



July 30, 2010

Office of Surface Mining,
Reclamation and Enforcement
Administrative Record
Room 252-SIB
1951 Constitution Avenue, N.W.
Washington, D.C. 20240

Dear Mr. Craynon:

The National Mining Association (NMA) appreciates the opportunity to file additional comments on the Office of Surface Mining's (OSM) notice of intent to prepare an environmental impact statement (EIS). 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 has faithfully and consistently participated in all of the agency's efforts to address the regulation of streams in recent years. This filing will mark the eighth time that NMA has filed formal written comments on an agency proposal relating to this subject. Previous submissions include comments on the following actions:

- OSM's Outreach Document titled *Planned Rulemaking to Clarify Excess Spoil/Stream Buffer Zone Requirements* (March 21, 2003);
- OSM's (along with West Virginia Department of Environmental Protection and three other federal agencies) *Draft Programmatic EIS on Mountaintop Mining and Valley Fills in Appalachia* (June 2003)
- OSM's proposed rule on excess spoil, stream buffer zones and diversions (January 7, 2004)
- OSM's notice of intent to prepare and EIS on the stream buffer zone rule (June 16, 2005)
- OSM's proposed rule on excess spoil, coal mine waste and buffers for waters of the U.S. (Aug. 24, 2007)
- OSM's advanced notice of proposed rulemaking on the stream buffer zone and related rules (Nov. 30, 2009)

- OSM's notice of intent to prepare an EIS for the stream protection rule (April 30, 2010)

Due to their importance and relevance to this rulemaking, NMA requests that all of our previous comments on this subject be incorporated by reference into the agency's rulemaking record for the stream protection rule.

I. General Comments

The agency is embarking on the most comprehensive revision of its regulations under the Surface Mining Control and Reclamation Act (SMCRA) since 1983. According to the agency's most recent *Federal Register* notice, there are two reasons for this rulemaking. The first is that the Secretary of the Interior signed a memorandum of understanding (MOU) with the Environmental Protection Agency (EPA) and the Corps of Engineers (Corps) implementing an interagency action plan "designed to significantly reduce the harmful environmental consequences of surface coal mining in six Appalachian states, while ensuring that future mining remains consistent with federal law."¹ The second reason proffered is that OSM settled litigation over the 2008 stream buffer zone rule in March 2010 and agreed to propose changes to that regulation. The problem is that neither of these reasons comes close to justifying this broad nationwide rulemaking effort.

Although the MOU may provide a political *reason* for action by OSM on these issues, that is a far cry from a substantive and legal *justification* for making such sweeping nationwide changes. There are several reasons why the MOU does not support OSM's comprehensive effort. First, the purposed scope of the MOU is inherently inconsistent with OSM's intent to initiate a comprehensive and nationwide rulemaking.² The MOU applies only to "Appalachian Surface Coal Mining," which is expressly defined in the MOU as including only the states of KY, OH, PA, TN, VA, and WV. Although NMA disagrees that there is significant and widespread environmental harm being caused by Appalachian surface coal mining operations,³ even if such harm were occurring in one region⁴ it would not necessarily justify a nationwide rulemaking to address it. In addition, OSM is attempting to apply its nationwide rules uniformly to all areas of the country, despite Congress' admonition

¹ 75 Fed. Reg. 34,667 (June 18, 2010).

² See 75 Fed. Reg. 34,667 ("...it would not be fair, appropriate, scientifically valid, or consistent with the principles of SMCRA to apply the new protections only in central Appalachia...").

³ See, e.g. *Programmatic Environmental Impact Statement on Mountaintop Mining and Valley Fills in Appalachia* (2003)(concluding that impacts below MTM valley fills did not cause or contribute to significant degradation of waters of the U.S.) at p. II D-9.

⁴ It is not at all clear that mining operations are causing similar impacts in various states in Appalachia, let alone nationwide. Industry has sought data purportedly used by EPA scientists to verify that impacts in Kentucky are similar to those in West Virginia. However, the government has been unwilling to share this data despite requests under the Freedom of Information Act. See *U.S. Geological Survey letter to Robert G. McLusky* (June 11, 2010)(denying his request for data used to validate EPA's studies regarding mining's relationship to stream impacts).

that States should be allowed to tailor their regulatory programs based on local conditions.⁵

Second, there are serious questions about the scientific conclusions relied upon in the MOU. Many of the key policy initiatives hinge upon an alleged relationship between conductivity and coal mining operations. Although not expressly mentioned by OSM in the *Federal Register* notice documents, the agency has raised the issue of conductivity in meetings with stakeholders as one of the justifications for promulgation of the stream protection rule. However, NMA has submitted technical reports to the EPA's Science Advisory Board that cast serious doubt about the reliability of using conductivity as a regulatory benchmark. One such report stated that:

"...there are insufficient data from the physiological and toxicology literature to rigorously support EPA's conclusion that 'conductivities in the region of concern reach levels that are sufficient to cause effects on stream communities... *** ...ionic composition, substrate, and channel features may be the most appropriate stressor variables to consider. *** **We conclude that the relationship between conductivity and changes in benthic macroinvertebrate community structure is neither strong nor reliable enough to warrant derivation of a regulatory benchmark at this time.**"

See GEI Consultants Interim Draft Report, *Technical Review: A Field Based Aquatic Life Benchmark for Conductivity in Central Appalachian Streams*, at pp. ES-1-ES-3 (July 12, 2010)(emphasis added).

Third, the MOU's assertion that it plans to "move America toward a 21st century clean energy economy...and strengthen the Appalachian regional economy..." by stimulating clean enterprise and green jobs is a fallacy.⁶ Not only would an attempt to substitute high-wage coal mining jobs⁷ in the Appalachian region with low wage "green jobs" be harmful to the Appalachian economy,⁸ but this policy finds no

⁵ See 30 U.S.C. § 1201(f).

