



November 21, 2007

Brent Wahlquist
Director
Office of Surface Mining, Reclamation & Enforcement
U.S. Department of the Interior
Administrative Record—Room 101
1951 Constitution Ave., N.W.
Washington, D.C. 20240

Re: Proposed Rule for Excess Spoil, Coal Mine Waste and Buffer Zones; 72 Fed. Reg. 48,890 (Aug. 24, 2007)

Dear Director Wahlquist:

The National Mining Association (NMA) submits the following comments in response to the Office of Surface Mining's (OSM) proposed rule to clarify the stream buffer zone rule and to revise the rules for the placement of excess spoil and coal mine waste associated with surface and underground coal mining operations under the Surface Mining Control and Reclamation Act (SMCRA). Recent court decisions, such as *Kentuckians for the Commonwealth v. Rivenburgh*,¹ clearly support the need for this clarification. NMA strongly supports the OSM's proposal to clarify the SBZ regulation. However, we do suggest several revisions in the text and structure of the rule to avoid future ambiguity and misapprehension about its proper applicability to a wide range of coal mining activities. We also recommend that the scope of the rule remain limited to perennial and intermittent streams, and that the agency not expand its application to 'waters of the United States', whose vague and uncertain meaning has plagued the Clean Water Act (CWA) programs. Finally, the rule should focus upon sound and practical principles for excess spoil minimization in steep slopes and not incorporate an alternatives analysis, which has great potential for being in tension with the specific factors SMCRA sets forth for consideration in the location and design of excess spoil fills.

NMA is a national trade association whose members include 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

¹ See *Kentuckians for the Commonwealth v. Rivenburgh*, 317 F.3d 425 (4th Cir. 2003).

other firms serving the mining industry. NMA's members will be directly affected by this rule in a number of ways. In Appalachia our members mine in steep slope areas and generate excess spoil material which will be subject to these rules. In addition, in many other places throughout the United States, NMA's members conduct surface coal mining operations within 100 feet of waters of the United States. Sometimes companies place excess spoil material in natural stream channels to create valley fills. In various coal regions, these areas are the only place for the construction of coal refuse piles or impoundments. Nationwide, companies must divert and mine through streams in the normal course of their surface coal mining operations. In order to comply with SMCRA and CWA, companies construct sediment ponds and other siltation structures in stream channels to ensure protection of downstream water quality. Finally, many operators conduct surface coal mining operations in or near waters of the United States that are not perennial or intermittent streams, and would incur additional regulatory burdens under certain aspects of the proposed rule. Accordingly, the rule will have a direct affect upon the manner in which NMA's members will design and conduct their surface coal mining operations across the United States.

I. The Purpose and Intent of the Stream Buffer Zone Rule

Since its original promulgation thirty years ago as part of the initial program regulations, the stream buffer zone rule has been interpreted and applied as a best management practice for activities that were designed or planned to occur adjacent to, but not in or through, perennial or intermittent stream channels. Mining and other related activities that were planned and designed to occur in those stream channels were approved and subject to other regulations requiring the best technology currently available for preventing, to the extent possible, the contribution of additional suspended solids to streamflow and runoff outside the permit area, and minimizing adverse impacts on related environmental values. These objectives were achieved primarily by using sediment ponds and siltation structures along with other practices to stabilize areas in order to minimize erosion during and after mining.

A. Initial Program

The stream buffer zone concept for perennial and intermittent streams was originally adopted as part of the 1977 initial program regulations.² The purpose of the rule is to protect stream channels from abnormal erosion from nearby upslope mining activities.³ Indeed, 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 the stream:

² See 30 C.F.R. § 715.17(d)(3).

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

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 supplied).

The buffer zone rule was not intended to act 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 certain requirements or conditions for proceeding with activities with the approval of the regulatory authority. For example, the initial program stream buffer zone 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.⁴ Moreover, the preceding paragraph clearly contemplates diversion of overland flows as a means to minimize erosion.⁵ 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 typically require diversion of those streams subject to the approval of the regulatory authority. As explained in the preamble, the stream buffer zone rule did not apply: “when mining in intermittent or perennial streams was approved by the regulatory authority.”⁶ As the agency further explained, the rule was designed so “existing rights to mine coal as evidenced in approved permits will not be adversely affected.”⁷

The purpose and intent is clear from the 1977 rule that a stream buffer zone 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 are governed by other regulations. 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 this proposed clarification, the buffer

⁴ See 30 C.F.R. § 717(d)(1).

⁵ See 30 C.F.R. § 717(c).

