No. 19-2194

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SOUTHERN APPALACHIAN MOUNTAIN STEWARDS, APPALACHIAN VOICES, and SIERRA CLUB,

Plaintiffs-Appellants,

v.

RED RIVER COAL COMPANY, INC.,

Defendant-Appellee

Appeal from the United States District Court for the Western District of Virginia
Big Stone Gap Division

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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Under the interpretation of 30 U.S.C. § 1292(a) put forward by Defendant-Appellee Red River Coal Company ("Red River"), the Surface Mining Control and Reclamation Act ("SMCRA") does not apply whenever there is a substantive overlap between it and the Clean Water Act ("CWA"). Based on that interpretation, Red River argues that Plaintiffs-Appellants Southern Appalachian Mountain Stewards, Appalachian Voices, and Sierra Clubs ("SAMS") cannot enforce SMCRA's performance standards because doing so would overlap with and negate Red River's immunity from CWA liability under the CWA's permit shield. If this Court accepted Red River's interpretation, it would compromise SMCRA's core provisions and make SMCRA subservient to the CWA.

Red River's interpretation ignores basic principles of statutory interpretation. In contrast, SAMS' interpretation is consistent with those principles and fully preserves both the CWA and SMCRA. One of those principles is that federal statutes should, whenever possible, be harmonized in order to give effect to the Congressional intent in each statute's passage. Under SAMS' interpretation of section 1292(a), the CWA's permit shield operates as a narrow bar to enforcement of shielded permit conditions, but does not override SMCRA's core provisions that all mine operators must comply with SMCRA's performance standards, including the standard requiring compliance with water quality standards. Thus, SAMS'

interpretation allows for the effective application of both statutes without damaging the structure of either one.

Red River is simply wrong to assert that section 1292 is anything more than a standard savings clause. The legislative history of SMCRA demonstrates that Congress expressly characterized it as a "standard savings clause." S. Rep. 95-128 (1977) at 99. Numerous courts have viewed it as such. Consequently, another fundamental principle of statutory interpretation applies: Savings clauses should be interpreted narrowly so as not to conflict with the substantive provisions in the same statute.

Red River misreads or overstates the import of several cases upon which it relies. The Court in *Shaw v. Delta Airlines Inc.* read the savings clause of the Employee Retirement Income Security Act (ERISA) narrowly to avoid a conflict with the broad preemption clause of that statute. 463 U.S. 85 (1983). *In re Surface Mining Regulation Litigation* must be read in the context of the issue before the D.C. Circuit—a challenge to newly promulgated SMCRA regulations—and with that court's ultimate holding that water quality standards should be applied consistently throughout the nation. 627 F.2d 1346 (D.C. Cir. 1980). Finally, the Sixth Circuit was simply wrong in *Sierra Club v. ICG Hazard* when it extended the D.C. Circuit's decision in *In re Surface Mining Regulation* into the enforcement context. 781 F.3d 281 (6th Cir. 2015).

I. SMCRA Can Be Harmonized with the CWA's Permit Shield, Negating Any Need to Render Any Portion of SMCRA Unenforceable.

A. Fundamental Principles of Statutory Construction Mandate that Federal Statutes be Harmonized Whenever Possible.

As SAMS described in its opening brief, "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). This is a longstanding principle and one of the fundamental rules of statutory construction, cited repeatedly by the U.S. Supreme Court and this Court of Appeals. *See e.g. U.S. v. Borden Co.*, 308 U.S. 188, 198 (1939) ("When there are two acts upon the same subject, the rule is to give effect to both if possible."); *U.S. v. Zacks*, 375 U.S. 59, 67-68 (1962) ("When there are two acts upon the same subject, the rule is to give effect to both if possible. The correctness of this statement is not to be doubted."); *Mejia v. Sessions*, 866 F.3d 573, 584 (4th Cir. 2017) ("In considering these statutes, our goal is to 'fit, if possible, all parts into an harmonious whole.'" (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)));

This principle is particularly forceful when two statutes are meant to regulate the same subject matter. "We believe the more appropriate rule of statutory construction is the principle that a court should, if possible, construe statutes harmoniously. This is especially true if the statutes deal with the same subject

matter, even if an apparent conflict exists." *Anderson v. Fed. Deposit Ins. Corp.*, 918 F.2d 1139, 1142 (4th Cir. 1990) (citation omitted). "When two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other." *POM Wonderful, LLC v. Coca Cola Co.* 573 U.S. 102, 115 (2014). Indeed, "[a] party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing a clearly expressed congressional intention that such a result should follow." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (internal quotations omitted).