⁶ See Morriss, Andrew P., Bogart, William T., Dorchak, Andrew and Meiners, Roger E., *Green Jobs Myths* (March 12, 2009). U Illinois Law & Economics Research Paper No. LE09-001; Case Legal Studies Research Paper No. 09-15 at pp. 96-97 (Green jobs estimates promise greatly expanded (and pleasant and well-paid) employment. This promise is false. The green jobs model is built on promoting inefficient use of labor, favoring technologies because they employ large numbers rather than because they make use of labor efficiently. In a competitive market, factors of production, including labor, earn a return based on productivity. By focusing on low labor productivity jobs, the green jobs literature dooms employees to low wages in a shrinking economy. Available at SSRN: <http://ssrn.com/abstract=1358423>

⁷ See U.S. Bureau of Labor Statistics, QCEW (2008)(finding that the average coal miner wage in 2008 in the U.S. was \$72,222 vs. \$45,368 for the average U.S. worker) available at http://www.nma.org/pdf/c_wages_state_industries.pdf

⁸ See *Study on the Effects on Employment of Public Aid to Renewable Energy Sources*, Universidad Rey Juan Carlos, at p. 7 (March 2009)(Optimistically ... we find that for every renewable energy job that the State manages to finance, Spain's experience ... reveals with high confidence, by two different methods, that the U.S. should expect a

support in, and is in fact, directly contrary to the law. SMCRA provides no basis for using the Secretary's regulatory authority to economically and socially transform a region of the country to a different type of industry. In fact, one of the express purposes of SMCRA states that supplying coal is essential to the Nation's energy requirements and to its economic and social well being.⁹ Moreover, far from discouraging coal mining, the law actually requires that surface coal mining operations be conducted to maximize the utilization and conservation of the coal resource.¹⁰

Finally, all of the major elements of the MOU relating to Interior/OSM are either contrary to SMCRA or the Administrative Procedure Act (APA), or are unsupported. For example, the very first requirement assumed that the Secretary should seek to have the 2008 stream buffer zone rule vacated without going through a public rulemaking process. However, a federal judge blocked this action because it was a clear violation of the APA:

NMA has the better argument...the APA requires government agencies to follow certain procedures, including providing for public notice and comment, before enacting or amending a rule. 5 U.S.C. § 553(b), (c). An agency must follow the same procedures in order to repeal a rule.

See National Parks Conservation v. Salazar, No. 09-00115 (D.D.C. Aug. 12, 2009)(HHK) at pp. 4-5.

Likewise, the MOU's command that OSM must "remove impediments to its ability to require correction of permit defects in SMCRA primacy states" directly contradicts SMCRA's entire state primacy scheme. SMCRA is crystal clear that approval of state programs by OSM results in exclusive regulatory authority for the state.¹¹ Thus, in a primacy state with an approved state program, OSM cannot take any direct action against the permittee without first following the dictates of SMCRA § 521(b).¹² These provisions have repeatedly been upheld by relevant circuit courts in the 3rd, 4th and D.C. Circuits.¹³

Even the MOU provision requiring OSM to "determine how it will more effectively conduct oversight of State permitting, State enforcement, and regulatory activities under SMCRA" is contradicted by the agency's own annual evaluation reports, which generally already provide very high marks in terms of state regulatory authority

loss of at least 2.2 jobs on average, or about 9 jobs lost for every 4 created, to which we have to add those jobs that non-subsidized investments with the same resources would have created);

⁹ 30 U.S.C. § 1202(f).

¹⁰ 30 U.S.C. § 1265(b)(1).

¹¹ 30 U.S.C. § 1253(a).

¹² 30 U.S.C. § 1271(b).

¹³ *See Haydo v. Amerikohl Mining*, 830 F.2d 494, 497-498 (3rd Cir. 1987); *Bragg v. West Virginia Coal Ass'n*, 248 F.3d 275, 289 (4th Cir. 2001); and *In re: Permanent Surface Mining Regulation Litigation*, 653 F.2d 514, 518-519 (D.C. Cir. 1981).

performance in implementing their state SMCRA programs. Some examples in major coal-producing states include:

Kentucky, (where OSM said that "Based on joint random oversight inspections OSM found that the Kentucky Department of Natural Resources (KYDNR) is meeting the requirements of state enforcement");¹⁴

Pennsylvania, where OSM said that: "Data show that the Pennsylvania Department of Environmental Protection (PADEP) is administering a regulatory program where active mining sites are, with very few exceptions, in compliance with the approved program requirements;"¹⁵ and

Wyoming, the nation's largest coal-producing state, where OSM said that: "Wyoming continues to administer a rigorous Title V program, even with the challenge of increasing coal production, increasing permit sizes, and increasing disturbance areas, with no increase in staff numbers...The LQD has made significant progress towards reducing the number of outstanding program deficiencies identified by OSM."¹⁶

Most relevant for purposes of the stream protection rule alternatives, the MOU also misses the mark with regard to its suggestion that "OSM will issue guidance clarifying the application of the 1983 stream buffer zone provisions to further reduce adverse stream effects." Proponents of agency action in this area have suggested that the agency should interpret the 1983 stream buffer zone regulation to prohibit fills in streams in a manner similar to the original decision by Judge Haden.¹⁷ Despite repeated losses at the circuit court level, some advocates erroneously insist that the 1983 stream buffer zone rule prohibited fills in streams.

The 1983 stream buffer zone rule was never interpreted to ban mining through streams or placing fill materials in streams. This consistent 30-year position of the agency¹⁸ and the state regulatory authorities was just recently reaffirmed, even after the change of administrations in 2009. In rejecting a petition requesting federal enforcement of West Virginia's surface mining program pursuant to 30 C.F.R. Part 733, OSM defended the West Virginia stream buffer zone rule and the state's interpretation allowing various mining activities to take place in streams:

¹⁴ See *2009 Kentucky Evaluation Report*, Department of the Interior, Office of Surface Mining, Reclamation and Enforcement, at p. 33.

¹⁵ See *2009 Pennsylvania Annual Evaluation Report*, Pittsburgh Field Division-Harrisburg Office, U.S. Office of Surface Mining, Reclamation and Enforcement, U.S. Department of the Interior, at p. 1.

¹⁶ *Annual Evaluation Summary Report for the Wyoming Regulatory Program*, Office of Surface Mining Reclamation and Enforcement, Evaluation Year 2009, at p. 3.