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

⁷ *Id.*

zone rule was not applicable to these activities which are governed by the specific rules authorizing them.⁸

This intent is corroborated by reviewing the underground coal mining standards. The underground coal mining standards did not contain a stream buffer zone requirement because the mining was beneath the stream and not through the stream.⁹ Surface activities associated with underground coal mining operations nearby or in perennial and intermittent stream channels were governed by the general hydrologic protection standards and any specific standards related to that activity.

For surface mining nearby, but not through a perennial or intermittent stream, the rule provided a presumptive 100-foot buffer width on each side of the stream. However, even this directive is not absolute, and a modified zone may be established for the stream or portions of stream segments. The history of the rule discloses that the designated 100-foot width was chosen as a matter of administrative convenience for the agency, and not because the technical literature suggests a one-size-fits-all approach of a 100 foot minimum. According to OSM, the 100-foot requirement was chosen because "site-by-site determinations would be impractical and very difficult to enforce."¹⁰ While this reasoning may have been appropriate for the initial program when states issued permits under their pre-existing SMCRA programs and OSM independently enforced SMCRA's initial program, those circumstances no longer exist, and therefore site-by-site determinations are most appropriate for permanent program permits issued by state regulatory authorities.

B. Permanent Program

The permanent program version of the stream buffer zone rule § 816.57, adopted in 1979, reflects that same purpose and intent. As explained by OSM, the rule is 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.¹¹ 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.¹² The 1983 revisions also reflect this purpose and understanding of the rule as providing a method "in conjunction

⁸ 72 Fed. Reg. 48,892.

⁹ See 30 C.F.R. § 717.17.

¹⁰ 42 Fed. Reg. 62,652.

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

¹² *Id.* at 15,176.

with sedimentation ponds and other measures, to prevent excessive sedimentation of streams by runoff from disturbed surface areas.”¹³

The 1979 environmental impact statement (EIS) accompanying the proposed permanent program discusses the stream buffer zone requirement in terms of “establishing an *unmined*, 100 foot wide buffer zone between the stream and mining operations.”¹⁴ The 1979 EIS’s assessment of the benefits afforded from the rule speak almost exclusively in terms of mining closer to or through a stream and the impacts of the rule on coal recovery.¹⁵ There is no mention in the EIS of applying the buffer zone requirement to activities designed to occur in these stream channels. Moreover, the discussion of the other rules that specifically address activities that may occur in stream channels do not mention the stream buffer zone rule at all. Take for example the discussion of the disposal of excess spoil, coal mine waste and impounding structures which do not mention a stream buffer zone requirement. Rather, the discussion of these standards all point to the design and construction requirements as addressing erosion and prevention of additional contributions of sediment to the hydrologic system.¹⁶ In sum, the regulatory structure and history demonstrate that for activities designed to occur in the stream channel are governed by other regulations.

The statutory basis for the stream buffer zone rule, its context in the regulations and the agency’s contemporaneous explanations all confirm that the purpose of the rule is to provide one of several best management practices or, in the words of SMCRA, best technology currently available for minimizing disturbance to the prevailing hydrologic balance from surface mining nearby certain streams. The purpose of the OSM stream buffer zone rule is confirmed by its underpinning in technical literature from which it was borrowed. A stream buffer zone or, as more widely referred to a vegetated buffer zone, is a vegetated area adjacent to a stream whose function is to serve as a sediment trap for erosion from upland areas, to stabilize stream banks against channel erosion, or to remove nutrients such as nitrates or phosphates before surface runoff enters the stream. Buffer zones are a best management practice used in connection with various land disturbing activities including residential and commercial construction, road building, oil and gas development, logging and agriculture. Of course, if the activity is designed to occur in the stream channel, then the buffer zone has no practical application and other methods and techniques are used to address downstream environmental impacts from those activities. These other techniques or methods include sedimentation ponds, diversions, check dams, mulching, matting, straw bales, filter fences and surface or slope shaping.

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

¹⁴ See Permanent Regulatory Program Implementing Section 501(b) of the Surface Mining Control and Reclamation Act of 1977, Final Environmental Impact Statement OSM-EIS-1 (Jan. 1979) at p. BIII-59 (emphasis added).

¹⁵ *Id.*

¹⁶ *Id.* at BIII-61 (design, construction technique, shaping, terracing, and drainage systems requirements of those specific rules address the impacts on hydrologic balance).

