address meaningful alternatives disregards the findings of the studies on mountaintop removal and flies in the face of common sense – and it clearly violates the law governing the EIS process, the National Environmental Policy Act (“NEPA”).³⁹ NEPA requires that Environmental Impact Statements describe (1) the “environmental impact of the proposed action,” (2) any “adverse environmental effects which cannot be avoided should the proposal be implemented,” (3) any “alternatives to the proposed action,” and (4) any “irreversible or irretrievable commitment of resources which would be involved in the proposed action should it be implemented.”⁴⁰ NEPA implementing regulations make clear that an EIS must “present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision maker and the public,” and to “rigorously explore and objectively evaluate **all reasonable alternatives.**”⁴¹

NEPA’s requirement that federal agencies evaluate all reasonable environmentally distinguishable substantive alternative to agency actions and to fully evaluate the consequences of these alternatives is flatly violated by the mountaintop removal DEIS. The three “action alternatives” in the DEIS are purely process alternatives; they provide no meaningful basis for analyzing, much less reducing, the environmental impacts of continued federal approval of mountaintop removal operations. By failing to consider reasonable alternatives that would restrict the size, scope, and number of valley fills, the DEIS fails to consider a reasonable range of alternatives, as NEPA requires.

³⁷ Email from John Forren re: Briefing Outline, with Attachment: Briefing, Mountaintop Mining/Valley Fills (MTM/VF) Draft Programmatic Environmental Impact Statement, May 21, 2003.

³⁸ Email from Dave Densmore re: FWS Comments on Chapter IV, September 30, 2002 (emphasis added).

³⁹ 42 U.S.C. § 4321 *et seq.* NOTE: This section only addresses a few of the many ways the DEIS violates NEPA statutory and regulatory requirements; it is not meant to be a comprehensive evaluation of all NEPA violations evidenced by this DEIS.

⁴⁰ 42 U.S.C. § 4332(2)(C).

⁴¹ 40 C.F.R. § 1502.14 (emphasis added).

In addition, NEPA requires that an EIS accurately portray the impacts of the proposed action, and alternatives to the proposed action.⁴² NEPA requires that an EIS prepared by a federal agency include “a **detailed statement**” on “the environmental impact of the proposed action, ...any adverse environmental effects **which cannot be avoided should the proposal be implemented**, [and] alternatives to the proposed action.”⁴³

The alternatives analysis, including discussion of the proposed action is “the heart of the environmental impact statement.”⁴⁴ The analysis, based in large part upon the environmental consequences section of the EIS, should “[d]evote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.”⁴⁵

The environmental consequences section of the EIS “forms the scientific and analytic basis” for the required comparison of alternatives; this section must contain discussions of, *inter alia*, “direct effects and their significance, indirect effects and their significance,” and “environmental effects of alternatives including the proposed action.”⁴⁶ Effects that must be analyzed include “ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect or cumulative.”⁴⁷ Direct effects “are caused by the action and occur at the same time and place.”⁴⁸ Indirect effects “are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.”⁴⁹ Cumulative impact is “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.”⁵⁰

The mountaintop removal DEIS fails in this regard. According to claims made in the document, the “Preferred Alternative” – Alternative 2 – would, like the other “action” alternatives considered, result in “significant environmental benefits”⁵¹ but this assertion is not backed up with any description of or factual information about what those benefits would actually be. At best, the DEIS further asserts that the coordinated permit process that comprises Alternative 2 might result in the identification of ways that could be used on a case-by-case basis to avoid or minimize adverse effects, but nowhere in the document do the agencies actually identify any actual resources that would be protected – at individual sites or on a cumulative basis – as a result of the selection of their preferred alternative.⁵²

⁴² 42 USC 4332 (NEPA 102(C & E)), 40 CFR 1502.14, 1502.16; 40 CFR 1508.8.

⁴³ 42 USC 4332 (NEPA 102(C)) (emphasis added).

⁴⁴ 40 CFR 1502.14.