¹⁷ See *Bragg v. Robertson*, 72 F. Supp. 2d 642, 660-663 (S.D. WV 1999); rev'd in *Bragg v. WVCA*, 248 F.3d 275, 296 (4th Cir. 2001); cert. denied, 534 U.S. 1113 (2002).

¹⁸ OSM also approved a WV state program amendment on the stream buffer zone rule in 2003. See 68 Fed. Reg. 67,037 (Dec. 1, 2003).

"West Virginia does not interpret its SBZ rule in a manner that serves as an absolute prohibition of fills and other coal mining activities (such as mining through, crossing, relocating or other activities) within 100 feet of an intermittent or perennial stream. West Virginia is applying its rule in a manner consistent with OSM's historical interpretation of the 1983 Federal SBZ rule upon which the SBZ rule is based. The state program applies the SBZ rule in a manner that allows the placement of excess spoil fills, refuse piles, slurry impoundments, and sedimentation ponds in intermittent and perennial streams..."

See OSM letter to Joseph M. Lovett, (Dec. 8, 2009) at p. 2.

Just as the MOU fails to justify the agency's sweeping stream protection rule proposals, OSM's settlement agreement in the 2008 stream buffer zone rule litigation also fails to provide adequate reason for the agency's broad actions. By the terms of the settlement agreement, it in no way obligates the agency to conduct a rulemaking that, in the agency's own words, "is much broader in scope than the 2008 rule."¹⁹ The settlement²⁰ merely requires the agency to "make best efforts to sign no later than Monday, February 28, 2011, a **proposed rule to amend or replace the 2008 SBZ Rule...**", to "sign a 'final action' on the proposed rule...no later than Friday, June 29, 2012..." and to consult with the U.S. Fish and Wildlife Service as appropriate prior to signing the final action.²¹ It in no way requires OSM to propose or address any rules other than the SBZ rule that was the subject of the litigation.

Despite the Secretary's decision not to defend the existing 2008 stream buffer zone rule, its own history refutes the implication by the agency that it is somehow illegitimate or undeserving of deference from the current administration. The SBZ rule resulted from a comprehensive and public regulatory process that took over five years to complete. It included public hearings, an environmental impact statement, and consideration of over 43,000 public comments.

In addition to the lengthy and comprehensive process that created the rule, the substantive requirements contained in the regulation represent significant enhancements in environmental protection. The rule not only clarified existing agency policy on stream buffer zones that was consistently used and applied by both OSM and state regulatory authorities for over 25 years, but added, codified, and strengthened new environmental requirements for the placement of excess spoil. Such requirements include, among other things, minimizing excess spoil,

¹⁹ See 75 Fed. Reg. 22723 (April 30, 2010).

²⁰ Despite the fact that NMA was a party to the litigation, the settlement agreement was negotiated exclusively between the environmentalist plaintiffs and the government, and not with NMA. Not only was NMA not invited to join in the settlement discussions, but we were excluded from such discussions by the government even after we became aware of the discussions and requested a seat at the table.

²¹ See *Agreement to Settle Cases Seeking Judicial Review of the 2008 Stream Buffer Zone Rule*, (March 19, 2010) at p. 3.

avoiding perennial and intermittent streams, requiring an alternatives analysis, and requiring the selection of the placement option with the least environmental impact on fish, wildlife, and related environmental values.²² OSM still does not appropriately recognize the significant enhancements to environmental protection that were incorporated into the 2008 SBZ rule. In addition, OSM has spent little or no time explaining why this rule is inadequate, and why, even if it is, the agency needs to perform a wholesale rewriting of its regulations on a nationwide basis.

Interestingly, OSM says in its *Federal Register* notice that the agency “had already decided to change the [2008 stream buffer zone rule] following the change of administrations on January 20, 2009,” before even a single public comment was filed on the agency’s advanced notice of proposed rulemaking.²³ We recognize that there are many in the new administration who do not agree with the policy of “mountaintop mining,” and even some who are opposed to surface coal mining in general. However, SMCRA is the governing law of the land, and not only sanctions and encourages coal mining in general, but it authorizes mountaintop mining in particular²⁴ and the placement of fill material in streams.²⁵ As noted by the D.C. Circuit, just because a new administration disagrees with existing national policy (such as that contained in SMCRA), that does not give it the right to implement policies that are in conflict with duly enacted laws:

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).

Despite the problems with the agency’s justifications explained above, OSM appears to be moving in lock-step with EPA²⁶ to implement an administration policy that can only be described as a strategy to restrict surface coal mining operations in general, and to completely eliminate Appalachian coal mining. This view with regard to EPA’s recent actions is shared by a recent minority staff report by the U.S. Senate

²² See 30 C.F.R. § 780.35 (2008).

²³ 74 Fed. Reg. 62663-62666 (Nov. 30, 2009).

²⁴ 30 U.S.C. § 1265(c)(2).

²⁵ 30 U.S.C. § 1265(b)(22); *Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 195 (4th Cir. 2009)(Congress clearly contemplated that the regulation of the disposal of excess spoil and the creation of valley fills fall under the SMCRA rubric.

²⁶ NMA recently challenged EPA’s illegally promulgated guidance document and permit moratorium on Clean Water Act permits for coal mining operations in six Appalachian states. See *NMA v. Jackson*, No. 10-01220 (D.D.C., July 20, 2010).

Committee on Environment and Public Works, which found that the administration is using the Clean Water Act § 404 permitting process to dismantle the coal industry in Appalachia.²⁷ As the agency correctly acknowledges in its *Federal Register* notice, OSM does not have the authority to ban mountaintop mining.²⁸ Yet many of the proposed alternatives and their cumulative impacts would effectively accomplish the same result. OSM may not do indirectly what SMCRA prohibits the agency from doing directly. Not only has OSM failed to explain why its proposed actions are necessary, but the agency has also not clearly identified nor discussed any analyses, studies or surveys that they have relied upon to support this initiative.²⁹

II. NEPA Issues

NMA has serious concerns over the contractors that were chosen by the agency to prepare the EIS. OSM is currently conducting the most comprehensive rewrite of its SMCRA regulations since 1983. Yet it is our understanding that the general contractor selected by OSM to perform the EIS on the stream protection rule, Polu Kai, has no significant mining-related experience whatsoever. The contractor's website provides no examples or evidence of any expertise that would make it an appropriate choice for leading one of the most complicated and comprehensive EISs in the history of the SMCRA program. OSM should address why this contractor was chosen, why a company with more mining expertise was not selected, and how Polu Kai's expertise makes them an appropriate choice for a project of this complexity, magnitude and importance.