A review of the current literature finds that creation of vegetated buffers is but one of a portfolio of best management practices that may be used to control sediment at various types of construction sites, including mining, forestry, road and highway construction projects. See *U.S. Environmental Protection Agency, Erosion and Sediment Control, Surface Mining in the Eastern U.S.*, Oct. 1976; *U.S. Environmental Discharge Elimination System (NPDES) Stormwater Menu of BMPs* available at: <http://cfpub.epa.gov/npdes/stormwater/menuofbmps/index.cfm>; *Effects of Urbanization on Streamflow and Sediment Transport*, Geological Survey Professional Paper, Yorke & Herb, 1978; *Environmental Protection in Surface Mining of Coal*, U.S. Environmental Protection Agency, Grim and Hill 1974; U.S. Environmental Protection Agency, *Impact of Nearstream Vegetation and Stream Morphology on Water Quality and Stream Biota*, August 1977. The width of the buffer strip is determined by evaluating a number of site-specific factors, including but not limited to slope, vegetation, soils, depth to impermeable layers, runoff sediment characteristics, rainfall and length of time the slope is left unreclaimed.¹⁷ A common theme in the literature is that buffer width is directly related to slope. Recognizing slope as a key factor, the U.S. Forest Service devised a formula or rule of thumb for recommended widths for filter strips for forest roads near streams. Starting with a strip of 25 feet wide on level land, the width of strip should increase 2 feet for each 1 percent increase in slope of the land between the road and the stream.¹⁸ Applying this recommended formula to mining operations in steep slopes, defined as within the 20 percent range, suggests the 100 foot width may be unnecessarily wide even in the steepest sloped mining areas. The agency itself stated expressly in its 1979 preamble discussion that the 100 foot width of the zone was only a general rule. "It is the intent of the Office that the width of the zone may be increased or decreased when there is justification for doing so, according to the findings of the regulatory authority."¹⁹ In order for the final rule to reflect the technical literature for vegetated buffer zones and the regulatory history of the agency's rule, both of which establish that width of the buffer zone is directly related to slope, topography and other site-specific factors, the rule should clearly provide the state regulatory authorities ample discretion to approve an alternative buffer zone proposed by the permittee.

C. Historic Interpretation and Application

Since 1977, the regulatory program, including the stream buffer zone rule, has been administered to routinely authorize in permits various coal mining and reclamation activities through or in stream channels, including mining of

¹⁷ See U.S. Environmental Protection Agency, National Pollutant Discharge Elimination System (NPDES) Stormwater Menu of BMPs available at: <http://cfpub.epa.gov/npdes/stormwater/menuofbmps/index>.

¹⁸ See *Journal of Forestry*, Trimble & Sartz, May 1957.

¹⁹ See 44 Fed. Reg. 15,177 (March 13, 1979).

coal, placement of excess spoil, placement of coal refuse piles, construction of coal slurry impoundments, placement of sedimentation ponds and other water control structures, stream fords and crossings. These and other activities are planned and approved to take place in or through stream channels in accordance with the regulations addressing the manner in which operations will minimize the disturbance to the prevailing hydrologic balance by preventing to the extent possible additional contributions of suspended solids to streamflow and runoff outside the permit area and otherwise minimize disturbances and impacts to fish, wildlife and environmental values. While these performance standards are met primarily through the requirement to pass all runoff from disturbed areas through sedimentation ponds or other siltation structures before leaving the permit area, they are fully advanced in the final restoration and reclamation of the land where these operations and activities take place.

This longstanding interpretation and application of the stream buffer zone rule is readily apparent from its overall context in the regulatory program as it relates to how coal mining operations are designed, approved and conducted to meet the statutory requirements of SMCRA §§ 515(b)(10) and 515(b)(24), which are the statutory provisions OSM identifies as the basis for promulgating the stream buffer zone rule. These rules include:

- 30 C.F.R. §780.21(f) (probable hydrologic consequences)
- 30 C.F.R. §780.21(g) (cumulative hydrologic impact analysis)
- 30 C.F.R. §780.21(h) (hydrologic reclamation plan)
- 30 C.F.R. § 816.41 (hydrologic balance protection)
- 30 C.F.R. § 816.42 (Water Quality)
- 30 C.F.R. § 816.43 (Diversion of Streams)
- 30 C.F.R. § 816.45 (Sediment Control)
- 30 C.F.R. § 816.47 (Hydrologic balance: discharge structures)
- 30 C.F.R. § 816.72 (Disposal of Excess Spoil in Valley Fills)
- 30 C.F.R. § 816.97 (Protection of Fish, Wildlife,
& Related Environmental Values)
- 30 C.F.R. § 816.150 (location, design and construction of roads)
- 30 C.F.R. § 816.151(location, design and construction of primary roads and stream fords).

