



December 30, 2009

Dennis Rice
Office of Surface Mining, Reclamation and Enforcement
1951 Constitution Avenue, N.W.
Room MS 202-SIB
Washington, D.C. 20240

Dear Mr. Rice:

The National Mining Association (NMA) submits the following comments on the Office of Surface Mining's (OSM) advanced notice of proposed rulemaking (ANPRM) on stream buffer zone (SBZ) and related rules. 74 Fed. Reg. 62663-62666 (Nov. 30, 2009). NMA is a national trade association that includes the producers of most of the nation's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions and other firms serving the mining industry. NMA's members have a wide variety of surface coal mining operations across the United States that conduct surface mining activities both in and near perennial, intermittent and ephemeral streams, and thus will be directly and significantly impacted by OSM's proposals.

I. General Comments

NMA strongly opposes eliminating the current SBZ rule. By proposing these changes in the ANPRM, OSM is jeopardizing a fragile regulatory compromise that has taken more than a decade to establish. In addition, pursuing some extreme alternatives to the current SBZ rule would be opening a Pandora's box of regulatory uncertainty that could unnecessarily impede, or perhaps even eliminate, significant segments of the coal mining industry. Permittees are already facing significant regulatory uncertainty because of a permit moratorium imposed through the administration's interference with U.S. Army Corps of Engineers' (Corps) Clean Water Act (CWA) § 404 program. That uncertainty is finally threatening to shut down mining operations and cause layoffs of miners,¹ and such layoffs will continue

¹ See, e.g., letter from Congressman Nick Rahall to Jo-Ellen Darcy, Dec. 17, 2009 expressing concern over expediting the Corps 404 permitting process, noting that CONSOL just recently issued WARN notices to over 500 employees at their FOLA and Little Eagle operations because of permitting issues. Rahall specifically notes in the letter that "...the situation at CONSOL's Fola and Little Eagle operations is just the latest example of how the

to mount until the Corps and the Environmental Protection Agency (EPA) end the permit moratorium on § 404 permits in the eastern United States. Adding additional parallel uncertainty to the Surface Mining Control and Reclamation Act (SMCRA) permitting process will only multiply job losses and further discourage investment in surface coal mining operations, impacting the direct and indirect jobs in those communities.

NMA believes that the best course of action would be to retain the existing SBZ rule. The extensive changes made in the excess spoil and coal mine waste rules, as well as the SBZ and related permitting rules, in December 2008 need to be given a chance to work. They are clearly more restrictive than the prior rules and may well "significantly reduce the harmful environmental consequences of Appalachian surface coal mining operations" in a manner consistent with federal law as sought by the memorandum of understanding (MOU) that was signed in June 2009 by the EPA, the Corps, the Council on Environmental Quality (CEQ), and the Secretary of the Interior.²

NMA recognizes these are significant new restrictions that will alter the way our members approach SMCRA permitting and conduct our operations. However, we have not challenged these changes. Instead, we have considered them an acceptable trade-off for the regulatory stability achieved through the clarification that (as it has always been applied) the SBZ rule³ does not preclude the placement of excess spoil in intermittent or perennial streams. If OSM and the administration really want to reduce the environmental consequences of Appalachian surface mining, they would work to get the 2008 rules implemented in central Appalachian states as soon as possible rather than creating additional regulatory uncertainty by pursuing additional rulemaking. There is simply no need for further rulemaking at this time.

Nevertheless, if OSM moves forward with a proposal to return to some version of the 1983 rule, it is imperative that the agency provide clear guidance that conducting surface coal mining activities in the SBZ are not prohibited. Rather, any rule must be clear that the protections of the SBZ rule are meant to ensure that surface coal mining operations are conducted so as to prevent, to the extent possible using best technology currently available, additional contributions of suspended solids to stream flow or runoff outside the permit area. No rational interpretation of an SBZ rule could survive judicial challenge if it provided for either a *per se* or a *de facto* prohibition on filling some stream segments. Although wrong

employment of WV coal miners, over the last decade or more, has repeatedly been threatened by disparate court actions on the permitting process for surface coal mining. This is an untenable situation..."

² See *Memorandum of Understanding Among the U.S. Department of the Army, U.S. Department of the Interior, and the U.S. Environmental Protection Agency, Implementing the Interagency Action Plan on Appalachian Surface Coal Mining*, June 11, 2009 (hereinafter "MOU").

³ 30 CFR § 816.57.

on the issue, some environmental activists are at least up front about their ultimate goal, which is to end mountaintop removal mining.⁴ OSM should not (and cannot) make the mistake of following them over that cliff.

Although marketed by opponents of "mountaintop mining" as an Appalachian-only problem, in reality, every surface coal mining operation across the country encounters streams in the permit area that can potentially trigger the provisions of the SBZ regulation. The agency offers nothing to support its implications that there are problems with the existing SBZ regulation. To our knowledge, there have been no state regulatory authorities clamoring for OSM to repeal or revisit the SBZ rule. The only basis cited for this complete reversal of policy is a politically and ideologically-driven MOU. That document is relied upon as the sole basis not only for changes to OSM and state regulatory programs, but also for all of the recent radical revisions to longstanding Corps and EPA policies. It contains numerous far-reaching mandates that go well beyond its title and purported assertions that it is limited to surface mining within a six-state area in the Appalachian region.

The MOU, by its own express terms, "does not, and is not intended to impose any legally binding requirements on Federal agencies, States, or the regulated public, and does not restrict the authority of the employees of the signatory agencies to exercise their discretion in each case to make regulatory decisions..." It goes on to state that "Nothing in this MOU is intended to diminish, modify, or otherwise affect statutory or regulatory authorities of any of the signatory agencies."⁵ Thus, the only controlling authority for regulatory changes contemplated in this notice is the SMCRA, not the MOU.

One of the express purposes of SMCRA is to:

Assure that the coal supply essential to the Nation's energy requirements, and to its economic and social well-being is provided and strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy.