Only five years ago, the federal government spent several years and several million dollars conducting the most comprehensive environmental impact statement in history on mountaintop mining and valley fills in Appalachia. This document, signed and agreed to by not only OSM but also EPA, the Corps and the Fish and Wildlife Service, contained 30 federally-sponsored studies containing over 5,000 pages of scientific information of all aspects of mountaintop mining and valley fills.³⁰ Since the administration seems intent on attempting to overturn³¹, the findings and conclusions contained in this comprehensive report, this EIS must explain why the contractors who are performing this EIS are more qualified, have better experience

²⁷ See *The Obama Administration's Obstruction of Coal Mining Permits in Appalachia*, U.S. Senate Committee on Environment and Public Works, Minority Staff Report, at p. 2 (May 21, 2010).

²⁸ See 75 Fed. Reg. 34,668 (June 18, 2010)(noting one alternative to prohibit mountaintop mining (would require a statutory change)).

²⁹ See 43 C.F.R. §46.30 (DOI NEPA regulations requiring EIS to clearly identify studies and analyses used to support the agency's proposed action).

³⁰ See, generally, *Programmatic Environmental Impact Statement on Mountaintop Mining and Valley Fills in Appalachia* (2003, 2005).

³¹ See 75 Fed. Reg. 34,667 (where OSM states that "we had already decided to change the rule following the change of Administrations on January 20, 2009).

and expertise and will produce superior science than the entities that performed the existing EIS with which the agency apparently now disagrees.

OSM's notice specifically asks for comments on studies and impacts that the EIS should address. There are several that the EIS must address. First, the EIS must acknowledge that there are many environmental effects which cannot be avoided should the proposal be implemented. Congress was very clear in SMCRA that OSM was supposed to balance environmental protection with the importance of supplying the coal necessary to meet the nation's energy needs.³² As such, the law was designed to recognize that there are unavoidable environmental impacts that would occur within the permit area. Instead of prohibiting surface coal mining operations from impacting the environment, SMCRA authorized mining companies through a carefully crafted permitting structure to impact lands and streams so long as operators minimize disturbances and adverse impacts on fish and wildlife and related environmental values *to the extent possible using the best technology currently available*.³³ Congress recognized that there would be impacts on streams within the permit area. DOI's own NEPA regulations recognize that OSM should only consider "reasonable" alternatives, which are defined as alternatives that are technically and economically feasible and meet the purpose and need of the proposed action.³⁴ Thus, any of the alternatives that can be shown to be either technologically or economically unfeasible are invalid and should not be further considered by the agency.

Second, the EIS must not only examine the Office of Surface Mining's alternatives in the stream protection rule, but must also analyze the cumulative impacts of all of the administration's recent proposals with respect to regulation of coal mining operations and the impacts of such actions on our members. This includes the recent actions by the U.S. Corps of Engineers in suspending the use of Nationwide Permit 21 for coal mining in six Appalachian states,³⁵ and EPA's suite of regulatory actions directed at surface coal mining operations. The EPA's actions include enhanced permitting reviews,³⁶ guidance³⁷ on when permits should be approved (based in large part upon conductivity levels in stream waters), and the use of the agency's Clean Water Act "veto" provision, such as the one currently being planned for use against the Spruce coal mine in West Virginia.³⁸ All of these actions and

³² See 30 U.S.C. § 1202(f).

³³ See 30 U.S.C. § 1265(b)(24).

³⁴ See 43 C.F.R. §46.420(b).

³⁵ See 75 Fed. Reg. 34,711-34,714 (June 18, 2010)(suspending immediately use of nationwide permit 21 for coal mining in six Appalachian states).

³⁶ See EPA web page explaining Surface Coal Mining Activities Enhanced Coordination Procedures at: <http://www.epa.gov/wetlands/guidance/mining-screening.html>

³⁷ EPA Memorandum to EPA Regions 3, 4 and 5: *Improving EPA Review of Appalachian Surface Coal Mining Operations Under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order* (April 1, 2010).

³⁸ See 75 Fed. Reg. 16,788-16,808 (April 2, 2010)(EPA proposal to "veto" permit for the Spruce mine that has already been issued).

their cumulative impacts on our members must be fully evaluated by the EIS in order to comply with NEPA requirements and regulations.³⁹ This is particularly important here, where they are “connected actions” that are closely related and therefore should be discussed in the same EIS. By the agency’s own admission⁴⁰, these actions stem from the same memorandum of understanding signed by EPA, the Corps, and the Secretary of the Interior.⁴¹

Third, NEPA requires that the EIS include a complete analysis on the effects of the proposed action, including both direct and indirect effects. Such effects include ecological effects (including effects on natural resources), as well as historic, cultural, economic, social or health impacts. Such analysis must include an in-depth look at the significant economic impacts that these alternatives would cause on the mining industry, both in Appalachia and around the nation. Our understanding is that contractors conducting the EIS visited only sites in the Appalachian coal fields. This is inappropriate for a proposal of this magnitude and scope. Contractors should visit mine sites in the Illinois basin, Powder River basin, and arid West as well to gain a full appreciation for the variety of conditions to which this rule will apply. For example, most of the arroyos and washes that cross the operations of companies in the southwest only flow during and after larger intense storm events. As a result of local geologic conditions, background water quality may approach or exceed 10,000 parts per million for total dissolved solids (TDS) with naturally high levels of sediment loading and various metals. These naturally-occurring conditions are clearly not conducive to sustaining biological communities. The EIS team should recognize these differences, view the different sites and consider them when writing the analysis that supports this stream protection rule.