All of these rules expressly contemplate that mining and mining-related activities will be designed to occur in stream channels. When activities are not designed and approved to occur in or through a perennial or an intermittent stream channel, a buffer zone applies to such stream. The 100-foot width set forth in the rule is merely a presumptive distance that can be altered in the permit. If the rule were applied in a manner that presumptively prohibits activities that are planned and designed to occur in stream beds, then it would conflict with the statutory and regulatory provisions that recognize that various activities associated with coal mining

inherently involve disturbing stream beds.²⁰ Our members' experience in operating under the initial and permanent regulatory programs discloses that the rule has not been construed by the federal or state agencies as a prohibition on conducting activities in perennial or intermittent stream channels. Rather, the rule has been administered to allow such activities with measures taken that, to the extent possible, prevent additional contributions of suspended solids to stream flow or runoff outside the permit area and minimize adverse impacts on downstream environmental resources. Indeed, statistics from the government's environmental impact statement on mountaintop mining bear this out, finding that, from 1985 through 2001, no less than 6,697 valley fills were issued permits and approved during this period.²¹

Since SMCRA's enactment thirty years ago, the coal industry has invested billions of dollars in mines and associated infrastructure, produced almost 30 billion tons of coal, reclaimed well over 2.2 million acres of mined lands to productive uses, paid \$8 billion in AML fees to reclaim pre-SMCRA abandoned mines, paid billions of dollars in state severance taxes, employed hundreds of thousands of miners and supplied the fuel that generates more than half of the electricity in the nation. It is self-evident, and well-documented as well, that much of this investment and the attendant coal production would not have occurred had the stream buffer zone rule been interpreted and applied in the manner advocated by plaintiffs in the *Bragg* case. To suggest, as some organizations do, that the proposed clarification is a change in the longstanding interpretation and application of the rule strains credulity. To accept their interpretation one must embrace the view that the regulations have been misinterpreted for 30 years by the federal agency which promulgated them and the states that were empowered under SMCRA to administer them. This view is, in a word, implausible.

II. The Need to Clarify the Rule

The proper interpretation and application of the stream buffer zone rule was well-settled during the initial program, permanent program and approval of state programs until certain groups initiated litigation advancing an interpretation of the rule that was directly contrary to SMCRA's text and the longstanding understanding and application of the stream buffer zone rule. Although subsequent court and agency decisions have clearly rejected their improper interpretation advanced during prior litigation, clarification to remove the ambiguity will restore the regulatory certainty necessary to efficiently and properly administer what is a complex and demanding regulatory program.

²⁰ See *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 876 (1991)(our cases have expressed a deep reluctance to interpret a provision so as to render superfluous other provisions in the same enactment).

²¹ See *Mountaintop Mining/Valley Fills in Appalachia Draft Programmatic Environmental Impact Statement* at III K-32 (2003).

An improper interpretation and application of the stream buffer zone rule is evident in the district court opinion in *Bragg v. Robertson*.²² There, the court agreed with the plaintiffs' view that the rule effectively barred construction of excess spoil fills in intermittent and perennial streams because regulatory authorities could not make the necessary findings related to water quantity and quality and adverse impacts on fish, wildlife and related environmental values *for the segment of the stream where the spoil fill is constructed*. The court rejected the state of West Virginia's interpretation that the necessary findings pertain to effects downstream from the fill, and concluded that no other statutory or regulatory provision "implicitly or explicitly contemplate such stream fill."²³

The court was categorically wrong on both counts. Indeed, as the United States Court of Appeals has held "SMCRA does not prohibit the discharge of surface coal mining excess spoil in waters of the United States."²⁴ As for the Bragg court's view that no SMCRA provisions contemplate such activities, the appeals court cited several, including § 515(b)(22), as evincing a clear statutory intent "that excess spoil could and would be placed in waters of the United States."²⁵ And, with respect to the *Bragg* court's view that the stream buffer zone rule requires no adverse impacts in the portion of the stream where fill placement will occur, the appeals court construed § 515(b)(24)—one provision that OSM relies upon as a basis for the stream buffer zone rule—as "implying the placement of fill within waters of the United States."²⁶

Notwithstanding the court of appeals' clear rejection of the *Bragg* court's construction of the stream buffer zone, along with the district court's reasoning, clarification of the rule will avoid similar misapplications of the rule not only for the disposal of excess spoil—which was the primary focus in *Bragg*—but for the other coal mining activities that occur nearby or within perennial or intermittent streams as well. In addition to the statutory and regulatory provisions discussed by the 4th Circuit in *Kentuckians for the Commonwealth* explicitly contemplating the placement of excess spoil in perennial and intermittent streams, (see, e.g., SMCRA § 515(b)(22), (24); 30 C.F.R. §§ 816/817.71-74), SMCRA and its implementing regulations are replete with requirements that either explicitly or implicitly contemplate other coal mining related activities in or nearby intermittent and perennial streams. Examples of the statutory provisions include:

§ 515(b)(4) (stabilize surface areas, including spoil piles to effectively control erosion and water pollution)

§ 515(b)(8) (creation of permanent water impoundments as part of reclamation activities)

²² 72 F. Supp. 2d 642 (S.D. W. Va. 1999), aff'd in part and vacated in part, 248 F. 3d 275 (4th Cir. 2001).