⁴⁵ *Id.*

⁴⁶ 40 CFR 1502.16.

⁴⁷ 40 CFR 1508.8.

⁴⁸ 40 CFR 1508.8(a).

⁴⁹ 40 CFR 1508.8(b).

⁵⁰ 40 CFR 1508.7.

⁵¹ DEIS II. B-17.

⁵² See DEIS II. Section C “Detailed Analyses of the Actions to Address Issues.” The title of this section is misleading in the sense that it contains no detailed analysis of the actions, including the preferred alternative.

Perhaps even more importantly, the DEIS fails to describe (either in detail or in general terms) the environmental resources that would be harmed under the agencies' preferred alternative. For example, the DEIS does not discuss the direct, indirect, or cumulative effects of Alternative 2 on stream losses, the consequential size of valley fills, future forest losses, effects on fish and wildlife resources, including endangered species, flooding or other environmental damage associated with mountaintop removal coal mining.⁵³

This omission in the DEIS itself is especially striking, given that the scientific studies contained in the appendices so vividly describe the environmental destruction that has been and currently is being caused by mountaintop removal. As the Cumulative Impact Study makes clear, without new restrictions on mountaintop removal, these impacts are likely to double over the next decade. Yet, the DEIS itself contains none of the detailed analysis NEPA requires saying what impact – if any – the proposed action alternative would have on the future of these resources.⁵⁴

Thus, a decision-maker reading the DEIS would not be able to figure out from this document that the federal action at issue is one that is destroying an environmentally sensitive area the size of one of the 50 United States (and not even the smallest one) – violating the very purpose of the NEPA analysis.

C. Elimination of Existing Protections, Such as the Buffer Zone Rule, Are Not Reasonable Alternatives

One of the most important components of current SMCRA law is the so-called buffer zone rule. This regulation, adopted in 1983 by the Reagan administration, prevents the OSM and state agencies from issuing permits for coal mining activities that would disturb land within 100 feet of streams, unless the permitting agency affirmatively confirms that the activities will not violate

⁵³ *Id.* In addition, under basic principles of administrative law, the agencies must do more than merely make the prescribed determinations but must support its determinations with substantial evidence. The D.C. Circuit has held that Administrative Procedure Act § 706(2)(A), which provides for reviewing courts to “hold unlawful and set aside” agency actions found to be arbitrary or capricious, “enabl[es] the courts to strike down, as arbitrary, agency action that is devoid of needed factual support.” *Assn. of Data Processing v. Board of Governors*, 745 F.2d 677, 683-84 (D.C. Cir. 1984) (emphasis in original; internal quotations and ellipsis omitted). Under this standard, the agencies must offer credible evidence, not mere speculation, to buttress factual conclusions. See, e.g., *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 866 (D.C. Cir. 2001) (remanded where agency had failed to “demonstrate[.]” relevant point with “substantial evidence -- not mere assertions”); *Edison Electric Inst. v. USEPA*, 2 F.3d 438, 446 (D.C. Cir. 1993) (agency’s purported “justification on the record” rejected where it “consists of speculative factual assertions”); *Chemical Mfrs. Assn. v. EPA*, 28 F.3d 1259, 1266 (D.C. Cir. 1994) (same); *United Distribution Cos. v. FERC*, 88 F.3d 1105, 1187-88 (D.C. Cir. 1996) (“the law requires more than simple guesswork”); *Air Transport Assn. v. FAA*, 254 F.3d 271, 279 (D.C. Cir. 2001) (agency “failed to provide any record justification” for a key assertion, but instead “simply assumed it was so”).

⁵⁴ Under the arbitrary and capricious standard, an agency “must examine the relevant data and articulate a satisfactory explanation for its action including a “rational connection between the facts found and the choice made.” *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). An agency action can be arbitrary and capricious “if the agency . . . entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Ass’n v. State Farm Mut.*, 463 U.S. 29 (1983).

water quality standards and will not adversely affect water quantity, quality, or other stream resources.⁵⁵ This regulation is needed to implement the provisions of SMCRA that require the protection of water courses from mining damage.