30 U.S.C. § 1202(f).

While there may or may not be merit to the MOU's stated intent to diversify the Appalachian economy and "create green jobs in Appalachia," any justification for OSM rule changes must still be SMCRA-based, which leaves OSM with the obligation to strike a balance between protection of the environment and coal production as an essential source of energy as expressly mandated in the statute. OSM is not vested with the authority for shifting coal mining jobs to other sectors of the

⁴ See, e.g., Earth Justice model comment letter at http://action.earthjustice.org/campaign/mtr_1209

⁵ See MOU at p. 5.

economy through regulation; such powers are certainly not contained within SMCRA. Only Congress can make such a determination through new legislation.

In proposing changes to the SBZ and related rules, the agency must also remain cognizant of unintended regulatory consequences of its actions. Agency actions aimed at surface mining in Appalachia can sometimes have a significant impact on mining in other areas, or even on underground operations in the same region.

As an example, consider the rules on the placement of coal mine waste. The extensive preamble discussion to the 2008 rule makes clear Congress recognized that coal mine waste had been and would continue to be placed in streams.⁶ Further, Congress found and declared in § 101(b) of SMCRA:

the overwhelming percentage of the Nation's coal reserves can only be extracted by underground mining methods, and it is therefore essential to the national interest to ensure the existence of an expanding and economically healthy underground coal mining industry;

30 U.S.C. § 1201(b).

Another express purpose of SMCRA, as stated in § 102, is to:

(k) encourage the full utilization of coal resources through the development and application of underground extraction technologies;

30 U.S.C. § 1202(k).

Virtually all coal produced by underground mines in central Appalachia must be washed through a preparation plant to remove rock and other impurities. The resulting coal mine waste lacks the stability of excess spoil and must be placed in disposal areas that extend farther down into valleys than excess spoil fills in order to meet the stability requirements of SMCRA. To preclude the placement of coal mine waste disposal sites in areas that extend into perennial streams in central Appalachia is to eliminate the underground coal mine industry throughout central Appalachia, which is one of the nation's richest and highest quality underground reserves. SMCRA simply does not contemplate or authorize any such restrictions on coal mine waste placement. To the contrary, such restrictions would be inconsistent with SMCRA.

The ANPRM notice states that, "the Secretary of the Interior remains committed to reducing the adverse impacts of Appalachian surface coal mining operations on streams. Accomplishing that goal will involve revision or repeal of certain elements of the 2008 rule."⁷ There are two problems with that statement. First, OSM is

⁶ See 73 Fed. Reg. 75815 (Dec. 12, 2008).

⁷ 74 Fed. Reg. 62664 (Nov. 30, 2009).

not—and should not be—an advocate for or against any type of mining. If public opinion changes with respect to certain types of mining operations that are expressly permitted by law, then the appropriate response is for those individuals to go to their congressmen, senators or state representatives and seek a change in the law. In the words of the D.C. Circuit:

We recognize that a new administration may try to effectuate new philosophies that have been implicitly endorsed by the democratic process. Nonetheless, it is axiomatic that the leaders of every administration are required to adhere to the dictates of statutes that are also products of democratic decision-making. Unless officials of the Executive Branch can convince Congress to change the statutes they find objectionable, their duty is to implement the statutory mandates in a rational manner.

International Ladies' Garment Workers' Union v. Donovan, 722 F.2d 795, 827 (D.C. Cir. 1983).

Thus, the proper recourse is not to do an end-run around the legislative process by targeting the agency's regulations against a type of mining that some political supporters of the administration dislike but is clearly sanctioned by SMCRA. Decisions about major changes in a regulatory program, with billions of dollars in long-term investments, should only be made based on sound science, evidence of significant problems and/or violations of laws or regulations.⁸ They should not be made based solely on shifting political winds and policy memos from the White House. Such actions are a recipe for another decade of uncertainty, turmoil and litigation.

Second, whenever an agency is considering conducting a public rulemaking, it should remain impartial and objective in addressing problems based on the best information that is gleaned from the rulemaking record. Stating that the Secretary has already pre-determined the outcome of the rulemaking by categorically stating that the 2008 rule *will be either revised or repealed* is inconsistent with a fair and balanced regulatory process required under the Administrative Procedure Act.

II. Specific Alternatives Proposed by OSM

(1) Revoking the 2008 SBZ rule and replacing it with the 1983 rule

The ANPRM's first suggestion is to repeal the existing SBZ rule and replace it with the 1983 version of the SBZ rule. Repealing the SBZ rule and reinstating the 1983 rule and the regulatory uncertainty that it produced would be a giant step backwards for the regulatory program and a tremendous mistake for the agency. It

⁸ NMA has sought to discover the basis for these sweeping changes through a Freedom of Information Act (FOIA) request filed on December 7, 2009, however, NMA is still waiting for a response to our FOIA request.

has been more than 10 years since a federal district court in West Virginia badly misinterpreted the 1983 OSM SBZ rule in the *Bragg* litigation⁹ to completely prohibit fills in streams, setting off a chain reaction of adverse consequences that nearly caused a regulatory meltdown.¹⁰

But even after the *Bragg* decision was reversed by the 4th Circuit, legal and regulatory uncertainties regarding the SBZ rule lingered for almost a decade. Many operations downsized and laid off workers, others have closed and moved to other states. In addition, investments that could and would have been made to produce energy for our nation and create high-wage jobs for its citizens were never made.¹¹ In short, during the past decade, the SBZ issue was in a state of turmoil due to regulatory uncertainty and the potential for lawsuits under the vagueness of the 1983 SBZ rule.

OSM finally stepped in and resolved the issue by publishing a final SBZ rule in December 2008. The rule clarified and codified the longstanding 30-year position of the agency and the state regulatory authorities, none of which had interpreted the SBZ rule as a prohibition on surface coal mining operations in streams or placing fill in streams. In addition to clarifying the longstanding interpretation of the SBZ regulation, the 2008 rule also codified significant provisions imposing new and stricter requirements for operators to minimize the environmental impact of the placement of excess spoil material, resulting in significant overall improvement in environmental protection.