The EIS analysis must also include a discussion of the natural resources (in this case, coal reserves) that may be taken off-line by the agency’s proposed actions.⁴² Any option by OSM that sterilizes significant amounts of coal reserves is not a reasonable alternative because such action would be contrary to SMCRA. SMCRA requires operators to provide as part of the reclamation plan its consideration of how to maximize the utilization and conservation of the solid fuel resource being recovered so that re-affecting the land in the future can be minimized.⁴³ Likewise, the very first general performance standard written into the law by Congress, the coal resource recovery and protection plan, requires operations to conduct surface

³⁹ See 40 C.F.R. § 1508.25(a)(requiring cumulative actions with cumulatively significant impacts should be discussed in the same EIS).

⁴⁰ See 75 Fed. Reg. 34667 (“...under the MOU [OSM] committed to consider revisions to key provisions of our rules”).

⁴¹ 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’).

⁴² This requirement is not only imposed by NEPA--regulations that significantly affect energy supply, distribution or use must also be analyzed under Executive Order 13211 (May 18, 2001).

⁴³ See 30 U.S.C. § 1258(a)(6).

coal mining operations so as to maximize the utilization and conservation of the solid fuel resource being recovered so that re-affecting the land in the future through surface coal mining can be minimized.⁴⁴ Any alternative that caused operators not to utilize significant portions of the coal resources would also conflict with OSM's own existing regulations that prohibit such behavior.⁴⁵

The EIS must include the impacts on state, tribal and local governments through loss of tax revenues and impacts on local communities if coal mining is reduced or eliminated. Moreover, the EIS should address the impacts of the alternatives on small entities as defined by the Regulatory Flexibility Act. Regulations by the Small Business Administration define a small entity in the coal mining industry as companies with 500 employees or less.⁴⁶ According to 2008 data from the U.S. Mine Safety and Health Administration, over 95 percent of the coal companies in the U.S. are small entities subject to the requirements of the RFA. Therefore, it is critically important for the agency to perform a comprehensive regulatory flexibility analysis in consultation with the SBA's Office of Advocacy, and that the EIS also fully analyze and discuss such impacts when it considers the effects of the proposed action.

Fourth, the EIS must reflect the agency's compliance with the requirements in NEPA that OSM coordinates with State, tribal and local governments during the scoping process. From our understanding, the states have not been satisfied with either the process or the substance of the stream protection rulemaking. For example, the Interstate Mining Compact Commission, which represents state regulatory authorities, has stated in written comments that:

"an overarching concern that should first be addressed is why OSM feels compelled to move forward with this rulemaking. We are still uncertain, even after all the debate over the past several months concerning the [MOU] about the basis for the proposed rulemaking or the problem the agency is attempting to fix. ***

We believe that there are opportunities for the states and the affected federal agencies (OSM, EPA, the Corps, and the U.S. Fish and Wildlife Service) to work cooperatively together to address stream protection concerns. However, to date our requests for arranging such meetings have been ignored."

IMCC letter to OSM on the notice of intent to prepare an EIS (May 26, 2010) at pp. 1-2.

Fifth, the EIS must examine aspects of the proposals that are duplicative with existing OSM and state regulations, and regulations under the Corps and EPA. Both

⁴⁴ See 30 U.S.C. § 1265(b)(1).

⁴⁵ See 30 C.F.R. § 816.59.

⁴⁶ See 13 C.F.R. § 121.201.

SMCRA and the Clean Water Act contain provisions that require OSM, EPA, and the Corps to avoid duplicative requirements.⁴⁷ Such duplicative requirements also impose a burden on state SMCRA programs. Such impacts are particularly troubling given the administration's proposal to cut state title V SMCRA grants by 15% in this year's budget. The EIS must evaluate the impact that this will have on the states and their ability to implement their regulatory programs successfully.

III. Specific Comments:

A. Collection of Baseline Data

It is unclear why OSM thinks that there is a need for these new requirements. No justification or support has been articulated by the agency that would warrant such a massive increase in data collection, let alone the rule in general. In fact, based on OSM's own annual evaluation reports, off-site impacts are rare. In 2009 for example, OSM's own reports show that 92 percent of the permits in West Virginia,⁴⁸ 95 percent of the permits in Illinois,⁴⁹ and 96 percent of permits in Pennsylvania⁵⁰ were free from off-site impacts. For Wyoming, the largest coal producing state in the country, and in New Mexico, there were no off site impacts at all.⁵¹

The existing rules already provide an adequate framework for baseline data on hydrology, soils, vegetation, and geology, determining the probable hydrologic consequences (PHC) and developing hydrologic reclamation plans to ensure the post-mining landscape supports the intended post mining land uses. The framework allows for flexibility to account for regional differences, and the permitting process allows the public and local governmental agencies to participate. Perhaps instead of requiring all of this additional data, OSM, EPA and the states should spend more time reviewing the data that already exists, not only from the mining industry but from other industries, identify where there may be gaps in the data, and work to fill in the gaps.

Information requirements should fit field conditions to avoid duplication and excessive data collection that provides no useful information and has no practical

⁴⁷ 30 U.S.C. § 1211(c)(12); 33 U.S.C. § 1251(f).

⁴⁸ See *2009 West Virginia Annual Evaluation Report*, Charleston Field Office, Office of Surface Mining, Reclamation and Enforcement (2009) at p. 8.

⁴⁹ See *Annual Evaluation Summary Report for the Regulatory and Abandoned Mine Lands Programs Administered by the State of Illinois for Evaluation Year 2009*, Alton Field Division, Indianapolis Area Office, Office of Surface Mining, Reclamation and Enforcement (2009) at p. ii.

⁵⁰ See *2009 Pennsylvania Annual Evaluation Report*, Pittsburgh Field Division, Harrisburg Office, U.S. Office of Surface Mining, Reclamation, and Enforcement, U.S. Department of the Interior, (2009) at p. 27.