The expansive reading of 30 U.S.C. § 1292(a) (SMCRA's savings clause) and 33 U.S.C. § 1342(k) (the CWA's permit shield) adopted by the District Court and advanced by Red River contravenes this fundamental principle of statutory interpretation. Red River's interpretation prioritizes the CWA's permit shield, 33 U.S.C. § 1342(k), over central provisions of SMCRA which are necessary to carry out the central goals and objectives of that act. SMCRA mandates that mine operators "meet all applicable performance standards," and further provides that "[g]eneral performance standards shall be applicable to all surface coal mining and reclamation operations." 30 U.S.C. § 1265(a), (b). Red River's interpretation of the CWA's permit shield and SMCRA's savings clause fundamentally alters SMCRA by inserting an exception to performance standards in certain situations where the

mine operator holds a CWA permit issued pursuant to section 402 of that CWA. Moreover, Red River's interpretation would subvert the citizen enforcement provision of SMCRA which allows suit against "any . . . person who is alleged to be in violation of any rule, regulation, order or permit issued pursuant to this subchapter." 30 U.S.C. § 1270(a)(1).

B. The SMCRA Savings Clause and CWA Permit Shield Can be Interpreted Harmoniously without Damaging the Structure or Intent of Either Statute.

Red River argues that SMCRA's savings clause prevents enforcement of performance standards that require compliance with water quality standards because allowing the enforceability of such standards would result in SMCRA "superseding, amending, modifying, or repealing" the CWA's permit shield. Doc. 20 at 17–18. The permit shield, however, has a specific role in the CWA's unique regulatory scheme, and the enforcement of performance standards under SMCRA does not damage that role or the CWA's structure.

The CWA's permit shield provides:

> Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health.

The text is plain. Compliance with a § 402 permit is compliance with certain sections of the Clean Water Act "*for purposes of sections 1319 and 1365.*" These are the two sections authorizing enforcement actions, from regulators and citizens

respectively. *See* 33 U.S.C. § 1319 (Enforcement); 33 U.S.C. § 1365 (Citizen Suits). Thus, the permit shield does not confer upon a permittee the status of permanent and substantive compliance with the CWA. Rather, it is a limited safe-harbor, or stay, of enforcement of the CWA in a circumstance where the permittee is complying with a permit issued pursuant to section 402, for the time period the permit is effective. *Black Warrior Riverkeeper, Inc. v. Black Warrior Minerals, Inc.*, 734 F.3d 1297, 1301 (11th Cir. 2013) ("permit holders are not governed by intervening changes in regulations for the duration of their permits and need not relitigate whether their permits are strict enough." (citing *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n. 28 (1977))); *see also, S. Appalachian Mtn. Stewards v. A & G Coal Corp.*, 758 F.3d 560, 564 (4th Cir. 2014). CWA permits are issued for periods not to exceed five years, after which they are renewed and reissued with conditions that take account of changed regulations and other new information. *Natural Res. Def. Council v. EPA*, 859 F.2d 156, 212 (D.C. Cir. 1988); 33 U.S.C. 1342(a)(3), (b)(1)(B).

Under the CWA, discharge permits under section 402 are the primary mechanism for applying water quality standards to dischargers of pollutants. This Court has explained that the CWA is a permit-focused regulatory system that imposes strict liability for violations of permit requirements. *Piney Run Pres. Ass'n v. County Comm'rs of Carroll County Md.* 268 F.3d 255, 264–66 (4th Cir. 2001).

The permit system relieves the enforcing party of the burden to prove "a causal link between the degradation of water quality and the pollutant in question." *Id.* at 264–65. It is up to the permitting authority to establish effluent limitations that will achieve the purposes of the act and the statute imposes strict liability, without regard to causation, for violations of those permit provisions. *Id.* at 265–66. In the context of such CWA permitting, the permit shield of 33 U.S.C. § 1342(k) makes perfect sense. Because the permit is the main mechanism through which the act is applied and enforced, the permit shield insulates the permittee from liability so long as its discharges are in compliance with its permit.