²³ *Bragg*, 72 F. 2d at 652-53, 660.

²⁴ *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F. 3d 425, 442 (4th Cir. 2003).

²⁵ *Id.* at 443.

²⁶ *Id.*

§ 515 (b)(10) (construction, cleaning and removing temporary sedimentation ponds and structures from drainways after revegetation)
§ 515(b) (13)/ 516(b)(5) (design, location and construction of coal mine and solid waste piles used as dams or impoundments)
§ 515(f) (coal mine waste disposal design to insure that flood control structures are safe).

Employing *Bragg* court's interpretation and reasoning in applying the stream buffer zone rule would effectively prohibit most activities integral to coal mining operations. For example, if, as the *Bragg* court opined, the rule prohibits mining activities in any stream segment absent finding no adverse impacts in the segment of the stream where the activities were designed to occur, the surface mining of coal lying beneath those streams would be effectively banned notwithstanding the frequent use of stream diversions prior to mining through those stream segments.²⁷ The principal method for minimizing adverse off site impacts to streams and water quality through construction of sedimentation ponds or other siltation control structures would be banned inasmuch as those technologies must be deployed close to or in stream channels as the best technology currently available to meet the effluent limit guidelines for the downstream segments of the receiving stream.²⁸ The interpretation of the rule reflected in the *Bragg* decision would also effectively prohibit: building of stream crossings and roads across such streams; culverts; construction of coal refuse disposal areas and impoundments necessary to operate coal preparation facilities; disposal of underground coal mine development waste; coal conveyor belts; and surface and groundwater monitoring.

The impacts of such an interpretation would cripple the coal mining industry and directly contravene SMCRA's purpose to assure that the coal supply essential to our Nation's energy requirements and social and economic well being is provided.²⁹ Shortly after the *Bragg* decision, miners were laid off or given WARN notices, and the Governor of West Virginia instructed all state agencies to start cutting their budgets and prepare for layoffs of state workers in anticipation of a substantial reduction in tax revenues. A Marshall University economic impact analysis forecasted unprecedented economic and social dislocation from the *Bragg* decision. The study found that the interpretation of the stream buffer zone rule provided for in *Bragg* would result in the loss of over ten thousand jobs and hundreds of million dollars in wages across West Virginia alone.³⁰ The loss of state and local

²⁷ See, e.g., 30 C.F.R. 816.43(b).

²⁸ See, e.g., 30 C.F.R. § 816/817.46(c) (locating sedimentation ponds in streams authorized, but for perennial streams such location requires approval); H.R. Rep. No. 95-218, at 114-115, *reprinted in* 1977 U.S.C.A.N. 593, 647-648 (characterizing as best available technology the construction of sedimentation ponds in streams and tributaries).

²⁹ 30 U.S.C. § 1202(f).

³⁰ Burton, Hicks and Kent, *The Fiscal Implications of Judicially Imposed Surface Mining Restrictions in West Virginia* (Feb. 2001).

revenues would exceed \$168 million annually.³¹ Fortunately, the *Bragg* court stayed its decision pending appeal—and the successful appeal avoided the regional economic catastrophe forecasted to accompany implementation of the *Bragg* court’s interpretation of the rule.

The agency studies confirm that the *Bragg* interpretation would cause severe disruptions in coal mining across the Appalachian coal region. These studies indicate that in excess of 90 percent of the reserves in this region could not be mined under the *Bragg* court’s interpretation of the stream buffer zone rule.³² These impacts largely arise from the restrictions such an interpretation would pose for excess spoil fills. However, the *Bragg* interpretation would adversely affect reserves, operational design and the economics for all types of coal mining and ancillary activities (e.g., coal processing, handling and transportation) for all coal mining regions. And NMA members’ evaluation of the application of the *Bragg* interpretation indicates that it would pose severe constraints and economic consequences for their operations throughout the coal mining regions of the country. The constraints include: limitations on access and economic recoverability of coal reserves, design and operation of surface and underground mines, and the design and location of auxiliary operations, all of which may render certain operations uneconomical or shorten their mine life.