Remarkably, all of the “alternatives” considered in the DEIS propose (or assume) that the Buffer Zone rule will be rewritten by the Bush administration to allow coal mining waste to be dumped into streams, burying them – essentially eliminating the stream “buffer” from the Buffer Zone rule. This is perhaps the most outrageous part of the DEIS. While the document overall fails to live up to the purpose of finding ways to minimize the already devastating effects of mountaintop removal by ignoring alternatives needed to limit the impacts of this form of mining, **the proposal to eliminate the Buffer Zone rule actually would increase the harm caused by mountaintop removal by removing from law an important and long-standing limit on coal mining activities.**⁵⁶

As noted above, the 1983 Buffer Zone rule protects streams from coal mining activities. In relevant part, the rule states that:

(a) No land within 100 feet of a perennial stream or an intermittent stream shall be disturbed by surface mining activities, unless the regulatory authority specifically authorizes surface mining activities closer to, or through, such a stream. The regulatory authority may authorize such activities only upon finding that--

(1) Surface mining activities will not cause or contribute to the violation of applicable State or Federal water quality standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream[.]⁵⁷

The Bush administration’s proposal, as distributed to regional groups in March 2003⁵⁸ would change the existing rule to state that:

(a) General. You must first obtain specific approval from the regulatory authority before conducting surface mining activities within 100 feet of a perennial or intermittent stream. Except as provided in paragraph (b), the regulatory authority may authorize such activities only after making a written finding that the activities will—

(1) Not cause or contribute to a violation of applicable State or Federal water quality standards.

(2) Be conducted to minimize disturbances to the quantity and quality of water in the stream. This finding need not be made with respect to any reach of the stream that is

⁵⁵ 30 CFR § 816.57 .

⁵⁶ All four of the alternatives considered in the DEIS, including the so-called “no action alternative,” contemplate changes to the existing Buffer Zone rule that would either weaken (“no action alternative”) or explicitly (alternative 1) or implicitly (alternatives 2 and 3) eviscerate the rule. The DEIS therefore frustrates Congressional will and illegally evades the requirements of NEPA to consider “the alternative of no action” and compare the benefits of stream protection as it exists with any changes in existing law.

⁵⁷ 30 CFR § 816.57 (emphasis added).

⁵⁸ See Office of Surface Mining “Outreach Document: Planned Rulemaking to Clarify Excess Spoil/Stream Buffer Zone Requirements,” March 21, 2003.

upstream of a sedimentation pond located within the stream channel; provided that the pond meets the location requirements of § 816.46(c)(1)(ii) of this part.

(3) Be conducted in a manner that minimizes disturbances and adverse impacts to fish, wildlife, and related environmental values of the stream.

(b) Placement of excess spoil in perennial or intermittent streams. The findings required in paragraphs (a)(1)-(3) do not apply to the construction of excess spoil fills in perennial or intermittent streams. To approve construction of fills in these streams, the regulatory authority must find that the applicant has—

(1) Minimized the creation of excess spoil to the maximum extent practicable as required under § 780.18(b)(3) of this chapter and § 816.102(b) of this part; and

(2) Designed the fill to avoid or minimize adverse impacts to perennial or intermittent streams to the extent required under § 780.16(c) of this chapter and § 816.97(f) of this part.

The proposed replacement of the Buffer Zone rule would obviously and specifically change the law to allow the dumping of coal mining spoil directly into these previously protected streams, with the only requirement being that the mining companies have “minimized the creation of excess spoil to the maximum extent practicable.” This rule change would effectively remove the “buffer” from the buffer zone rule to create an illegal and unwarranted exception allowing coal companies to bury streams under valley fills.

