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1. PURPOSE AND NEED

1. NEED FOR ACTION

Surface coal mining in the Appalachian coalfield states of Kentucky, Tennessee, Virginia, and West Virginia is conducted by a variety of mining methods and in different topographic settings. For the purposes of this EIS, “mountaintop mining” will be considered to include all types of surface coal mining in the steep terrain of the central Appalachian coalfields. Removal of overburden and interburden (rock above and between coal seams) during mountaintop mining operations results in generation of excess spoil because the broken rock will not all fit back into the mining pit. The excess spoil must be placed in disposal sites adjacent to the mining pits in order to allow for efficient and economical coal extraction. Typical locations for excess spoil disposal sites are valleys also known as heads of hollows or uppermost stream reaches. The typical method of disposing of this excess spoil is to place it in engineered earthen and rock structures known as excess spoil disposal areas or colloquially known as head of hollow fills, hollow fills or valley fills.

Increased concern about mountaintop mining operations occurred in 1997 and 1998, both in the media, by the Federal agencies, and in notices of intended litigation related to the subject. It appeared that the number of these types of operations had increased in recent years in Appalachia, and that more and more valley fills were being proposed/built. A growing concern expressed by the FWS initiated an informal inventory of the amount of stream impacts resulting from valley fills and sediment ponds in West Virginia, Virginia, and Kentucky. FWS also brought their concerns to OSM and EPA, most notably in an interagency forum in 1997 hosted by EPA, called the Federal Regulatory Operations Group, or FROG. Out of this meeting, an interagency working team was formed by OSM, EPA, COE, and FWS in early 1998. Several studies were designed to prepare a consistent fill inventory, look at stream impacts, fill stability, and evaluate regulatory program inconsistencies in mitigation and other mining program requirements.

Press coverage of public issues with mountaintop mining surfaced beginning in August 1997, in television, periodicals, and newspapers, including *U.S. News and World Report*, ABC’s “Night Line” program, as well as the Charleston (WV) *Gazette*, *Washington Post*, *New York Times*, Lexington (KY) *Herald-Leader*, and *Louisville Courier-Journal*. In 1998, OSM initiated oversight activity evaluating how the West Virginia, Kentucky, and Virginia SMCRA delegated programs were approving coal mines that proposed not to restore to “approximate original contour.” These practices result in more numerous and larger valley fills. EPA began utilizing the CWA authority under the Section 402 (National Pollution Discharge Elimination System permit) to object to the size and location of valley fills because of impacts to streams. EPA also began to evaluate the applicability of the existing framework under the COE Nationwide versus Individual Permit authority under CWA 404.

The notification by citizens and the West Virginia Highlands Conservancy of the intent to sue the state (WVDEP) and federal (COE) government in West Virginia occurred in early 1998. Litigation ensued in July 1998 [Bragg, *et al. v. Robertson, et al.*, Civ. No. 2:98-0636 [S.D.W. Va.]. Generally, the lawsuit concerned allegations that valley fills associated with surface coal mining operations result in the loss and degradation of West Virginia streams, and that the Clean Water Act (CWA) and Surface Mining Control and Reclamation Act (SMCRA) were being improperly applied. The plaintiffs argued that the current practice of valley filling, both individually and cumulatively, caused more than a minimal impact to the “waters of the US.” Under the CWA, activities causing more

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than a minimal impact are not eligible for a Nationwide or General Permit under CWA Section 404, but must apply the more rigorous standards imposed under the CWA 404 Individual Permitting process. As part of this claim, the plaintiffs alleged that the COE also violated the National Environmental Policy Act (NEPA), by failing to analyze the adverse and cumulative environmental impacts of valley fills and surface mining activities in West Virginia. In December 1998, the plaintiffs and the COE, EPA, OSM, FWS and the WVDEP agreed to settle the CWA portion of the case. The settlement agreement covers two primary objectives, which are increased scrutiny of permits involving valley fills and performance of an EIS.