As previously mentioned, the current SBZ rule is a compromise based on longstanding regulatory practice, sound science and codification of new excess spoil requirements. The rule resulted from a monumental investment of government resources and public input and drew upon a 5,000 page environmental impact statement (MTM EIS) on mountaintop mining.¹² The statement, which contained 30 federal studies on all aspects of mountaintop mining in Appalachia, was signed by OSM, the Corps, EPA, Fish and Wildlife Service, and the West Virginia Department of Environmental Protection (WVDEP). The agency also conducted a specific EIS

⁹ *Bragg v. Robertson*, 72 F.Supp 2d 642, 660-663 (S.D. W. Va. 1999); *rev'd in Bragg v. WVCA*, 248 F.3d 275, 296 (4th Cir. 2001); *cert. denied*, 534 U.S. 1113 (2002).

¹⁰ Following the original *Bragg* decision, surface coal mining operations within the jurisdiction of the court in West Virginia were literally shut down for over a week until the court realized its mistake, stayed its own decision pending appeal, and the decision was thrown out by the 4th Circuit Court of Appeals.

¹¹ Mining in central Appalachia has decreased from 279 million tons in 1998, the year before the *Bragg* decision, to 234 million tons in 2008, a 16% decline. This while overall coal production in the U.S. increased by 4.9% during the same period. While part of this regional decline had to do with other factors, most would credit regulatory and legal uncertainty fueled by ongoing litigation as a significant factor in the region's decline in coal production.

¹² Mountaintop Mining/Valley Fills in Appalachia Draft Programmatic Environmental Impact Statement (June 2003).

just for the SBZ rule,¹³ solicited and considered more than 43,000 public comments, and conducted several public hearings. The effort resulted in a reasoned and well supported SBZ rule that not only ended much of the legal and regulatory uncertainty created by the old SBZ rule, but also added significant new requirements to further improve environmental performance.

OSM still does not appropriately recognize the significant enhancements to environmental protection that were incorporated into the 2008 SBZ rule. Specifically, the 2008 SBZ rule includes an entire section of new provisions requiring improvements in the handling and placement of excess spoil material. OSM's regulations now require a demonstration that the operation has been designed to minimize, to the extent possible, the volume of excess spoil that the operation will generate.¹⁴ It further requires a demonstration that the designed maximum cumulative volume of all proposed excess spoil fills within the permit area is no larger than the capacity needed to accommodate the anticipated cumulative volume of excess spoil that the operation will generate.¹⁵

Operators are now required by rule to discuss how they will address impacts to perennial and intermittent streams. Operations must be designed to avoid placement of excess spoil in or within 100 feet of a perennial or intermittent stream, to the extent possible. If avoidance of the stream is not possible, then operators are required to explain why it is not possible and identify a reasonable range of alternatives that vary with respect to the number, size, location and configuration of proposed fills. Such alternatives must conform to safety, engineering, design and construction requirements, and they must be capable of being done after consideration of cost, logistics and available technology. Operators must analyze the impacts of such alternatives on fish, wildlife and related environmental values and must consider the impacts on both terrestrial and aquatic ecosystems.¹⁶

If an operator puts forward an alternative that requires the placement of excess spoil in a perennial or intermittent stream, the analysis must include an evaluation of the impacts on the physical, chemical and biological characteristics of the stream downstream of the proposed fill, including seasonal variations in temperature and volume, changes in stream turbidity or sedimentation, the degree to which the excess spoil may introduce or increase contaminants, and the effects on aquatic organisms and the wildlife that is dependent upon the stream. Most importantly, the regulation now requires operators to select the alternative with the least overall

¹³ See Draft Environmental Impact Statement: Excess Spoil Minimization; Stream Buffer Zones, OSM EIS-34 (April 2007).

¹⁴ 30 C.F.R. § 780.35(a)(1)(Demonstration of minimizing excess spoil).

¹⁵ 30 C.F.R. § 780.35(a)(2)(Capacity Demonstration).

¹⁶ 30 C.F.R. § 780.35(a)(3)(Discussion of how you will address impacts to perennial and intermittent streams and related environmental values).

adverse affect on fish, wildlife and related environmental values, including adverse impacts on water quality and aquatic and terrestrial ecosystems.¹⁷

Even before the 2008 SBZ rule was finalized, surface coal mining operations were making significant strides in improving environmental performance and addressing perceived deficiencies in the existing regulatory programs. For example, as the Government Accountability Office (GAO) just recently observed, both Kentucky and West Virginia implemented spoil minimization policy guidance in 2001 and 1999, respectively.¹⁸ The states issued this guidance following special oversight reviews that OSM conducted on how states applied standards and approved permits in reference to approximate original contour requirements. The GAO report found that 76 percent of the permits in Kentucky since 2002 required the operator to reclaim the land to approximate original contour (AOC), and among the remaining 24 percent, four out of five of those variances were issued for reclamation of remining operations.¹⁹ In West Virginia, the percentage is even higher, with 85 percent of permits requiring reclamation of AOC.

As another example, in West Virginia, WVDEP incorporates a site-specific "Buffer Zone Analysis" into its permitting process whenever an applicant proposes to conduct mining activities within 100 feet of an intermittent or perennial stream. This comprehensive and thorough analysis, conducted by WVDEP *prior* to the issuance of a permit, addresses the following issues:

1. Disposal Site Selection

- Does the site selection of the proposed fills and its associated drainage structures represent the least environmentally damaging practicable alternative?
- Can the activity operate without fills in an intermittent or perennial stream?
- Has the least adverse impact alternative on special aquatic sites been identified?
- Has the activity's fill volume been minimized?
- Has the fill been located and confined to impaired streams to minimize smothering of organisms?
- Are previously used disposal sites available?