The DEIS acknowledges that this change in the stream Buffer Zone (“SBZ”) rule is in the works, but does not address the environmental effects that this change in law will have on the future of mountaintop removal coal mining. The DEIS states that:

OSM is currently preparing a draft proposed rule that would amend the rules at 30 CFR 816.57 and 817.57 to clarify the SBZ requirements . . . Exemptions to the SBZ requirements would only be granted upon a demonstration by the coal operator, to the satisfaction of the SMCRA regulatory authority, that encroachment into the SBZ is necessary and that disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas have been minimized.⁵⁹

The DEIS’ explanation for the proposal to eliminate the buffer from the Buffer Zone rule for valley fills is on its face nonsensical. The DEIS’ rationale ignores the existing rule’s plain meaning and is seemingly ignorant of the interpretation of the Buffer Zone rule by previous administrations.

The DEIS claims that applying the stream buffer zone rule under SMCRA to prohibit fills in intermittent and perennial streams would be inconsistent with existing Clean Water Act

⁵⁹ DEIS II.C-34 to C-35 (emphasis added). *See also*, DEIS II.B-7, regarding the “No Action Alternative” (“OSM initiated a SMCRA regulatory program enhancement to amend and clarify the stream buffer zone (SBZ) rules at 30 CFR 816.57 and 817.57”); DEIS II.B-19, regarding the “No Action Alternative” (“SMCRA buffer zone (SBZ) subject to interpretation”); DEIS II.C-1, regarding the “No Action Alternative” (“Current SBZ rule-making (OSM)”); DEIS II.D-2, regarding “Alternatives Considered but Not Carried Forward in this EIS,” (“Use of the [existing] OSM SBZ rule was considered to implement the alternatives establishing valley fill restrictions for certain stream segments [but not carried forward]”).

requirements allowing valley fills⁶⁰ and would therefore violate section 702 of SMCRA, which provides that SMCRA does not supercede, amend or repeal the Clean Water Act.⁶¹

In describing the proposed changes to the Buffer Zone rule in the so-called “No Action Alternative,” the DEIS states:

Historically, OSM has not viewed, applied, or enforced the buffer zone regulation to prohibit mining activities within the buffer zone if those activities would have less than a significant effect on the overall chemistry and biology of streams, i.e., the overall watershed or stream below the activity. Therefore, excess spoil fill construction within the buffer zone has been allowed if a demonstration of no significant effect on downstream water quality was made by the permit applicant to the satisfaction of the SMCRA regulatory authority.⁶²

The DEIS’ argument is flatly inconsistent not only with the text of the current rule, but also with the position taken by the United States in the litigation that actually was the source of this DEIS in the first place, *Bragg v. Rivenburgh*. In its brief in the 4th Circuit in that case, the United States argued that:

SMCRA section 702 provides merely that SMCRA does not alter the existing regulatory schemes adopted by Congress in the [Clean Water Act] and other environmental statutes. ... When Congress has intended that one statute should take precedence over another statute in the regulation of a particular activity, it has done so with language very different and much clearer than SMCRA section 702. ... While WVDEP has asserted that it would create an impermissible statutory “conflict” to read the buffer zone rule to establish a stricter standard than that established by the 404(b)(1) guidelines, such a statutory construction does not create any such “conflict” as that term is understood in the law. As the Supreme Court has held, two statutes can be said to conflict only when it is impossible to comply with both. **No such conflict arises if SMCRA is construed to prohibit some activities that would be authorized by the CWA, since it is possible to comply with both statutes by engaging in only those activities authorized by both statutes.**⁶³

Thus, OSM’s interpretation of the existing Buffer Zone rule in the DEIS is incorrect, and is directly inconsistent with the interpretation given by the United States before the 4th Circuit in *Bragg*. In addition, EPA’s Office of Water warned OSM in December, 2002 that the DEIS’ legal position on the Buffer Zone rule is incorrect, commenting that:

⁶⁰ This argument is especially cynical and disingenuous given that in May, 2002, the Bush administration rewrote 25-year-old Clean Water Act regulations prohibiting the disposal of waste material – including mountaintop removal waste – from being dumped in streams in an attempt to allow such waste disposal in waters to occur.