⁵¹ See *Annual Evaluation Summary Report for the Wyoming Regulatory Program*, Office of Surface Mining, Reclamation and Enforcement (2009) at p. 7; *Off-Site Impact Evaluation Report*, New Mexico Regulatory Program, Evaluation Year 2009, Office of Surface Mining, Reclamation and Enforcement (2009) at p. 2.

utility.⁵² OSM must not attempt to develop nationwide requirements for cumulative hydrologic impact analyses because such regulatory assessments must be driven by regional and local conditions that must be taken into account during baseline data collection and development of PHCs. OSM should abandon its plan for using hydrologic equilibrium in rulemaking due to the high degree of variability among regions and within local hydrologic systems.

Any new data collection requirements must be prospective in nature, and should not be applied to any permit applications that have already been filed. Applying new data collection requirements for permit applications that have already been submitted has the potential to cause a crippling delay in mine permit processing that could delay some mines by several years. Such unnecessary disruption must be avoided at all costs, and any alternative being considered by the agency must evaluate such risks in the EIS and regulatory impact analysis.

B. Definition of Material Damage to the Hydrologic Balance

Like the rest of the proposal, the agency has failed to justify the need for adding this provision after 30 years. OSM's proposal to add language about this in a national definition would only serve to restrict the regulatory authority's flexibility to consider criteria best determined on a regional or local basis. Currently, states have the flexibility to define these terms (and OSM approved West Virginia's definition in their regulations less than two years ago)⁵³ in a manner appropriately tailored to their local conditions. Defining water quality standards and impacts are state functions pursuant to the Clean Water Act.⁵⁴ Congress also recognized the primary roles of the states in this area when debating SMCRA, stating that:

The total prevention of adverse hydrologic effects from mining is impossible and thus the bill sets attainable standards to protect the hydrologic balance within the limits of feasibility...It is not intended by such minimum standards that these measures will be considered wholly sufficient to meet the objectives of 'minimizing disturbance to the prevailing hydrologic balance.' It is anticipated that *the State regulatory authorities* will strengthen such provisions and require whatever additional measures are necessary to meet local conditions.

H.R. Rpt. 94-1445 at p. 55. (1976)(emphasis added).

A proposal to tie material damage outside the permit area to state-designated uses (i.e. fishable, swimmable, recreation, etc.) would be the least objectionable.

⁵² Information collection that lacks practical utility may be subject to judicial review and reversal pursuant to the provisions of the Paperwork Reduction Act, 44 U.S.C. § 3501 et seq.

⁵³ See 73 Fed. Reg. 78,970-78,981 (Dec. 24, 2008).

⁵⁴ 33 U.S.C. § 1251(b)(it is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use...of land and water resources).

However, even here, there are cases where long-term monitoring data clearly indicate that one or more designated uses established by a State or a Tribe for a downstream segment are not being met for reasons other than mining impacts. When this occurs, OSM must consider relying on only those designated uses that are being met, and also clearly comport with approved post-mining land uses in the SMCRA permit. Streams that do not meet designated uses prior to mining can be addressed by a determination that the drainage downstream of the mine has not been significantly affected or damaged by the mining operation.

C. Mining Activities in or Near Streams

OSM indicated that an operator must restore a mined-through stream to the pre-mine function. Baseline monitoring will be required to show the status and condition of the natural stream and will be the basis for determining reclamation success. Considering Western surface mining operations that may be conducted within a single watershed over the course of many years, OSM should only require restoration of form and function on a watershed basis, not on a prescriptive 1:1 stream reach basis. This would allow mine operators flexibility to reclaim relatively large watersheds over time that feature reaches with intermittent, or in some cases, perennial flow sufficient time to support the biological communities that were present prior to mining, as well as smaller ephemeral drainages as needed. This flexibility will allow operators to take advantage of opportunities during reclamation to create post-mining watersheds that will not only support, but enhance the post mining land uses.⁵⁵

Although referring to the flexibility needed to meet the requirements to reclaim the land to approximate original contour, the Congressional sentiment which extolled the virtues of flexibility are equally applicable to the protection of the hydrologic balance:

Responsibility for devising methods for reaching any necessary reclamation goals should be left up to the operator. Within limits of economic constraints, the available equipment and his own ingenuity, the surface mining operator will develop whatever approach best suits his needs and the peculiarities of his mining site.

H.R. Rpt. No. 94-1445 at pp. 27-28 (1976).

Although not mentioned in OSM's June 18 *Federal Register* notice, the agency has proposed separate performance bonds for stream reclamation, but no clear reason or justification has been provided by the agency. OSM has made no showing of significant or widespread bond forfeitures, delays or disapproval of bond release applications, nor any evidence showing that streams are not being reclaimed as

⁵⁵ See 30 U.S.C. § 1265(b)(24)(encouraging operators to achieve enhancement of environmental resources, where practicable).

part of the normal SMCRA reclamation process. Thus, it appears arbitrary and unnecessary to add separate performance bonds for stream reclamation at this time.

Many of the alternatives in this section are not “reasonable” alternatives in the NEPA sense because they are not technically or economically feasible. Member companies have told NMA that the mine sequencing proposal is completely infeasible, and would prohibit not only surface coal mining operations but construction of surface facilities that are necessary to conduct underground mining operations as well as coal preparation plants. One comment we received stated that if the stream buffer zone concepts are extended to surface impacts of underground mining, then the entire longwall mining industry will be unable to operate. In addition, the agency’s own studies have shown that prohibiting operator ability to fill ephemeral streams in Appalachia would result in a sterilization of over 90 percent of coal reserves.⁵⁶ Reinstating the 1983 stream buffer zone regulation would be a giant step backwards and risks the potential to shut down mining operations across the Appalachian region, an example of which actually occurred in West Virginia following the original erroneous decision by Judge Bragg.⁵⁷ Filling of streams as a part of surface coal mining operations is expressly contemplated and authorized by SMCRA, and is consistent with the requirements of the Clean Water Act.⁵⁸ Selection of an alternative that bans fills in streams would thus not only be illegal because it is not a “reasonable” alternative under NEPA, but also because it would violate SMCRA on its face.