SMCRA is structured differently from the CWA. Under SMCRA, performance standards (such as those SAMS seeks to enforce in this matter) are directly and automatically applicable to the mine operator. 30 U.S.C. § 1265. While the CWA only allows citizen enforcement of violations of permit-specific "effluent limitations," 33 U.S.C. § 1365(a)(1), (f), SMCRA allows citizen enforcement of "any rule, regulation, order or permit" issued pursuant to SMCRA, 30 U.S.C. § 1270(a)(1). The performance standards SAMS seeks to enforce are rules and regulations issued pursuant to SMCRA under delegated state authority. *See* 4 VAC 25-130-816.41, 816.42. To enforce SMCRA's performance standards relating to water quality standards, citizens may need to establish causation (which is not necessary under the CWA's permit-focused scheme). Allowing for such

SMCRA enforcement actions, however, does not disturb the CWA's permit-focused enforcement methods.

Conversely, expansion of the CWA's permit shield to interfere with SMCRA's unique enforcement scheme *does* fundamentally interfere with Congress' approach to regulating coal mine pollution. As described in SAMS' opening brief, SMCRA was enacted, at least in part, to make up for deficiencies in the CWA's regulation of inactive mines such as the mine at issue here. *Consolidation Coal Co. v. Costle*, 604 F.2d 239, 251 (4th Cir. 1979), *rev'd in part sub nom. E.P.A. v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64 (1980) ("By enacting the Surface Mining Control and Reclamation Act of 1977, Congress recognized that the Federal Water Pollution Control Act [CWA] is inadequate to eliminate pollution from inactive mines."); *see also In re Surface Min. Regulation Litig.*, 627 F.2d 1346, 1367 (D.C. Cir. 1980) ("Congress certainly recognized in the Surface Mining Act that the EPA's existing regulatory authority under the Federal Water Pollution Control Act was deficient with respect to surface coal mining"). The federal Office of Surface Mining, Reclamation and Enforcement reemphasized, in a letter specifically regarding Red River's mine, that under SMCRA "[r]emoval of ponds does not negate the obligations for compliance with water quality standards." J.A. 880 n. 4; J.A. 825. Under Red River's interpretation, pollution

from inactive mines *would* be immune from citizen enforcement and Congress' regulatory objectives in SMCRA would be thwarted. [1]

II. Savings Clauses Should Be Interpreted Narrowly to Avoid Damaging the Substantive Provisions of the Statute in which They Are Contained.

A. SMCRA's Section 1292(a) is a Standard Savings Clause, which Congress Intended to be Narrowly Interpreted.

Red River is simply wrong when it argues that section 1292 is not a savings clause. Doc. 20 at 21. The Senate Report on the bill that became SMCRA states unequivocally that section 1292(a) is a "standard savings clause." S. Rep. 95-128 (1977) at 99. In full, the Report's discussion of the savings clause states that:

> This section contains the standard savings clauses concerning existing State or Federal mine health and safety, and air and water quality laws, and the mining responsibilities of the Secretary and heads of other Federal agencies for lands under their jurisdiction. Specifically, it disclaims any conflict between the Act or any State regulations approved pursuant to it, and . . . the Federal Water Pollution Control Act, . . .

[1] Red River's description of the Rahall Amendment in this matter is nothing more than a distraction. Red River does not and cannot point to anything in the law as amended by Rahall that would relieve Red River of its obligations to comply with SMCRA's generally applicable performance standards. While Red River implies that pollution from its mine may have much to do with previous operations on the site, it is clear—as recognized by the district court—that current pollution concentrations exceed the levels recorded prior to the beginning of Red River's mining operations. J.A. 872–73. Pollution concentrations have continued to increase, even after the mine has stopped producing coal and shifted to mine reclamation. J.A. 882–83.

Id. The text of the savings clause discussed in that Senate Report is identical to the final language in the statute. *Compare* S. Rep. 95-128 at 44 (Sec. 502(a)) *with* 30 U.S.C. § 1292(a). The D.C. Circuit cited this same "Senate Report on the bill that evolved into the Surface Mining Act" as definitive evidence of "Congressional intent." *In re Surface Min. Regulation Litig.*, 627 F.2d at 1355.