⁶¹ DEIS II.D-2. See 30 U.S.C. § 1292(a)(2).

⁶² DEIS II.C-34.

⁶³ Brief for the Federal Appellants, 4th Cir., No. 99-2683, April 17, 2000, pp. 45-49 (emphasis added) (internal citations omitted).

There are fairly sweeping legal conclusions here that the stream buffer zone rule could not be used to determine allowable stream segments for filling because doing so would supercede the CWA, something [C]ongress precluded in SMCRA. The lawyers need to look at this more closely. I'm uncomfortable with the breadth of this argument...⁶⁴

The DEIS' interpretation of the Buffer Zone rule, as supplied by OSM, is erroneous as a matter of policy and of law, and is an arbitrary reversal of the prior position taken by the U.S. government before the federal courts.

All of the alternatives considered in the DEIS, including the "No Action" alternative and the three "action alternatives," contemplate **changing** the Buffer Zone rule so that the rule is weakened or eviscerated. No alternative contemplates keeping the Buffer Zone rule in place as it currently exists. This failure to consider any alternative which includes the option of not changing current law violates NEPA, under which the EIS must "[i]nclude the alternative of no action."⁶⁵ **By illegally including a rule change in the "No Action" alternative, the DEIS attempts to evade a fundamental requirement of NEPA to consider the benefits of reasonable alternatives, including the alternative of leaving the law unchanged.** Rather, the DEIS assumes that under all alternatives spoil can be placed in streams and contains no analysis of the benefits of maintaining the current level of protection afforded by the Buffer Zone rule. Further, the DEIS' assumption that changing the Buffer Zone rule is part of the "no action alternative" violates SMCRA, which requires OSM to prepare an EIS on significant changes to the SMCRA regulations.⁶⁶

D. The DEIS' Proposed Continued Reliance on the Use of Nationwide Permits for Valley Fills Is Illegal

The DEIS perpetuates the Corps' longstanding violation of the Clean Water Act, by relying upon issuance of general Nationwide Permits to authorize valley fills from mountaintop removal mining operations. All of the proposed alternatives discussed in the DEIS include the continued use of nationwide permits for future authorizations of valley fills.

Section 404(e) of the Clean Water Act authorizes EPA and the Army Corps to issue general permits for the discharge of dredged or fill material for categories of activities that are "similar in nature" when the discharges that will be permitted under the permits will cause "only minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effect on the environment."⁶⁷

Currently, the Army Corps relies upon Nationwide Permit 21 (NWP 21), an overly-broad general permit that encompasses "Surface Coal Mining Activities," to authorize mountaintop removal mining valley fills to bury streams throughout Appalachia. Virtually every valley fill that has

⁶⁴ Email from Steve Neugeboren, EPA, re: MTM legal issues, January 7, 2003.

⁶⁵ 40 C.F.R. § 1502.14(d).

⁶⁶ *See, e.g.*, DEIS II.C-63 ("SMCRA Section 702(d) states that SMCRA rulemaking is a major Federal action requiring NEPA compliance.") (emphasis in original).

⁶⁷ 33 U.S.C. § 1344.

been permitted by the Army Corps in Appalachia has been pursuant to a nationwide general permit, as opposed to individual permits under the Clean Water Act.

Studies estimate that, over the last 10 years, mountaintop removal has already caused direct impacts to more than 1,200 miles of streams, including an estimated 724 stream miles that were covered by valley fills from 1985 to 2001.⁶⁸ The studies confirm that “[i]f mining permitting and mitigation trends stay the same, an additional thousand miles of direct impacts could occur in the next ten years... The majority of streams impacted are headwater streams.”⁶⁹ These estimates are only for direct impacts to streams (i.e., the streams are buried or otherwise destroyed) and do not take into account the “indirect impacts” on streams such as elevation of selenium levels as well as changes to stream chemistry, temperature, flow, energy, sedimentation, or biota. The studies conclude that such effects may be irreversible, noting that: “[s]tudies seem to suggest that the impacts to the aquatic community downstream from fills may result from water quality impacts due to filling which may be extremely difficult or impossible to correct.”⁷⁰