2. Fill Material Evaluation

An evaluation of the proposed fill for any indication of possible contaminants, considering the following physical characteristics:

¹⁷ 30 C.F.R. § 780.35(a)(3)(iv).

¹⁸ See *Surface Coal Mining-Characteristics of Mining in Mountainous Areas of Kentucky and West Virginia*, Government Accountability Office, GAO-10-21 (December 2009) at p. 40.

¹⁹ *Id.* at p. 49.

- Results from previous testing of the material or similar material in the vicinity of the project.
- Protection practices for petroleum products or designated hazardous substances.
- Known existence of substantial material deposits of substances that could be released in harmful quantities to the aquatic environment by manmade discharge activities.

3. Environmental Analysis

Are the physical and chemical characteristics of the aquatic ecosystem significantly affected in the following areas:

- Substrate impacts, changes in the physical, chemical and biological characteristics?
- Suspended particulate/turbidity impacts?
- Changes in chemistry and physical characteristics of the receiving stream?
- Alternation of normal water flow which will result in changes in habitat, food supplies and spawning areas?

Do the proposed fills and associated drainage structures significantly affect the following:

- Violate applicable State Water Quality Standards?
- Violate applicable toxic effluent standards?
- Jeopardize the continued existence of endangered or threatened species or their habitat?
- Aquatic ecosystem diversity, productivity and stability?
- Other wildlife ecosystem diversity, productivity and stability?
- Riffle and pool complexes?
- Human health, municipal and private water supplies?
- Recreational, aesthetic and economic values?
- Parks, historical sites and wilderness areas?

The analysis also includes a table summarizing temporary and permanent impacts to intermittent and perennial streams within the proposed permit area.²⁰

In addition to all of the improvements included in the 2008 SBZ rule and increased efforts by state SMCRA regulatory authorities to improve their guidance and

²⁰ See *Response to petition requesting federal enforcement of West Virginia's surface mining program pursuant to 30 C.F.R. Part 733*, from OSM Appalachian Regional Director to Joseph M. Lovett, (Dec. 8, 2009) at pp. 3-4 (describing details of the West Virginia buffer zone analysis).

regulations on SBZs and AOC, the Corps and EPA also significantly improved their own programs in terms of providing additional protection for streams. The Corps added features to its nationwide permit 21 (NWP 21) when it was reissued in 2007 that focused on improving environmental protection, and in 2008, the Corps and EPA jointly promulgated a new mitigation rule that also provided important environmental protection enhancements. Among other things, the mitigation rule required for the first time that specific mitigation requirements be incorporated as enforceable conditions on the CWA section 404 permit. In addition, the rule required that permittees must provide certain assurances that mitigation would be successfully completed as planned and that the proposed mitigation would replace unavoidable losses to wetlands and streams.

Despite all of the progress that has been made since the *Bragg* litigation through the adoption of the 2008 SBZ rule, improvements to state regulatory programs, enhancements to the Corps NWP 21 rule, and the joint EPA-Corps mitigation rule, OSM not only fails to explain the need for amending the SBZ rule,²¹ but also fails to explain how the 1983 rule would be interpreted if the agency returned to that language. The agency also fails to explain its basis for proposing to change its long-established view that the SBZ rule does not prohibit filling of stream segments.²²

Contrary to what opponents of the current rule suggest, the 1983 SBZ rule was never meant to prohibit filling of streams. As the preamble to the final rule explains:

It is impossible to conduct surface mining without disturbing a number of minor natural streams, including some which contain biota. For this reason, surface coal mining operations will be permissible as long as environmental protection will be afforded to those streams with more significant environmental resource value.

48 Fed. Reg. 30313 (June 30, 1983).

²¹ 5 U.S.C. § 553(c)(there must be a thorough and comprehensible statement of the reasons for the agency decision); *See also International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 815-818 (D.C. Cir. 1983)(an agency's failure to cogently explain why it has exercised its discretion in a given manner renders its decision arbitrary and capricious).

²² *See Office of Communications of United Church of Christ v. FCC*, 560 F.2d 529, 532 (2nd Cir. 1977)(in order for an agency to change its previous holdings, there must be a thorough and comprehensive statement of reasons for the decision); *See also Macon County Samaritan Memorial Hospital v. Shalala*, 7 F.3d 762, 765 (8th Cir. 1993)(in cases where an agency's rule reflects a departure from that agency's prior policy, such reasoned analysis for change must go beyond that which may be required when the agency does not act in the first instance), *quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

The purpose of the rule was to protect streams from sedimentation and help preserve riparian vegetation and aquatic habitat.²³

The SBZ rule draws its lineage from the 1977 initial program regulations.²⁴ The purpose of the rule was to protect stream channels from abnormal erosion from nearby upslope mining activities. The language of the rule expressly contemplated that a buffer zone is not required or applicable when mining and reclamation activities are authorized by the regulatory authority through a stream:

No land within 100 feet of an intermittent or perennial stream shall be disturbed by surface coal mining and reclamation operations unless the regulatory authority specifically authorizes surface coal mining and reclamation operations **through** such a stream.

30 C.F.R. § 715.17(d)(3)(emphasis added).

Thus, the SBZ rule was never intended as a *per se* prohibition on mining activities closer to, within, or through intermittent or perennial stream channels. Rather, like many other regulations implementing SMCRA, the rule sets forth criteria requirements or conditions for proceeding with activities with the approval of the regulatory authority.