Clearly such consequences demonstrate that the rule requires proper clarification to avoid the dire consequences that cannot be reconciled with the purpose of SMCRA to assure a coal supply essential to our nation’s energy supply and economic well being.³³ This can be accomplished while striking the balance with the environmental protection by restoring regulatory certainty through a clarification that reflects the longstanding interpretation and application of the rule as a best management practice for coal mining activities that are not designed and planned to occur in perennial and intermittent stream beds. Any other interpretation converts what is a precautionary principle related to the planning and conduct of operations in or nearby these streams into a *de facto* prohibition which would exceed any delegated rulemaking authority under SMCRA.

SMCRA is a detailed and prescriptive statute. As the agency explains in the preamble, SMCRA does not contain an express requirement for a stream buffer zone, let alone a prohibition on conducting operations nearby or in stream beds.³⁴ When Congress intended to prohibit activities absolutely or conditionally, it did so expressly in the text of the statute. For example, § 522(e) imposes both absolute and conditional prohibitions upon surface coal mining operations within or nearby certain areas. These prohibitions establish “buffer zones” around certain lands or features which apply absent

³¹ *Ibid.*

³² See Sandberg, Doss, et al., “The Mountaintop EIS Technical Report,” 3 (2000).

³³ See 30 U.S.C. §1202(f).

³⁴ See 72 Fed. Reg. 48,894.

valid existing rights or pre-existence of the mining operation. In some cases these prohibitions are conditional and operations may be conducted closer or in those areas upon obtaining waivers or determinations that allow them.³⁵ Accordingly, where in SMCRA Congress has included particular language in one section but not another, it is presumed that Congress has acted intentionally and purposefully.³⁶ Moreover, an earlier version of SMCRA that passed the House of Representatives in 1972 (H.R. 6482) included an express prohibition on mining within 100 feet of “any body of water, stream, pond or lake” with public use or access. This bill did not become law and that provision never reappeared in any subsequent version of SMCRA legislation including the bill that was enacted in 1977. To construe a rule in a manner that effectively resurrects such a prohibition is no less *ultra vires* than promulgating a rule that expressly does so. Even the conditional extension of express prohibitions in the statute has been declared beyond the agency’s rulemaking authority.³⁷

A proper clarification of the stream buffer zone rule will avoid any future misapprehension of the rule’s purpose and the improper application of the rule that would conflict with the text and purpose of SMCRA. The clarification is necessary to avoid future misapplications of the rule that cause the dire economic consequences that would be forthcoming if a *Bragg*-type reading is perpetuated elsewhere. It will avoid costly and unnecessary litigation and the attendant regulatory uncertainty that compromises existing investments and deters new investment in coal mines necessary to supply our nation’s growing energy requirements. Moreover, the removal of lingering ambiguity will avoid the regulatory uncertainty that compromises sound planning and design of efficient and environmentally protective coal mining operations. SMCRA places a premium upon the principles of planning and sound resource management. The absence of a stable regulatory framework—through changing standards or inconsistent application—compromises the integrity of any planning and resource management strategy.

III. The Proposed Clarification

NMA supports the clarification of the stream buffer zone rules in § 816.57/817.57 and the attendant clarifications in the operation and reclamation plan rules at § 780.28/784.28. However, we suggest several modifications to the text and structure of the rules to better reflect their original intent as a best management practice and to avoid any future misapprehension that the rule is a prohibition. Moreover, as we explain later, the rule should not be expanded to apply to all waters of the United

³⁵ See, e.g., § 522(e)(2)-(5); § 515(b)(12).

³⁶ *National Wildlife Federation v. Hodel*, 839 F. 2d 694, 760 (D.C. Cir. 1988)(quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

³⁷ *In re: Surface Mining Regulation Litigation*, 627 F. 2d 1346, 1358-59 (D.C. Cir. 1980).

States, and should remain applicable as it always has to perennial and intermittent streams.

A. § 816.57/817.57 Hydrologic Balance: Activities in or adjacent to perennial or intermittent streams.

We agree with how the clarification more explicitly reflects the historic interpretation by distinguishing between activities that are not planned to occur in streams where a buffer zone does apply and those activities that inherently involve placement of fill or the disturbance of the stream channel.³⁸ However, the text of the rule uses new terminology such as “prohibition” and “exceptions” which incorrectly implies that the rule (and therefore the statute) prohibits disturbances in stream channels. As the agency correctly notes in the preamble, coal mining involves activities that inherently involve disturbances or placement of fill in the stream so a buffer zone is neither feasible nor appropriate.³⁹ Accordingly, for those activities, there is no buffer zone at all. As OSM explains, “those activities are governed by other regulations.”⁴⁰ The conduct of those types of activities is approved in the permit in accordance with the “other regulations” which specifically govern those activities.