In addition, the studies accompanying the DEIS document the enormous cumulative terrestrial impacts already caused by the sweeping deforestation that is part and parcel of mountaintop removal mining.⁷¹ Besides those forests destroyed directly in order to access seams of coal below the mountaintops, those forests located down in the valleys that are filled are also extinguished, along with the wildlife that rely upon them. But for the general permits issued allowing “valley fills” under the Clean Water Act, many of these forests and their associated wildlife would not be destroyed. As noted above, the destruction of these streams, forests, and associated wildlife is, for the most part, irreversible.

The DEIS studies clearly establish that greater than minimal adverse environmental effects have occurred, are occurring and will continue to occur as a result of mountaintop removal mining valley fills. Many of the authorized fills cause greater than minimal adverse effects individually, and there can be no question that the cumulative impacts of valley fills have already exceeded the “minimal adverse effects” threshold established by the Clean Water Act. Thus, no additional general permits for valley fills may be issued by the Army Corps, nor can existing general permits be relied upon to authorize such fills, or as a basis for considering alternatives under the DEIS.⁷²

⁶⁸ DEIS, ES-4.

⁶⁹ DEIS, App. I at 67.

⁷⁰ *Id.* at 75.

⁷¹ As noted above, the Clean Water Act prohibits the issuance of general permits to fill waters when the activity will have more than a “minimal adverse **environmental** effects when performed separately and will have only minimal cumulative adverse effect on the **environment.**” 33 U.S.C. §1344(e) (emphasis added). Thus, the analysis of the harm caused by the activity proposing to discharge pollutant into water is not limited to the harm caused only to the aquatic environment, but necessarily consider the harm that would result to the environment generally, including the terrestrial environment.

⁷² We hereby incorporate by reference additional reasons why the continued use of NWP 21 violates the Clean Water Act as stated in NRDC’s October 2001 comments on the NWP proposal published in the Federal Register at 66 Fed. Reg. 42070 (August 9, 2001).

E. The DEIS' Mitigation Analysis Is Fundamentally Flawed Because Burial of Streams Cannot Be Mitigated.

The DEIS further violates NEPA by failing to adequately analyze the effectiveness of proposed mitigation measures. Specifically, the DEIS wrongly relies on the effectiveness of in-kind mitigation to justify failure to recommend other stream protection measures⁷³ despite the fact that the DEIS and its accompanying studies admit that on-site headwater stream reconstruction has never been successfully accomplished and that the technology to reconstruct free-flowing streams does not even exist. Thus, there is no rational basis for the DEIS' reliance upon stream mitigation as a method of reducing impacts of mountaintop removal mining to an environmentally acceptable level.

The DEIS states that “[m]itigation for lost stream functions is important to ensure that significant degradation to waters of the U.S. does not occur”⁷⁴ and that “[I]n-kind mitigation must restore or create headwater stream habitat on the reclaimed mine area to replicate the functions lost from direct stream loss.”⁷⁵

The Fish and Wildlife Service's reviewer of the DEIS has commented that “...the ability of compensatory mitigation to reduce impacts to minimal levels is the linchpin of each of the alternatives” but that such mitigation for buried streams “is an untested, unproven concept, and many believe it can't be accomplished.”⁷⁶

The DEIS states: “[w]hile proven methods exist for larger stream channel restoration and creation, the state of the art in creating smaller headwater streams onsite has not reached the level of reproducible success required for these efforts to be reasonably relied upon programmatically as an option for full compensatory mitigation.”⁷⁷ And elsewhere: “[d]uring the development of this EIS, technical representatives from OSM and from West Virginia have suggested that groin ditches constructed along the edges of fills may represent an opportunity for in-kind replacement of streams with an intermittent or ephemeral regime. To date, no drainage structures observed appear to have successfully developed into a functional headwater stream.”⁷⁸

While it is true that NEPA does not require an agency to mitigate adverse environmental impacts, where, as here, “an agency's decision to proceed with a project is based on unconsidered, irrational, or inadequately explained assumptions about the efficacy of mitigation measures, the decision must be set aside as ‘arbitrary and capricious.’”⁷⁹

⁷³ DEIS II.C-23 (stating that burial of streams by valley fills “can be successfully offset by a comprehensive mitigation proposal”).