To aid in the objective of increased scrutiny of permits, a *Memorandum of Understanding (MOU) Among the USOSM, USEPA, USCOE, USFWS, and WVDEP for the Purpose of Providing Effective Coordination in the Evaluation of Surface Coal Mining Operations Resulting in Placement of Excess Spoil Fills in the Waters of the United States* establishes a process for improving coordination in the review of permit applications. The entire MOU is provided in an appendix to this EIS. The signatory agencies entered into the agreement with the goals of enhancing cooperation and communication in order to ensure compliance with all applicable federal and state laws, improving time lines and predictability of the permit process, and minimizing adverse environmental impacts from surface coal mining operations resulting in placement of excess spoil fills in the waters of the United States. The experiences of the agencies resulting from the increased permit scrutiny have been considered in the development of this EIS. Many of the efforts in this so-called “interim permitting” period identified areas where the agencies, the regulated community, and the environment would benefit from coordinated or clarified procedures, better baseline data collection, improved analysis of potential impacts, and a different sequence of processes.

In June 1998, West Virginia Governor Cecil Underwood created the “Task Force on Mountaintop Mining and Related Practices” to study the effects of mountaintop mining. The task force was organized into three committees: 1) Impact to the Economy; 2) Impact on the Environment; and 3) Impact on the People. The findings of the task force were published in December 1998. The recommendations included:

- The need for more research on the environmental and economic effects of mountaintop mining.
- Establishment of a state office to regulate the impact of mountaintop removal mining on people.
- Establishment of a nationwide stream mitigation policy.
- Discontinuing of “fish and wildlife habitat” as a postmining land use (PMLU).
- Development of commercial forestland as a preferred PMLU.
- Rigorous enforcement of existing regulatory requirements, including water quality and approximate original contour (AOC) guidelines.

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- Examination by the legislature of whether public values compel restrictions on the degree of alteration of the landscape and the environment with regard to large-scale mountaintop mining operations.

All of these events and publicity heightened the federal government's awareness that a thorough evaluation of the impacts of mountaintop mining and valley fills was warranted. The settlement negotiations for the *Bragg* litigation were a final catalyst and galvanized the resolve to perform this EIS.

2. PURPOSE OF THE EIS

The Notice of Intent to prepare the EIS is provided in the Federal Register, dated February 5, 1999 (64 FR5778, 02/05/99). The stated purpose for this EIS in this Notice is "to consider developing agency policies, guidance, and coordinated agency decision-making processes to minimize, to the maximum extent practicable, the adverse environmental effects to waters of the United States and to fish and wildlife resources affected by mountaintop mining operations, and to environmental resources that could be affected by the size and location of excess spoil disposal sites in valley fills (64 FR 5778, 02/05/99)." The EIS also satisfies one of the requirements of the December 23, 1998 Settlement Agreement in the *Bragg* lawsuit described earlier.

Because the federal and state agencies determined that there is a lack of comprehensive data regarding mountaintop mining and valley fill impacts, a number of studies have been initiated to address these data gaps. However, accurately describing and quantifying the extent and nature of direct, secondary, and cumulative impacts related to valley fills and associated mining practices is difficult (64FR5778). Thus, another purpose of this EIS is to evaluate significant environmental impacts associated with these mountaintop operations on aquatic and terrestrial habitat communities, and other individual and cumulative effects.

The agencies undertaking preparation of this EIS implement federal and state laws with which mountaintop mining operations and associated discharges to the waters of the United States must comply. It is the further purpose of this EIS to evaluate the various laws, regulations, policies, guidelines, and processes to determine if more protective requirements are needed. OSM is responsible for the national administration of SMCRA, and has delegated the SMCRA regulatory functions to Appalachian coalfield states (except Tennessee, where OSM directly regulates coal mining). The discharge of fill material into waters of the United States is regulated under Section 404 of the CWA, with permit responsibility administered by the COE. Under Section 404, regulations are issued by both the COE and EPA. Other discharges to waters of the United States are subject to Section 402 of the CWA administered nationally by EPA with authority for the program delegated to West Virginia and other Appalachian coalfield states. Mountaintop mining operators must comply with the Endangered Species Act administered by the FWS. In addition, the Fish and Wildlife Coordination Act (FWCA) pertains to federally permitted, constructed, or licensed water development projects and land development projects that affect any waterbody. Whenever OSM, the COE or EPA authorizes an action within the scope of the FWCA, they are required to consult with the FWS and counterpart state agencies, to obtain recommendations on ways to mitigate adverse effects on fish and wildlife resources. As a signatory to the December 1998 settlement agreement,

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West Virginia is participating with the federal agencies as a co-lead agency in the preparation of this EIS.