The rule as presently structured by setting forth the buffer zone requirement and then listing exceptions will inevitably prove to be inflexible or quickly obsolete since there are many types of activities where a buffer zone is infeasible or inappropriate. Of course, this can be remedied by simply adding a catch-all provision to the exceptions that recognizes any other activity planned and approved to occur in the stream. However, we believe it far better to restructure the rule so that it more straightforwardly reflects the underlying functional and operational distinction that has guided the rule’s application historically: (1) activities that occur in the streams and, (2) activities that are not designed to occur in the streams. We suggest the following language and structure for the rule (suggested language in **bold**)

§ 816.57

- (a) **Buffer zone: You the permittee or operator shall refrain from conducting surface mining activities that would disturb the surface of land within 100 feet, measured horizontally, of a perennial or intermittent stream unless:**
- (1) **the permit authorizes you to conduct such activities closer to such stream under § 780.28 (c) of this chapter; or**

³⁸ 72 Fed. Reg. 48,892.

³⁹ *Id.*

⁴⁰ *Id.*

- (2) the permit authorizes you to conduct such activities in or through such stream under § 780.28(d) of this chapter.
- (b) ***Additional Clarification:*** The buffer zone standard does not apply to surface mining activities that have been authorized under the permit to occur in or through a perennial or intermittent stream.
- (c) ***Best technology currently available:*** Surface mining activities conducted in or through a perennial or intermittent stream shall be conducted in accordance with the plans approved under § 780.28(d) so as to the extent possible using best technology currently available—
 - (1) prevent additional contributions of suspended solids to streamflow or to runoff outside the permit area; and
 - (2) minimize disturbances and adverse impacts on fish and wildlife and related environmental values, and achieve enhancement of those resources where practicable.

§ 817.57

Section 817.57 should be revised to reflect the same structure but substitute the term “surface activities” for “surface mining activities;” insert § 784.28 for § 780.28.

B. § 780.28/784.28 Reclamation and Operation Plan Requirements

The operation and reclamation plan requirements would be clearer and avoid future misapprehension if the language and structure were revised in a manner similar to what we have suggested for the performance standards. The word “prohibition” should be removed and the structure should be altered to more clearly distinguish between activities that will not be conducted in a perennial or intermittent stream but conducted closer than 100 feet, and those that are planned to be conducted in the stream. As we explain later, the plan requirements, like the performance standards, should continue to apply only to perennial and intermittent streams and not be extended to the vague and evolving universe of “waters of the United States.”

1. Alternative Buffer Zone Finding

The finding required for authorizing activities closer than 100 feet is confusing and does not match up with the demonstration required from the permit applicant. In addition to requiring a finding that the measures proposed will achieve the purposes of § 515(b)(10)(B)(i) and (24) (or the § 516 counterparts for underground mines), the rule would require the regulatory authority to also find that the measures proposed would be no

less effective than a 100 foot buffer zone.⁴¹ Historically, approval of a modified buffer zone only required a demonstration and finding related to the purpose of the rule which is to minimize downstream sedimentation and the attendant impacts it would have on related environmental resources. There was no requirement that the measures employed to meet those purposes would have to be shown to be as effective as a 100 foot undisturbed buffer.

All of the literature OSM has cited in the past for the rule only supports the proposition that a "buffer zone" is one effective method to prevent sediment transport to streams.⁴² The width of 100 feet was selected more for administrative convenience for the agency, not because 100 feet was deemed best technology currently available. As we explained earlier, the technical literature does not support a universal 100 foot width for a buffer zone for achieving the purposes of reducing sediment transport and its attendant downstream impacts. Indeed, the literature demonstrates that even a narrower buffer zone can be effective depending upon various site specific factors related to the nature of the activity, terrain, location and quality of the stream. In sum, the 100 foot width was a rule of thumb that would be adhered to unless an operator proposed to conduct activities closer to the stream using a narrower buffer alone or in combination with other measures to meet prevent or minimize to the extent possible the downstream impacts related to sediment transport.

2. Adjacent Area

The agency should not revise the operation and reclamation plan requirements in §§ 780.28 and 784.28 to require additional and specific mapping requirements to include adjacent areas. We have reviewed the explanation for this new requirement and do not find it sufficient to justify this new requirement. According to the agency, the change will enable a determination of what lands within the proposed permit area are potentially subject to the buffer zone rule.⁴³ However, adjacent area is "the area *outside* the permit area . . ."⁴⁴ So it is difficult to understand how mapping waters in the adjacent area will be pertinent to applying the buffer zone which applies to streams inside the permit area. The buffer zone applies on either side of the stream where a surface activity will occur, not upstream or downstream.