⁷⁴ DEIS II.C-49.

⁷⁵ DEIS IV.B-9.

⁷⁶ Email from Cindy Tibbott, FWS, re: Chapters I & II comments, November 13, 2002.

⁷⁷ DEIS II.C-50.

⁷⁸ DEIS III.D-18 – D-19.

⁷⁹ *Stein v. Barton*, 740 F. Supp. 743, 753-54 (D. Alaska 1990) (conclusion that mitigation “will prevent any significant reduction in fish habitat” was arbitrary in light of evidence in the record demonstrating mitigation failures).

In short, **the mountaintop removal DEIS relies upon mitigation “alternatives” that have little basis in reality, and no credible prospect of success. Accordingly, the DEIS cannot satisfy NEPA’s requirements for a proper alternatives analysis.**

F. The Economic Impact of Reducing the Size of Valley Fills Would Be Minimal

The failure to consider new restrictions on mountaintop removal – especially objective limits on the size of valley fills – cannot be justified on economic grounds. Studies prepared for the DEIS concluded that limits on valley fills would not only have significant environmental benefits, but also that the economic consequences would be moderate, or relatively insignificant. Even after the first economic study was rewritten for the DEIS in order to be more sympathetic to the coal industry’s concerns, the second version of the study concluded that the economic costs would be small.

As part of the programmatic EIS effort, EPA contracted with Hill & Associates (H&A), an economic modeling firm, to model the economic impacts of the various alternatives – still under consideration at that time – for restricting the size of valley fills. In a December 2001 “final” report to EPA, H&A concluded that even the most severe restriction on valley fills studied in the report – one that barred fills covering watersheds more than 35 acres – would raise the price of coal by only \$1 per ton and raise the cost of electricity by a few cents per megawatt-hour.⁸⁰ In a March 2002 slide show presentation to senior EPA officials in its Washington, D.C. headquarters, EPA Region 3 officials characterized these effects as “a minimal impact on the price of coal” and “virtually NO impact on electricity prices.”⁸¹ The presentation revealed that:

- Sufficient coal reserves appear to exist under the 250, 150, 75, and 35-acre restriction scenarios necessary to meet demand during the 10 year study period . . .
- Restricting valley fills to 250, 150, 75, or 35-acre watersheds will increase the price of coal by only \$1/ton under each respective restriction scenario.
- Restricting valley fills to 250, 150, 75, or 35-acre watersheds will increase the price of electricity by only a few cents/MWHR under each respective restriction scenario.⁸²

Another EPA draft study, dated April 23, 2002, concludes that, even under the most restrictive option studied – limiting the size of valley fills to 35-acre watersheds – annual average impacts to total statewide employment in Kentucky and West Virginia are no more than 0.3% of total year 2000 employment. In addition, this study found that there are no “notable differences in [wholesale electricity] prices or generation levels among the alternative [restrictions] . . . due to the competitive nature of the energy markets.”⁸³

⁸⁰ Hill & Associates, "Economic Impact of Mountain Top Mining and Valley Fills, Environmental Impact Statement," for U.S. EPA, December 2001. The H&A study assumed that valley fill restrictions would apply immediately to all existing mines, while a more likely scenario is that new restrictions would only apply to future permits. Thus the study overstates the likely economic impacts of limiting future Clean Water Act § 404 permits to dump mountaintop removal waste into waters.

⁸¹ Mountaintop Mining EIS Presentation, EPA Office of Water, Office of Federal Activities, and Office of General Counsel, March 5, 2002 (emphasis in original).