For example, the initial program SBZ rule is part of the stream channel diversion standards which require regulatory authority approval for diversions of intermittent and perennial streams within the permit area.²⁵ Moreover, the rule clearly contemplates diversion of overland flows as a means to minimize erosion.²⁶ The language confirms this intent by using the phrase “through such a stream.” The context of the rule—as part of the stream channel diversions—also confirms that the rule applied to mining through the stream which would technically require diversion of those streams subject to the approval of the regulatory authority. As explained in the preamble of the initial program rules, the SBZ rule did not apply “when mining in intermittent or perennial streams was approved by the regulatory authority.”²⁷ As OSM further explained, the rule was designed so “existing rights to mine coal as evidenced in approved permits will not be adversely affected.”²⁸

The purpose and intent is clear from the 1977 rule that a SBZ would only be maintained around intermittent and perennial streams for surface mining that was not approved to occur through those stream channels. It had no applicability to activities that were designed to occur in such stream channels. Those activities were governed by other regulations.

²³ 48 Fed. Reg. 30314.

²⁴ 42 Fed. Reg. 62,652 (Dec. 13, 1977).

²⁵ 30 C.F.R. § 717(d)(1).

²⁶ 30 C.F.R. § 717(c).

²⁷ 42 Fed. Reg. 62,652 (Dec. 13, 1977).

²⁸ *Id.*

For example, many other provisions of the initial regulatory program clearly contemplate that mining activities will occur adjacent to or in stream channels. These include: construction of excess spoil fills, § 715.15(a)-(d)(requiring underdrain systems along the natural drainage course when the disposal area contains natural watercourses such as streams); § 715.17(c)-(f)(temporary or permanent diversions of streams; sedimentation ponds and siltation structures located in streams); § 715.17(l)(stream fords, stream crossings and roads in inactive stream channels); and § 715.18 (construction of dams). As OSM correctly notes in the preamble to the 2007 proposed SBZ rule, the SBZ rule was not applicable to these activities which are governed by the specific rules authorizing them.²⁹

The permanent program version of the SBZ rule (§ 816.57), adopted in 1979, reflects that same purpose and intent. As explained by the agency, the rule was one of several rules designed to implement the general performance standards to minimize disturbances to the prevailing hydrologic balance during and after mining by preventing, to the extent possible, additional contributions of suspended solids to stream flow or runoff outside the permit area.³⁰ OSM went on to explain that the buffer zone was one of several practices or methods that could be used alone or in combination with others, such as sedimentation ponds, to prevent sedimentation of streams by runoff from disturbed surface areas.³¹ The 1983 revisions also reflect this purpose and understanding of the rule as proving a method "in conjunction with sedimentation ponds and other measures, to prevent excessive sedimentation of streams by runoff from disturbed areas."³² As summarized by the government's own programmatic EIS on mountaintop mining: "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..."³³

In conclusion, the 2008 rule should not be repealed and should not be replaced by the 1983 rule. The 1983 rule was fraught with uncertainty and problems that persisted for more than a decade until the 2008 rule was promulgated. The 2008 rule correctly spells out the original intent of the SBZ rule to ensure compliance with SMCRA's requirements in using caution when mining near streams and using the best technology currently available to avoid, to the extent possible, the contributions of suspended solids to streamflow or runoff outside the permit area. The rule was never meant as a ban on surface mining activities in streams and to interpret it in such a manner would be absurd. Mining companies and federal and state regulators have made significant improvements in environmental protection of

²⁹ 72 Fed. Reg. 48,892.

³⁰ 44 Fed. Reg. 15,176 (March 13, 1979) citing 30 U.S.C. § 1265(b)(10)(B).

³¹ Id. at 15,176.

³² 48 Fed. Reg. 30,312 (June 30, 1983).

³³ See *Mountaintop Mining/Valley Fills in Appalachia, Draft Programmatic Environmental Impact Statement* ("MTM EIS")(June 2003) at p. II C-34.

streams since the original *Bragg* litigation, and OSM should implement the 2008 rules and give them a chance to further improve environmental performance before even considering, let alone initiating, major regulatory changes in an area that is in dire need of regulatory stability.

(2) Proposing to apply the prohibitions and restrictions of the SBZ rule to all segments of all perennial and intermittent streams and to the surface of lands within 100 feet of those streams

Prohibiting the placement of excess spoil or coal mine waste in all segments of intermittent or perennial streams, or even imposing a rebuttable presumption that such placement is unacceptable, exceeds restrictions authorized or contemplated by SMCRA and would be contrary to it.

Placement of excess spoil and coal mine waste in intermittent and perennial streams were both clearly contemplated by SMCRA and prohibiting such placement of excess spoil would destroy the surface coal mining industry, while prohibiting such placement of coal mine waste would destroy the underground coal mining industry in central Appalachia. In passing SMCRA, Congress did not even mention, let alone require, a SBZ rule. In fact, the opposite is true. To prohibit mountaintop mining or valley fills by regulation would be directly and clearly contrary to the statute and how it has been interpreted by the courts. SMCRA § 515(b)(22)(D) expressly authorizes mine operators to place excess spoil material in “springs, natural water courses or wet weather seeps” so long as “lateral drains are constructed from the wet areas to the main under drains in such a manner that filtration of the water into the spoil pile will be prevented.”³⁴ In addition, § 515(b)(24) recognizes the legitimacy of placing fill in waters of the United States by requiring surface mine operators to minimize disturbances and adverse impacts of the operation on fish, wildlife and related environmental values, and achieve enhancement of such resources where practicable.³⁵ As the 4th Circuit explained:

...SMCRA does not prohibit the discharge of surface coal mining excess spoil in waters of the United States...It is beyond dispute that that SMCRA recognizes the possibility of placing excess spoil material in waters of the United States even though those materials do not have a beneficial purpose.

Kentuckians for the Commonwealth v. Rivenburgh, 317 F. 3d 425, 442-443 (4th Cir. 2003).

Prohibition of fills, even if it were not illegal, would destroy significant segments of the mining industry. A Marshall University economic impact analysis forecasted unprecedented economic and social dislocation from an interpretation of the SBZ like that of the *Bragg* decision. The study found that interpreting the rule as the

³⁴ 30 U.S.C. § 1265(b)(22)(D).