In addition to describing section 1292(a) as a "standard" savings clause, the Senate Report explains that Congress specifically intended SMCRA's savings clause only to "disclaim[] any conflict" between SMCRA and existing laws, including the Clean Water Act. S. Rep. 95-128 at 99. In that same Report, Congress further clarified that there are no exceptions to the applicability of SMCRA's standards, stating that "[t]he Committee was adamant that there should be no broad exceptions to the vital mining and reclamation standards of this bill," and that any limited exceptions only apply "where such variances provide equal or better protection to the environment." *Id*. at 55.[2]

In addition, multiple courts have repeatedly described section 1292(a) as a "savings clause." *E.g.*, *Bragg v. Robertson*, 72 F. Supp. 2d 642, 654 (S.D.W. Va. 1999), *rev'd on other grounds sub nom. Bragg v. W. Virginia Coal Ass'n*, 248 F.3d 275 (4th Cir. 2001); *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 204

[2] The D.C. Circuit favorably quoted this language from the Senate Report in a portion of its *In re Surface Mining Regulation* decision rejecting a challenge to the SMCRA regulations alleging that the Secretary of the Interior had failed to provide adequate variance and exemption procedures. 627 F.2d at 1355.

F. Supp. 2d 927, 941 (S.D.W. Va. 2002), *rev'd on other grounds*, 317 F.3d 425 (4th Cir. 2003); *S. Appalachian Mtn. Stewards v. A & G Coal Corp.*, 2:12-CV-00009, 2013 WL 3814340, at *2 (W.D. Va. July 22, 2013), *aff'd*, 758 F.3d 560 (4th Cir. 2014); *Ohio Valley Envtl. Coal. v. Elk Run Coal Co., Inc*., 3:12- CV-0785, 2013 WL 12144077, at *3 (S.D.W. Va. Nov. 25, 2013); *Ohio Valley Envtl. Coal. Inc. v. Pocahontas Land Corp.*, 3:14-cv-11333, 2015 WL 2144905, at *10 (S.D.W. Va. May 7, 2015). This list includes, most recently, the district court below. *See, e.g.*, J.A. 901, 903.

In re Surface Mining Regulation is not to the contrary. Red River overstates the D.C. Circuit's conclusion in that case when it asserts that the court of appeals "expressly rejected" the suggestion that section 1292(a) is "merely a 'savings clause.'" Doc. 20 at 23. Although the D.C. Circuit quoted the Secretary of the Interior's assertion that section 1292(a) is "merely a 'savings clause'" (627 F.2d at 1366), the court did not return to that phrase, and did not directly endorse or analyze that assertion. Notably, the D.C. Circuit's analysis is devoid of any reference to the legislative history. Instead, the court focused on a different assertion of the Secretary, that "he must promulgate effluent regulations at least as stringent as those of the EPA but he may promulgate more stringent provisions." *Id*. at 1367. It is that concept that the court of appeals rejected. But while the "at least as stringent as" language is relevant to the discussion of the promulgation of

national regulations at issue in *In re Surface Mining Regulation*, it does not apply in this case, which deals not with the promulgation of regulations but with enforcement of Virginia's approved state program. Thus, the D.C. Circuit did not directly decide the question of whether section 1292(a) constitutes a savings clause.

None of the specific terms used by Congress in section 1292(a) supports an interpretation that the provision is anything other than a standard savings clause that should be narrowly applied. Section 1292(a) states that "Nothing in this chapter shall be construed as superseding, amending, modifying, or repealing" a series of statutes, including the Clean Water Act. 30 U.S.C. § 1292(a). Courts have interpreted similar terms in other statutes as straightforward savings clauses. For example, in *Trans Union LLC v. Federal Trade Commission*, the D.C. Circuit described as a "savings clause" a provision stating that "nothing in this chapter shall be construed to modify, limit, or supersede the operation of the Fair Credit Reporting Act." 295 F.3d 42, 49 n.4 (D.C. Cir. 2002) (discussing 15 U.S.C. § 6806). The Supreme Court has described as a savings clause the statutory provision that "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 406 (2004) (discussing section 601(b)(1) of the Telecommunications Act of 1996, 110 Stat.

143, 47 U.S.C. § 152, note). Thus, the language used in section 1292 is not unique, and in fact is consistent with language in other statutes that courts have identified as savings clauses.