D. Additional Monitoring

As indicated above, the amount and frequency of water monitoring, as well as the appropriate sampling parameters, should primarily be a state issue based on local conditions, geology, precipitation and climate. OSM has also stated in stakeholder meetings that its rule would require long term water monitoring and bonds to be held until six months after hydrologic equilibrium is established. This is inconsistent with SMCRA for at least two reasons. First, Congress was clear that its intent was for reclamation to be conducted in a manner that maximizes recharge capacity of the mine site upon completion. But the law never contemplated waiting until the aquifer is restored:

In order to assure that both the short and long term disruptive impacts of mining and ground water supplies are minimized, it is necessary that reclamation be conducted in such a way as to maximize the

⁵⁶ See Sandberg, Doss, et. al., “The Mountaintop Mining EIS Technical Report,” at p. 3 (2000).

⁵⁷ *Bragg v. Robertson*, 72 F. Supp. 2d 642, 660-663 (S.D. WV 1999); rev’d in *Bragg v. WVCA*, 248 F.3d 275, 296 (4th Cir. 2001); cert. denied, 534 U.S. 1113 (2002). Following the original Bragg decision, surface coal mining operations within the jurisdiction of the court in WV were literally shut down for over a week until the court realized its mistake, stayed its own decision pending appeal, and the decision was ultimately reversed by the 4th Circuit Court of Appeals.

⁵⁸ See *Kentuckians for the Commonwealth v. Rivenburgh*, 317 F.3d 425, 442-443 (4th Cir. 2003).

recharge capacity of the minesite upon completion. Recharge capacity refers to the ability of an area to replenish its ground water content from precipitation and infiltration from surrounding lands. **Restoring recharge capacity does not mean restoring the aquifer, but rather that the capability of an area to recharge an aquifer be restored.**

H.R. Rep. No. 94-1445 at 62 (1976)(emphasis added).

Second, it is inconsistent with the reclamation bond liability periods, which generally range from to five or ten years after successful revegetation.⁵⁹

E. Corrective Action Thresholds

NMA has serious concerns about this section of the proposal. No matter which of the three alternatives are selected by OSM, they all appear to be directly contrary to the Clean Water Act, since the CWA places primary authority for establishing water quality standards with the States and tribal entities and not with OSM.⁶⁰ There is also legal precedent which has overturned OSM regulations in the past for being inconsistent with water quality standards.⁶¹ Even if OSM directs States and tribal entities to set "correction action standards" and does not establish the levels themselves, the agency cannot indirectly force changes in state SMCRA programs by requiring program amendments on something that the agency cannot do directly.

F. Land-forming and Fill Optimization

Again, as explained above, banning excess fill placement in streams is not a reasonable alternative under NEPA and should not be seriously considered under the EIS. Prohibition of fills, even if it were not illegal for numerous reasons, 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 1983 stream buffer zone rule like that advanced in the *Bragg* decision. The study found that interpreting the rule as the district court had originally suggested would result in the loss of more than 10,000 jobs and hundreds of millions of dollars in wages across West Virginia alone.⁶² In addition, such losses of surface production would not likely be regained by switching to underground coal mining operations:

⁵⁹ See 30 U.S.C. § 1265(b)(20).

⁶⁰ See 33 U.S.C. § 1313.

⁶¹ See *OSM's Stream Buffer Zone 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 exceptions are substantive elements of the Clean Water Act that cannot be altered by OSM).

⁶² Burton, Hicks, and Kent, *The Fiscal Implications of Judicially-Imposed Surface Mining Restrictions in West Virginia* (Feb. 2001).

...the estimation results clearly demonstrate that any supposition that underground mining will fill the void of curtailed surface mining is incorrect. Quite 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.

OSM just promulgated significant improvements in the regulations governing the placement of excess spoil material in December 2008.⁶³ Any EIS must carefully explain why such rules have not been given an adequate opportunity to be implemented, why such rules are all of a sudden considered inadequate and what the agency is using to make such determinations. The EIS also must do an extensive analysis of the safety and stability of the measures proposed by the agency. Safety was one of the primary considerations and motivations by Congress in passing SMCRA.

It should also be noted that most of the key Appalachian states, including Kentucky and West Virginia, already have extensive fill optimization policies in place that were put together with OSM and with input from other agencies, including the Corps. In fact, OSM just last year cited with approval West Virginia's spoil minimization policy in denying a petition requesting federal enforcement of the state's program: "The AOC+ method is a reasonable procedure to ensure that an adequate amount of spoil will be returned to the mine excavation so that the AOC requirements of configuration, stability, and drainage will be achieved."⁶⁴ The various state policies were established recognizing the practical constraints for safety, stability (the fill toe can only sit so high in a steep hollow and backstack on the mine can only be placed so steep or high or it has the potential to fail) and access roads. Due to the varying topography and other issues that are state-specific, as SMCRA contemplates and encourages⁶⁵, these issues are much more appropriately left to the States.

OSM must be very careful in requiring "landforming" requirements to include restoration of the slope. This can cause stability issues in steep sloped areas and create safety issues. A landscape design for EPA should not trump an engineering design for stability and safety.

G. Approximate Original Contour Exceptions

⁶³ 73 Fed. Reg. 75,813-75,885 (Dec. 12, 2008).

⁶⁴ See OSM letter to Joseph M. Lovett, (Dec. 8, 2009) at p. 3.

⁶⁵ See 30 U.S.C. § 1201(f)(finding that primary responsibility for developing and enforcing regulations should rest with the States due to diversity in terrain, climate, biologic, chemical, and other physical conditions that vary from place to place).

The first two alternatives suggested by OSM are directly contrary to the statute. Exceptions from AOC are exactly that, and are expressly sanctioned in SMCRA.⁶⁶ In fact, in federal program states, such a provision is mandatory. Congress clearly wanted to seize the opportunity that mining presented to create additional economic, social and recreational opportunities in Appalachia that would likely not otherwise be possible without a variance from AOC to create useable flat land. The regulatory authority should ensure that approved post-mining land uses are achievable and feasible, so long as such requirements are reasonable, not unduly burdensome, and do not discourage operators from seeking such exceptions in appropriate circumstances that would further the purposes of SMCRA and the local communities. The agency must be especially careful not to choke off investments in jobs and legitimately productive post-mining land uses with unnecessary and burdensome regulation, or risk losing many of the nation's and the region's best and highest-wage jobs.