³⁵ 30 U.S.C. § 1265(b)(24).

district court had suggested would result in the loss of more than 10,000 jobs and hundreds of millions of dollars in wages across West Virginia alone.³⁶ In addition, the agency's own studies confirm that such a prohibition on placing fill material in streams would render over 90 percent of the coal seams in the region unmineable.³⁷ Finally, such losses of surface production would not likely be regained by switching to local underground coal mining operations:

...the estimation results clearly demonstrate that any supposition that underground mining will fill the void of curtailed surface mining is incorrect. Quite to the contrary, the empirical analysis suggests that reduced surface volumes will increase the cost of coal mined underground within most study region counties.

Coal Production Forecasts and Economic Impact Simulations in Southern West Virginia: A Special Report to the West Virginia Senate Finance Committee, Marshall University-Center for Business and Economic Research (2000) at p. 37.

Since OSM lacks the authority to promulgate such rules, and because of the devastation that they would cause to the industry, OSM should not even propose such prohibitions.

(3) Making the SMCRA authority a Clean Water Act regulator

This alternative specifies four criteria that must be met for mining activities to be authorized within the SBZ.

The first two, which preclude violations of certain sections of the CWA, are superfluous, inappropriate and unnecessary. They are superfluous and unnecessary because, with or without such a SMCRA rule, mining operations must still comply with applicable provisions of the CWA. Including the provisions suggested in this alternative in SMCRA rules would be inappropriate because it would place the SMCRA regulatory authority in the position of making determinations on whether or not the CWA would be complied with or is even applicable. SMCRA regulatory authorities have absolutely no authority to make such CWA determinations, nor can OSM give them such authority by regulation. SMCRA § 702(a)(3) states that nothing in SMCRA shall be construed as superseding, amending, modifying or repealing the CWA or its implementing regulations.³⁸ Neither the CWA nor its implementing regulations provide for authorizing SMCRA regulatory authorities to make applicability or compliance determinations for sections 401, 402 or 404 of the CWA unless the delegation occurs under the CWA, not SMCRA.

³⁶ Burton, Hicks, and Kent, *The Fiscal Implications of Judicially Imposed Surface Mining Restrictions in West Virginia* (Feb. 2001).

³⁷ Sandberg, Doss, et. al., "The Mountaintop Mining EIS Technical Report," at p. 3 (2000).

³⁸ 30 U.S.C. § 1292(a)(3).

Further, the 2008 rule requires that SMCRA permits must be conditioned upon compliance with the CWA,³⁹ specifically any clearances or permits required by §§ 401, 402 and 404 of the CWA. There is nothing added by these first two criteria that is not already in OSM's current rules except the requirement to have the SMCRA regulatory authorities make CWA determinations, which they cannot be authorized to make.

The third criterion would need some spatial clarification such as the variation suggests (outside the permit area). Without such clarification, there will be controversy over whether this language does or does not preclude extending a valley fill into an intermittent or perennial stream, just as there was with the 1983 SBZ rule. Another spatial limit variation would be "within 100 feet of the surface mining activities" as was contained in the 1979 version of the SBZ rule.

The wording of the fourth criterion is essentially identical to existing 30 CFR §§ 816.71(a)(4) and 816.57(c)(3) as finalized in the 2008 rulemaking. Therefore, existing OSM rules already require that the regulatory authority must find that an operation will comply with these requirements before a permit can be issued. There is nothing new in this criterion that is not contained in existing rules.

(4) Proposing numerical limits on fill sizes, the percentage of a watershed disturbed, or total stream miles covered by fills in each watershed

The idea of imposing numerical limits on fill size is technically unsound, both from an environmental perspective as well as from the standpoint of safety and stability. The simple fact is that if an operation has 30 million cubic yards of excess spoil it must dispose of, placing that material in 30 separate one-million cubic yard fills would affect substantially more total area with much greater risk of fill failure than placing that same material in six separate five-million cubic yard fills, which would, in turn, cover more total area with greater risk of failure than placing the entire 30 million cubic yards in one fill.

The reasons are simply geometry and gravity. The geometry is simply that the ratio of surface area to volume decreases as the volume increases – substantially (30 separate one-million cubic yard fills would cover in the range of 10 times the surface area that would be covered by one 30-million cubic yard fill).

Gravity comes into play because the smaller the fill, the higher the toe of the fill would be – and the higher the toe of the fill, the steeper the slope where that toe is placed. A fill that toes out where the slope of the natural ground is less than 10 percent is orders of magnitude easier to hold in place than one where the slope of the natural ground is over 15 percent at the toe (and there would be 30 fill toes on

³⁹ 30 C.F.R. § 816.57(a)(2).

those steeper slopes rather than six toes on a gentler slope, or one toe on a still gentler slope). Perhaps the historic emphasis on stability in OSM's rules is one reason why the government's MTM EIS found that there were only a very small percentage of fills that had experienced stability problems.⁴⁰

The current rules finalized in 2008 push the limit of sound engineering by only allowing excess spoil fills to extend into intermittent or perennial streams where avoidance is not possible. Even then, there is a mandate for an alternatives analysis to demonstrate that avoidance is not reasonably possible and that the selected alternative is the one with the least overall adverse impact.⁴¹

Limitations on fill sizes can be unwise from an environmental perspective as well. The government's own programmatic EIS on mountaintop mining found that: "Although a minimum impact threshold may reduce the size of fills, it could actually cause greater stream impacts by requiring the construction of valley fills in a greater number of headwater stream segments."⁴² Likewise, limitations on watershed sizes were already considered and appropriately rejected by OSM as recently as 2007. The agency explained that:

...there is no current statutory authority in SMCRA, and no scientific basis, for establishing such a 'bright line' watershed size threshold...On the other hand, a sensitivity study of economic effects of such watershed size restriction indicated a loss of coal reserves (45%) and surface mine capacity (31.6%) in central Appalachia would occur if the 75-acre watershed threshold was applied...The resulting impairment of coal recover[y] would be inconsistent with Congress' explicit purpose...

SBZ EIS (April 2007) at pp. II-24, II-35.