B. Supreme Court Precedent Requires SMCRA's Savings Clause to be Interpreted Narrowly to Avoid Conflict with SMCRA's Substantive Provisions.

Because section 1292(a) is a savings clause, it is not itself a substantive provision. It must therefore be interpreted narrowly to avoid conflict with substantive provisions of the statute. Courts have routinely distinguished savings clauses from substantive statutory provisions. *Resolution Trust Corp. v. Cityfed Fin. Corp.*, 57 F.3d 1231, 1250 (3d Cir. 1995), *vacated sub nom. Atherton v. F.D.I.C.*, 519 U.S. 213 (1997) (distinguishing two parts of a statutory section: "a substantive provision and a savings clause"); *Harris v. City of Montgomery*, 322 F. Supp. 2d 1319, 1329 (M.D. Ala. 2004) (distinguishing "a source of substantive rights" from "a savings clause"). The courts have consistently held that such savings clauses should be interpreted narrowly to avoid doing damage to the substantive provisions of the act. *See Aviall Servs., Inc. v. Cooper Indus., Inc.*, 263 F.3d 134, 140 (5th Cir. 2001) ("[R]eading the savings clause to nullify the substantive portion of the section would violate the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." (citations omitted)); *Resolution Trust Corp. v. Miramon*, 22 F.3d

1357, 1361-62 (5th Cir. 1994) (same); *Morales v. Trans World Airlines, Inc.* 504 U.S. 374, 385 (1992) ("A general remedies saving clause cannot be allowed to supersede the specific substantive pre-emption provision."; *Carstensen v. Brunwick Corp.*, 49 F.3d 430, 432 (8th Cir. 1995) (quoting *Morales*).

This approach is consistent with additional principles of statutory construction articulated by the Supreme Court, particularly the oft-quoted principle that "[C]ongress. . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Assocs., Inc.* 531 U.S. 457, 468 (2001). Additionally, the Supreme Court has held that statutes should be interpreted so as to "give effect, if possible, to every clause and word of a statute." *Moskal v. United States*, 498 U.S. 103, 109–110 (1990). A court should "not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *U.S. Nat. Bank of Or. v. Indep. Ins. Agents*, 508 U.S. 439, 455 (1993). And a court should demonstrate a "deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." *Pa. Dep't of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990).

The Seventh Circuit has applied these and other fundamental principles of statutory construction in considering how a savings clause in the Negotiated Rates Act ("NRA") interacts with two other federal statutes: the Bankruptcy Code and

ERISA. *Matter of Lifschultz Fast Freight Corp.*, 63 F.3d 621 (7th Cir. 1995). The question before the court of appeals was whether a bankruptcy trustee could recover undercharges that would normally be prohibited by the NRA. *Id*. at 622-23. The NRA's savings clause provides that "[n]othing in this Act (including any amendment made by this Act) shall be construed as limiting or otherwise affecting application of title 11, United States Code, relating to bankruptcy; title 28, United States Code, relating to the jurisdiction of the courts of the U.S. (including bankruptcy courts); or [ERISA]." *Id*. at 625 (quoting 49 U.S.C. § 10701(f)(9)).

In interpreting the savings clause, the Seventh Circuit first considered the statute's legislative history. *Id*. at 625-27. When that inquiry yielded "no clear guidance", the court turned to traditional canons of statutory construction articulated in a variety of Supreme Court decisions. *Id*. at 627-29 (citing *Moskal v. United States*, 498 U.S. at 109–110; *U.S. Nat. Bank of Or. v. Indep. Ins. Agents*, 508 U.S. at 455; *Pa. Dep't of Public Welfare v. Davenport*, 495 U.S. at 562). Ultimately, the Seventh Circuit adopted a narrow reading of the savings clause that allowed the remainder of the statute to be given full effect. *Id*. at 628-29. The court took this approach because "when forced to choose between specific substantive provisions and a general savings clause, we choose the more specific provisions because we believe they express congressional intent more clearly." *Id*. at 628 (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 379 (1992)). In a later,

similar decision, the Seventh Circuit held that "A savings clause is not intended to allow specific provisions of the statute that contains it to be nullified," and that "[a statute's] savings clause must not be used to gut provisions of [that statute]." *PMC, Inc. v. Sherwin–Williams Co.*, 151 F.3d 610, 618 (7th Cir.1998) (analyzing the CERCLA savings clause under 42 U.S.C. § 9652(d)).