H. Reforestation

NMA is a proud member of the agency's Appalachian Regional Reforestation Initiative (ARRI) and strongly encourages the voluntary reforestation of mined lands by our member companies and others in appropriate circumstances. However, OSM's proposed alternatives are inappropriately proscriptive and miss the mark with regard to SMCRA and reclamation in general. First of all, SMCRA does not require reforestation of all reclaimed mine lands, and with good reason. The statute authorizes a variety of suitable post mining land uses, depending upon a variety of factors including the local conditions, the desire of the operator and the landowners and the input of the state regulatory authority. To mandate a one-size-fits-all standard requiring reforestation in all cases is inflexible, inappropriate and unnecessary. In certain instances, reforestation may not be technically or economically feasible. Doing so would not only be contrary to SMCRA, but would be counter-productive for the environment.

In many cases, forest is an appropriate post-mining land use. But in other cases, landowners, state wildlife officials or others may have their own reasons for wanting a different post-mining land use. In Kentucky and other nearby states, a program that has reintroduced wild elk herds has been wildly successful beyond the expectations of many of those involved with the program. The herd, originally numbering in the hundreds, is now over 10,000 strong. This program has been successful in part because the elk prefer reclaimed mine lands which in many cases do not contain complete forest cover. Although forest fragmentation can be an issue in some areas, it should be noted that over 78 percent of West Virginia is already forested, making it the third most forested state in the nation. The state

⁶⁶ 30 U.S.C. § 1265(c).

also grows more trees than it harvests each year.⁶⁷ Requiring reforestation in all cases is not only contrary to SMCRA, but is unnecessary.

I. Permit Coordination

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 EPA's interference with the Corps' permitting process under § 404 of the CWA and the effective creation of a permit moratorium 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 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.

J. Long-Term Discharges of Pollutants

OSM has shown no need to incorporate its March 31, 1997, policy statement on acid mine drainage into SMCRA regulations. What data of long-term discharges of pollutants currently not being addressed by OSM and the States—pursuant to the existing policy statement—justifies this change in the regulations? If anything, OSM should consider repealing the policy statement due to its inflexibility. If read in a strict manner, it would prohibit the regulatory authority from issuing permits for any anticipated long term discharge of AMD, regardless of the scope of the potential problem. In addition, OSM has already added rules in its Tennessee program that allow for financial mechanisms to provide long-term treatment of AMD, where necessary.⁶⁸ Similar programs are in existence in the Pennsylvania state program. In another classic example of a solution in search of a problem, instead of adding more regulations on this issue, OSM should be spending its limited resources working with state regulatory authorities to implement and further the existing situations where long-term financial assurances are necessary.

K. Stream Definitions

The SMCRA program has been in existence for over 30 years, and both operators and state regulatory authorities have become relatively confident in the meaning of

⁶⁷ Georgette F. Plaughter, Extension Service, West Virginia University: *Trees, the Renewable Resource*, WLG-171 (2006).

⁶⁸ See 72 Fed. Reg. 9,615-9,637 (March 2, 2007)(establishing a mechanism to accept financial assurances for long term pollutional discharges).

the current definition of streams. The Corps has been constantly changing their program's definition of the term "waters of the United States" (in all fairness, not always by their choice but often caused by litigation), and the results have been devastating to their program. Not even the Supreme Court can agree⁶⁹ on a bright line definition of the term in their program, and operators and regulators are left scratching their heads in a futile attempt to determine exactly what constitutes a water of the U.S. NMA looks at attempts to tinker with the SMCRA program definitions of streams with appropriate trepidation.

Regarding the substance of the proposed alternatives, we note that OSM previously tied the definition of a stream to biological life as early as 1979.⁷⁰ However, this idea was ultimately rejected by the agency in its final rule four years later:

OSM has rejected the suggestion that it continue to require protection for any stream with a biological community...The biological community standard was confusing to apply since there are areas with ephemeral surface waters of little biological or hydrologic significance which, at some time of the year, contain a biological community as defined by provisions of § 816.57(c). Thus, much confusion arose when operators attempted to apply the previous rule's standards to springs, seeps, ponding areas, and ephemeral streams. While some small biological communities which contribute to the overall production of downstream ecosystems will be excluded from special buffer zone protection under final § 816.57(a), the purposes of section 515(b)(24) of [SMCRA] will be best achieved by providing a buffer zone for those streams with more significant environmental resource values...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. 30,313 (June 30, 1983).

If OSM is going to reverse this longstanding interpretation of its regulations with respect to stream protection, it must explain, in detail, why the reasons it provided in 1983 are no longer valid or applicable. This is particularly true when the agency actually adopted the biologic component and rejected it based on the actual experiences of the agency, the state regulators and the public.

One alternative that NMA does strongly support is the agency's proposal to remove the one-square mile criterion for intermittent streams. The current definition makes no sense, is not based upon sound science and is inconsistent with other

⁶⁹ See *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006).

⁷⁰ 44 Fed. Reg. 15,177 (March 13, 1979).

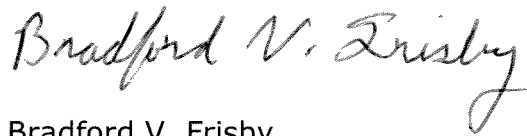
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recognized definitions of *intermittent stream*. In an arid Western environment, an arroyo can drain a watershed of a hundred square miles or more and still flow only briefly in response to precipitation (or snowmelt) and be above the groundwater table at all times. This of course stands in stark contrast to eastern environments. Removal of this criterion for intermittent stream should be a separate alternative that the EIS should consider, regardless of what the agency decides to do with regard to the biological component.

Thank you for the opportunity to provide comments regarding the scope of the EIS. If you have any additional questions, please feel free to contact me.

Sincerely,

A handwritten signature in black ink that reads "Bradford V. Frisby". The signature is written in a cursive, flowing style.

Bradford V. Frisby
Associate General Counsel
National Mining Association