As previously mentioned, in order for the agency to change its previous holdings, there must be a thorough and comprehensive statement of reasons for the decision, and in cases where the agency's rule departs from prior policy, such analysis must go beyond that which is required when the agency has not taken a position in the first instance. As quoted above, the agency has taken the position that there is neither statutory authority nor scientific basis for establishing such thresholds. So far, the agency has pointed to no change in its SMCRA authority nor has it produced any new scientific data to support a change in the agency's prior findings on these issues. Thus, any attempt by OSM to change its previous findings without such support would be arbitrary and capricious.

⁴⁰ See *Mountaintop Mining/Valley Fills in Appalachia-Final Programmatic Environmental Impact Statement*, (Oct. 2005) at p. 68.

⁴¹ See 30 CFR § 780.35(a)(3).

⁴² See MTM EIS at IV B-8.

(5) Proposing watershed water quality criteria

Establishing watershed water quality criteria (either quantitative or qualitative) is entirely beyond the scope of what is authorized by SMCRA. We do not believe such an approach could be harmonized with the CWA and would be in violation of § 702(a)(3) of SMCRA, which states that nothing in SMCRA shall be construed as superseding, amending, modifying or repealing the CWA or any rule or regulation promulgated thereunder.⁴³

(6) Proposing to adopt the watershed approach

There is an essential point that seems to be missed by ideas such as Alternative 6. Coal mining operations are, by necessity, located where minable coal reserves are located. Minalable reserves are not evenly distributed and do not encompass only a certain percentage of each watershed. Some watersheds are full of minable reserves (sometimes with multiple seams of mineable coal), while others have little or none. In that sense, this is simply not like the industrial citing that EPA is used to regulating. Mines can only go where the minable coal is. To preclude the mining of minable reserves—particularly when the infrastructure and equipment is already in the area—simply because other mines are already in the watershed makes no sense, either from an environmental or practical perspective. It would only increase the size of the infrastructure footprint for the same production. It would also be contrary to SMCRA, which requires the agency to “encourage the full utilization of coal resources...”⁴⁴ Further, to preclude mining of such readily available reserves would constitute a taking of private property requiring just compensation.⁴⁵

The SMCRA mandate for the regulatory authority to prepare a cumulative hydrologic impact assessment (CHIA)⁴⁶ should not and cannot be shifted to the permit applicant. Further, the finding required by the regulatory authority, after preparing the CHIA, only applies to the proposed operation, not all anticipated mining.⁴⁷

The new extensive alternative analysis requirements contained in § 780.35(a)(3) should be given a chance to work before considering further revisions. Because the proposed operation may affect more than one watershed, there may be some

⁴³ See *SBZ EIS (OSM EIS-34, April 2007) at III-95*, quoting *In re Permanent Surface Mining Regulation Litigation*, 627 F.2d 1346, 1369 (D.C. Cir. 1980)(EPA variances and exemptions are substantive elements of the CWA that cannot be altered by OSM).

⁴⁴ 30 U.S.C. §1202(k).

⁴⁵ U.S. Const. Amendment V (nor shall private property be taken for public use without just compensation).

⁴⁶ 30 U.S.C. § 1257(b)(11).

⁴⁷ 30 U.S.C. § 1260(b)(3).

watershed components to that alternative analysis, but it will be within the context of that proposed operation.

(7) Proposing to define “material damage to the hydrologic balance” and “cumulative impact area”

It remains hard to imagine how there can be one nationwide definition (or criteria) for what constitutes “material damage to the hydrologic balance *outside the permit area.*” That last phrase should be included in any attempt to define the term as raised in this alternative since it is an integral part of the finding that a regulatory authority (RA) must make. While some generic qualitative language like the definition that OSM has approved as part of the Wyoming program might work nationwide, it is hard to see that it adds much clarity to the decisions RAs face with each permit decision. Criteria that would be appropriate for defining material damage to the hydrologic balance outside the permit area—for a permit covering thousands of acres in the four corners area with annual precipitation less than 10 inches a year and no intermittent or perennial streams in the immediate area—can and should be quite different than those criteria appropriate for a mountaintop operation in Central Appalachia, or a large dragline operation in the flat areas of east Texas with more than 50 inches of annual precipitation.

The issue is not whether understanding of the relevant hydrology and the associated technology have advanced, but that the vast differences in hydrologic conditions under which coal is mined across the nation have not changed, nor will they. One of the primary reasons why Congress vested primary governmental responsibility for developing regulations for surface coal mining operations with the States (instead of OSM) through SMCRA was exactly because of the diversity in terrain, climate, biologic, chemical and other physical conditions around the country.⁴⁸

We have concerns with the idea of incorporating elements of the Corps processes and standards for potential adverse impacts of fill disposal under the CWA §404 program into the SMCRA probable hydrologic consequences (PHC) and CHIA processes. As acknowledged in the notice, the Corps is concerned with determining adverse impacts to waters of the U.S. in relation to the discharge of fill material under § 404 of the CWA. The CHIA process and the finding the RA must make is concerned with the possible impact of the entire mining operation(s) upon the entire hydrologic balance outside the permit area (not the stream inside the permit area and not just the stream).

(8) Proposing to require that SMCRA permits be submitted to other agencies

⁴⁸ See 30 U.S.C. § 1201(f).

This alternative is totally inappropriate and beyond what is authorized by SMCRA. It just looks like permit review by committee to include parties that have no jurisdiction in a SMCRA permitting decision. If OSM wants to facilitate better coordination then it should follow the pattern set by 30 C.F.R. § 780.16(c) for fish and wildlife information. Under those rules, it is the responsibility of the RA to provide relevant parts of the application to other agencies that have an interest. Further, only permit application information should be provided that is relevant to the other agencies' jurisdiction. Also, if National Pollutant Discharge Elimination System authority has been delegated to a state, there is no reason for EPA to be involved. Requiring the collection of information from operators from other agencies that are not relevant to the SMCRA permit decision making would also violate the requirements of the Paperwork Reduction Act, since such requirements would lack practical utility.⁴⁹

(9) Proposing new regulations for stream channel diversions and restoration of streams

OSM needs to better articulate what problem the agency is trying to solve. It is unclear what the basis is for thinking that further rulemaking is needed on stream-channel diversions, or how this alternative is connected to central Appalachia. With no stated basis or purpose, it is simply impossible to respond without further information. In short, NMA does not believe that OSM should propose additional requirements of this nature.