Here, similarly, these canons of statutory construction favor a narrow reading of section 1292(a) that preserves both the CWA's permit shield, as applied to permits issued under that statute, 33 U.S.C. § 1342(k), and SMCRA's statutory provisions requiring universal compliance with performance standards and allowing citizens to enforce that requirement, 30 U.S.C. § 1265(a), (b); 30 U.S.C. § 1270. Were this court to adopt Red River's interpretation, it would expand the permit shield beyond the intent of Congress by applying it outside of the CWA, and would upset SMCRA's carefully constructed regulatory scheme. That cannot be the proper result, particularly where there is an interpretation available that fully preserves both the CWA and SMCRA.

Contrary to Red River's assertions, the Supreme Court's decisions in *U.S. v. Locke* (529 U.S. 89 (2000)) and *Geier v. American Honda Motor Co., Inc*. (529 U.S. 861 (2000)) are particularly instructive because they offer a clear and consistent articulation of the Court's approach to interpreting savings clauses. Both cases involved the question of whether a savings clause in a federal statute should

be read to avoid pre-emption of state law. In addressing these questions, the Court articulated general principles that apply universally to savings clauses in federal statutes. First, the Court "decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *Locke*, 529 U.S. at 106-107 (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992), and *Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc.* 524 U.S. 214, 227-228 (1998))); *Geier*, 529 U.S. at 870. Second, the Court rejected "an interpretation of the saving provision . . . [that] permits the law to defeat its own objectives, or potentially, as the Court has put it before, to 'destroy itself.'" *Geier*, 529 U.S. at 872 (quoting *Am. Tel. & Tel. Co.*, 524 U.S. at 228).

In the *Locke* and *Geier* decisions, the Supreme Court applied those principles to adopt a narrow reading of the savings clause in question. In *Locke*, the Court held that certain aspects of a state law regulating oil tankers were pre-empted by the federal Oil Pollution Act, notwithstanding Congress' inclusion of a savings clause in that statute. 529 U.S. at 112-116. And in *Geier*, the Court held that a state law tort action against a vehicle manufacturer was pre-empted by the federal National Traffic and Motor Vehicle Safety Act, despite Congress' inclusion of a savings clause in that statute. 529 U.S. at 886. In both cases, the Court preserved the substantive provisions of a federal statute and rejected the argument that a savings clause overrode those provisions. These holdings are relevant to the

present action because they stand for the proposition that savings clauses are to be construed narrowly, particularly where to do otherwise would render other portions of the statute containing the savings clause invalid.[3]

III. The Principal Cases Relied upon by Red River Support SAMS' Position.

A. *Shaw v. Delta Airlines* Supports a Narrow Reading of Savings Clauses

The Supreme Court's decision in *Shaw v. Delta Airlines, Inc.*, cited by Red River, actually supports SAMS' position that section 1292(a) should be read narrowly. In *Shaw*, the Supreme Court considered the scope of the preemption provision of the federal Employee Retirement Income Security Act of 1974 (ERISA). 463 U.S. 85 (1983). That provision pre-empts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. *Id*. at 91 (quoting 29 U.S.C. § 1144(a)). ERISA's savings clause, in turn, provides that "[n]othing in this title shall be construed to alter, amend,

[3] Red River attempts to parse the *Geier* decision to find support for its position (Doc. 20 at 39), but that effort fails because the Court declined to read that savings clause broadly so as to preserve the state law tort action. *Geier*, 529 U.S. at 886. That the Court concluded that the savings clause could be read to preserve some tort actions does not alter its more fundamental conclusion that savings clauses are to be construed narrowly. SAMS has never argued that section 1292(a) is invalid or should not be given any effect. For example, SAMS does not disagree with the D.C. Circuit's application of section 1292(a) in its review of the newly promulgated SMCRA regulations at issue in *In re Surface Mining Regulation*. But Red River is advocating for an exceedingly broad application of the section 1292(a) savings clause that would alter substantive provisions of SMCRA, and that is exactly the type of result the Supreme Court has found to be inappropriate.

modify, invalidate, impair, or supersede any law of the United States." *Id*. (quoting 29 U.S.C. § 1144(d)).