⁸² *Id.*

⁸³ Gannett Fleming, Draft Economic Consequences Study for MTM/VF EIS, April 23, 2002.

Apparently because the coal industry was unhappy with the conclusions of the first “final” report, Hill & Associates was directed to reopen their study by conducting a “sensitivity analysis” that consisted mostly of interviewing coal company officials to incorporate their opinions of the economic effects of limiting the size of valley fills.⁸⁴ Even with this industry input, the economic consequences of limiting the size and location of valley fills was found to be minimal.

Thus, the May 30 DEIS finds that “in most situations the restriction would change the price of coal to less than one dollar per ton,” and “[t]he price of electricity would continue to rise approximately 1 to 2 percent across the scenarios; the impacts due to restrictions will have little effect on price.”⁸⁵ Even after adjusting the models based on the coal industry’s inputs, the change in the price of coal rose to only two dollars a ton.

Morgan Worldwide Consultants, Inc. (MWCI) conducted an analysis of the economic reports. As OSM’s Mike Robinson observed in a January 2003 e-mail, the MWCI analysis concluded “...it is evident that the electricity prices are quite insensitive to the MTM/VF restrictions, showing differences of only 1%-2%, or 3% at the maximum.”⁸⁶ Perhaps recognizing this might be a public relations issue for the agencies – since no other reason to avoid limiting the size of valley fills had been produced – a background memo for the agencies’ “Communications Team” dated January 16, 2003, warns that “[a]s part of the studies conducted in conjunction with the DEIS were studies to assess the economic impacts that would result from implementing actions considering limits on the size of valley fills. Information from the economic studies ... suggest that limits on the size of fills will have only minimal economic consequences on coal and electricity prices.”⁸⁷

Therefore, one of the coal industry’s – and this administration’s – primary rationales for failing to rein in the worst abuses caused by mountaintop removal coal mining is refuted by its own economic studies.

Conclusion

The environmental and economic studies prepared for the mountaintop removal programmatic EIS do not lend any support to the administration’s proposed “Preferred Alternative” that would

⁸⁴ Although the “Phase II” H&A study states that stakeholder meetings were held with “members of the environmental community, representatives from academia, governmental agency personnel, and technical representatives from the coal mining industry,” under the heading “Findings from Individual Stakeholder Meetings” the report states that “[s]hortly after the initial “kickoff” meeting of this project, a team of technical specialists from Hill & Associates made separate visits to individual coal mining companies to research actual “on-the-ground” impacts experienced and projected due to valley fill restrictions. Coal producers representing approximately 60% of the affected surface mine tonnage in southern West Virginia and eastern Kentucky were visited.” DEIS, App. G “Phase II Study” at 6.

⁸⁵ DEIS App. G, p. 6 (summary of Phase II Economics study by Hill and Associates) (emphasis added).

⁸⁶ Email from Mike Robinson re: H&A economic analysis, citing Letter from Morgan Worldwide Consultants, Inc., January 10, 2003.

⁸⁷ Mountaintop Mining / Valley Fill DEIS Background Information for Communications Team, January 16, 2003, p. 2 (emphasis added).

result in the weakening of existing environmental laws that limit the size and location of valley fills. In fact, the studies support the opposite conclusion: mountaintop removal must be much more strictly limited to head off additional and significant devastation of the Appalachian region's natural resources – and the communities that depend on those resources now and for future generations.

The DEIS represents a wholesale retreat from the promise made by the federal government in 1998, when the agencies involved pledged to develop a programmatic EIS to minimize to the maximum extent practicable the environmental harm caused by mountaintop removal and valley fills – not prolong or exacerbate the problem. The DEIS also violates or calls for changes in long-standing environmental protections that would violate numerous federal environmental laws, including the National Environmental Policy Act, the Clean Water Act, and the Surface Mining Control and Reclamation Act.

As stated above, the DEIS must be rewritten to consider substantive alternatives that would minimize the environmental harm caused by mountaintop removal and select a preferred alternative that would truly protect the resources and people of the region.

Sincerely,

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