(10) Proposing to limit the rule to mountaintop removal operations and operations on steep slopes

OSM lacks the authority to do anything other than national rules, except where expressly authorized by SMCRA, such as alluvial valley floors in the West or revegetation standards in the arid and semi-arid West. However, since mountaintop removal mining and steep slope mining are specifically recognized by SMCRA, OSM has the authority to promulgate regulations specifically for those types of operations. Such regulations must be consistent with SMCRA, which means they must be limited to the types of issues that SMCRA recognizes as distinct for those operations, namely those identified in SMCRA Sections 515(c) and (d).

As previously mentioned in our comments, the agency has not articulated any support for such rules, whether they be nationwide in scope or targeted toward a particular type of mining operation. The evidence that is in the record reflects significant improvement in environmental protection based on the findings of the

⁴⁹ 44 U.S.C. § 3501 et seq.

EIS,⁵⁰ on improvements in state programs and policies, and on added federal protections in the 2008 SBZ rule, the mitigation rule and the Corps NWP 21 reauthorization.

III. Other provisions

Approximate Original Contour

We do not believe it would be appropriate nor provide any environmental benefit related to Appalachian coal mining for OSM to revise regulations related to approximate original contour (AOC).

First, AOC is a term expressly defined in SMCRA for the nation. Any regulatory changes to it would have to be national in scope and consistent with the statutory definition. The differences in terrain from Appalachia to the Illinois coal basin, to East Texas, to the Western states, and on to Alaska simply preclude further specificity in that definition in a way that is workable across the nation.

Second, each state program has the discretion to further clarify that nationwide definition as it applies to mining conditions in that state. If further refinement were warranted for the specific conditions in a state, it should be done at the state (or federal program for a state) program level.

Third, as OSM has recognized in Directive INE-26 at 3. c. (1) in its guidance to OSM inspectors:

(1) Role of Permitting. Because backfilling and grading represents the largest single cost in reclamation and, once completed, is followed by topsoil replacement and revegetation, both the permittee and the regulatory authority need a clear understanding of the final post-mining topography prior to mining. The permittee needs this information so that he may determine if mining is profitable and know that once topsoil replacement and revegetation proceeds, additional regrading will not be required. The regulatory authority needs to know in order that the appropriate bond can be set, contemporaneous reclamation standards can be enforced, and the environmental disruption and topsoil loss associated with a second regrading can be avoided. Therefore, the anticipated post-mining topography must be determined in the permitting process with typical cross section or contour maps depicting both the pre-mining and anticipated post-mining slopes with sufficient clarity and detail to enable a comparison to determine if AOC has been achieved.

⁵⁰ See, e.g., one of the key findings of the MTM EIS that its studies did **not** conclude that impacts documented below mountaintop mining valley fill operations cause or contribute to significant degradation of waters of the U.S. MTM EIS (2003) at p. II. D-9.

Since what will constitute AOC at a specific site is established in the permitting phase for each surface coal mine, the public participation process available at the time an application is pending also gives the public the opportunity to weigh in (complete with appeal rights) on whether what is being proposed constitutes AOC at that mine. Thus, the permitting process for each operation constitutes the appropriate way to address any concerns that citizens or others may have about how AOC is being applied in Appalachia as well as other areas of the nation. No new national rulemaking is needed to facilitate that site specific process.

Immediate Stream Protection Measures

OSM asserts that it has implemented a series of measures to provide increased protection for streams until the agency's modifications to the SBZ rule are finalized. OSM has stated its intention to:

"...establish a practice that the review and approval of SMCRA permits must be coordinated with reviews and authorizations required under the CWA. OSM will also work with the Corps of Engineers and the EPA to coordinate these permitting processes and ensure effective and coordinated compliance with provisions of the CWA."

Although NMA at one time advocated more coordination between the various regulatory agencies, we now have serious concerns about the agency's establishment of such practices. Judging by our experience with the EPA's interference with the Corps' permitting process under § 404 of the CWA and the effective creation of a permit moratorium⁵¹ under that program, we believe that introducing personnel from EPA and the Corps into SMCRA permitting decisions of the regulatory authority is inappropriate. Each agency has its clearly defined jurisdiction with regard to issuing permits under SMCRA and the CWA, respectively. To allow state-issued SMCRA permits to be held up in indefinite review periods by agencies that have no jurisdiction over the majority of the mine project is inappropriate. Moreover, one of the biggest problems with the 404 permit moratorium has been a complete lack of transparency by the EPA and the Corps with respect to what companies need to do in order to obtain a permit. This process has been abusive and unfair to our members, and we strongly object to any plans by the administration to institute a similar practice on the SMCRA permitting side.

⁵¹ Even the Sierra Club brags about the CWA § 404 permit moratorium on their website: *See No New Coal Plants Started in 2009: Year End State of Coal*, Sierra Club (Dec. 21, 2009) ("From the mine, to the plant, to the ash, 2009 has not been a good year for the coal industry. The Obama Administration has blocked most new permits to bury streams with waste as part of mountaintop removal mining operations...") http://action.sierraclub.org/site/MessageViewer?em_id=150401.0

Dennis Rice
December 30, 2009
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IV. Conclusion

Thank you for the opportunity to comment. We hope that you will consider our views on the SBZ regulations and reconsider the alternatives that were articulated in the ANPRM.

Sincerely,



Bradford V. Frisby
Associate General Counsel