Red River misstates the holding of *Shaw*. Red River contends that in *Shaw* the Supreme Court "held that the terms 'impair' or 'modify' included anything that 'would *change* the means by which [Title VII] is enforced.'" Doc. 20 at 31 (emphasis provided by Red River). That quote is not a holding, but rather a restatement of the position of the appellants. *See* 463 U.S. at 101 ("According to appellants, pre-emption of state fair employment laws would impair and modify Title VII because it would change the means by which it is enforced."). And the Court ultimately rejected appellants' interpretation. *See id*. at 106 ("To give 514(d) the broad construction advocated by appellants would defeat the intent of Congress to provide comprehensive pre-emption of state law.").

The question for the Court in *Shaw* was whether the savings clause operated to shield a state law—New York's Human Rights Law—from pre-emption. *Id.* at 100-101. Appellants argued that ERISA's savings clause applied because pre-emption of the Human Rights Law would in turn change the means by which Title VII of the federal Civil Rights Act is enforced, due to the fact that Title VII preserves and incorporates certain state laws. *Id.* at 100-104. After concluding that the pre-emption provisions necessarily apply to the state Human Rights Law, the Court considered whether the savings clause could save that state law due to its

interaction with Title VII. *Id*. That consideration hinged on whether pre-emption of the state law would "impair" Title VII. *Id.* at 102-103.[4] Ultimately, the Court determined that although pre-emption of the state law could "impair" federal law in some circumstances, the Court would adopt a narrow construction of the savings clause that fully preserved the pre-emption provisions of ERISA. *Id*. at 103-105. In so holding, the Court looked to "the intent of Congress" as expressed through ERISA's legislative history and Congress's choice to include broad pre-emption language. *Id*. at 106.

In reaching its holding in *Shaw*, the Supreme Court looked to ERISA's legislative history and concluded that the Congressional record "caution[ed] against applying [ERISA's savings clause] too expansively." *Id*. at 104. This is consistent with other Supreme Court precedent where the Court has sought to avoid an "odd result" that would follow from literal application of a disputed term by looking to "other evidence of congressional intent to lend the term its proper scope." *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 454 (1989) (quoting *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509 (1989)).

In the present case, the legislative history demonstrates that Congress intended SMCRA's savings clause to be interpreted narrowly and SMCRA's

[4] While "impair" is an operative verb in ERISA's savings clause, it is absent from SMCRA's savings clause in section 1292. Impair is a verb with greater scope and effect than supersede, modify, amend or repeal—the verbs used in section 1292.

performance standards to apply to all operators without exception. S. Rep. 95-128 on S. 7 (1977), at 99 (describing § 1292(a) as a "standard savings clause" that was intended to "disclaim[] any conflict" with existing statutes, including the CWA); *id.* at 55 ("there should be no broad exceptions to the vital mining and reclamation standards of this bill," exceptions only apply "where such variances provide equal or better protection to the environment.") This legislative history supports a narrow reading of the savings clause that preserves the enforceability of all provisions of SMCRA in all cases, while allowing the CWA's permit shield to continue to apply within the confines of that statute. Such a narrow reading avoids the odd—indeed perverse—alternative result of expanding the CWA's permit shield to serve as an exception to the otherwise universal applicability and enforceability of SMCRA's performance standards.

B. The D.C. Circuit's Overarching Holding in *In re Surface Mining Regulation Litigation* Was Intended to Ensure National Consistency in the Application of Water Quality Standards.

Red River relies heavily on the D.C. Circuit's *In re Surface Mining Regulation* decision, but the question before that court was very different from the present case, and the court's ultimate decision to prioritize the preservation of consistent water quality standards nationwide actually supports SAMS' position.

The D.C. Circuit's interpretation of section 1292(a) must be read in the context of the issue before it. There, the court was confronted with the question of

how to resolve an inconsistency between two overlapping sets of regulations promulgated under the CWA and SMCRA. Importantly, nothing in the court's consideration of the challenge to newly promulgated SMCRA regulations required it to grapple with the implications of a decision that would render a portion of the SMCRA statute inoperative. Although some of the challenged regulations were remanded back to the agency, the D.C. Circuit was not confronted with the question of whether SMCRA's savings clause should control over any substantive portion of the statute.[5]

In contrast, here, adopting Red River's interpretation would make portions of SMCRA inoperative as applied to the mine operator. SMCRA mandates that all mine operators "meet all applicable performance standards," and further provides that "[g]eneral performance standards shall be applicable to all surface coal mining and reclamation operations." 30 U.S.C. § 1265(a),(b). Virginia's approved delegated program imposes those same requirements. VA Code § 45.1-242(B). SMCRA also expressly authorizes citizen enforcement suits against any person "alleged to be in violation of any rule, regulation, order or permit issued" pursuant to SMCRA. 30 U.S.C. § 1270. But Red River would effectively alter those

[5] The D.C. Circuit's subsequent decision in *National Wildlife Federation v. Hodel* is not directly relevant to the present case for the same reasons. In that decision, the court of appeals was asked to consider whether the Secretary of the Interior's decision not to promulgate regulations on fugitive dust under SMCRA was reasonable in light of the fact that EPA was contemplating regulations on that same issue under the Clean Air Act. 839 F.2d 694, 764-765 (D.C. Cir. 1988).

statutory requirements by creating out of whole cloth a new provision relieving certain mine operators of their statutory SMCRA obligations in the event an operator is able to avail itself of the CWA's permit shield. Such a disruption to Congress' carefully considered statutory scheme carries far more weight than an order remanding a regulation back to the agency, and therefore demands greater proof of Congress' intent.

The D.C. Circuit's overarching principles in interpreting section 1292(a) were to "afford consistent effluent standards nationwide" and "avoid inconsistent water quality standards." 627 F.2d at 1367-1368. As applied to the facts of this case, the D.C. Circuit's interpretation favors SAMS' position because only SAMS' interpretation of the savings clause results in consistent application and enforcement of water quality standards nationwide by preserving the requirement that all mine operators prevent pollution that violates water quality standards. *See* 4 VAC 25-130-816.41, 816.42. In contrast, Red River's interpretation would result in inconsistent application of SMCRA's performance standards, and would therefore be in direct conflict with Congress' directive that "performance standards shall be applicable to all surface coal mining and reclamation operations." 30 U.S.C. § 1265(b).

The Sixth Circuit, in its *Sierra Club v. ICG Hazard* decision, improperly expanded the *In re Surface Mining Regulation* decision by misapplying it in the

enforcement context. 781 F.3d 281 (6th Cir. 2015). In so doing, the Sixth Circuit adopted an inappropriately broad interpretation of section 1292(a) without consideration of either the legislative history or the profound implications of forcing specific statutory directives to give way to a general savings clause. In the few scant paragraphs it devoted to the question of SMCRA liability, the Sixth Circuit summarily concluded that "operation of the statutory permit shield is closely akin to the 'variances from effluent limitations' and 'exemptions from effluent requirements' under the CWA that were addressed in Surface Mining Regulation" (*id*. at 291), but offered no analysis to support this determination. In fact, as explained above, the two scenarios are dramatically different, as the challenge to the regulations at issue in *In re Surface Mining Regulation* resulted only in remand of those regulations to the agency, while the Sixth Circuit's decision in *ICG Hazard* fundamentally altered two substantive provisions of the SMCRA statute: the requirement that all mine operators comply with the performance standards (30 U.S.C. § 1265) and the right of citizens to enforce that requirement against any operator (30 U.S.C. § 1270).

CONCLUSION

SAMS and Red River offer two competing interpretations of the SMCRA savings clause. SAM's interpretation is more reasonable and consistent with basic principles of statutory construction. Red River's expansive interpretation of the

savings clause and the CWA's permit shield damages the structure of SMCRA and contravenes congressional intent. SAMS' narrow interpretation allows each statute to operate independently and as intended. For those reasons, the Court should adopt SAMS' interpretation, reverse the District Court's decision, and remand this matter back to the District Court.

Respectfully submitted this 28th day of January, 2020.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. Excepting portions of the brief described in Fed. R. App. P. 32(f), the brief contains 6,059 words.

This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. Pl. 32(a)(6). The brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in Time New Roman, 14-point.

DATED: January 28, 2020

/s/ Peter Morgan
Peter Morgan

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January 2020, I have served the forgoing Appellants' Opening Brief on all registered counsel through the Court's electronic filing system (ECF).

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