Extending the operation and reclamation plan requirements related to the stream buffer zone rule to adjacent areas will also present confusion and conflict with the stream buffer zone rule itself, which does not apply to areas overlying underground mine workings. The term "adjacent areas" includes possible impacts from underground mine workings. Therefore, by requiring

⁴¹ Compare § 780.28(c)(1)-(2) with (d)(1)-(2).

⁴² See Final EIS, OSM-EIS-1 at BIII-59 (Jan. 1979).

⁴³ 72 Fed. Reg. 48,900.

⁴⁴ 30 C.F.R. 701.5 (emphasis supplied).

mapping of streams above the underground mine workings for purposes of the stream buffer zone rule may create a future misapprehension and misapplication of the rule to underground mine workings.

We also fail to understand, and the agency does not explain, why the existing mapping requirements in §§ 779.25(a)(7) and 783.25(a)(7) are inadequate for meeting the purpose of the stream buffer zone rule. Those rules require maps showing the location of surface water bodies including ponds, lakes and natural drains in the permit and adjacent area. The only difference we see is that the new requirement is tied to waters of the United States, but as we explain later the revisions to the rules to incorporate that CWA regulatory concept is unwarranted and will create regulatory confusion and will not result in any greater environmental benefits.

For purposes here, we raise another concern related to changing the mapping requirements to adjacent areas and with the accompanying proposal to tie it to waters of the United States. First, it will be extremely difficult to secure jurisdictional determinations (JDs) on lands adjacent to the mine site where such property is under separate ownership. This will often be the case, and many property owners would not want a legally binding JD made with regard to waters on their land. This is particularly true where any final determination would mean the landowner is forced to appeal any decision with which they disagree. Further complicating things, is the fact that once determined, any final JD must be appealed by the landowner in federal court within a specific period of time. There is a strong likelihood that landowners will find themselves in court repeatedly challenging final JDs for which the landowner never requested or desired. Furthermore, coal mining permit decisions will be further delayed while these cases wind themselves through the courts. It would be unwise policy for the agency to establish a regulatory paradox with such a high likelihood of disrupting that the nation's coal supply for an undeterminable period of time. Imposing a mapping requirement for adjacent areas with "waters of the United States" opens up a host of issues that OSM may not have carefully considered with respect to the intrusion upon and impact on private property rights. Applying the rule to such areas will likely have a chilling effect on the ability to obtain mining rights on or adjacent to private property. The current mapping rules avoid these problems since they rely not upon some other agency determination about what falls within the CWA jurisdiction, but on readily available information regarding surface waters and features that are already mapped and documented.

3. Recommended Revisions to Proposed Language and Structure

We recommend the following revisions to the proposed language and structure (suggested language in **bold**):

§ 780.28 Activities in or adjacent to perennial or intermittent streams (surface mines).

(a) *Applicability:* This section applies to applications to conduct surface mining activities on the surface lands closer than 100 feet of a perennial or intermittent stream or in or through such stream.

(b) *Mapping Requirements:* Maps prepared under § 779.25 of this chapter must identify any perennial or intermittent stream where surface mining activities will occur in, through or closer than 100 feet of, such stream.

(c) *Application requirements for an alternative buffer zone:* If you propose to conduct an activity closer than 100 feet of, but not in or through, a perennial or intermittent stream, your application must demonstrate, and the regulatory authority find, that, any measures that you propose to implement in lieu of maintaining a 100-foot undisturbed buffer zone between the surface mining activities and such stream, including the extent of any lesser buffer zone that you propose, constitute the best technology currently available to—

(1) Prevent the contribution of additional suspended solids to streamflow or runoff outside the permit area to the extent possible; and

(2) Minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible.

(d) *Application requirements for activities in or through a perennial or intermittent stream:* If you propose to conduct surface mining activities in or through a perennial stream, your application must demonstrate, and the regulatory authority must find, that, to the extent practical, you will use the best technology currently available in accordance with §§ 816.41(d) and 816.97(a) of this chapter, as required by §§ 780.16(b), and 780.21(h) of this part.

(e) *Additional requirements for specific activities in or through a perennial or intermittent stream:* If you propose the following activities in or through a perennial or intermittent stream, your application must demonstrate how the activities will be conducted to comply with—

(1) § 816.43(b) of this chapter if mining through a perennial or intermittent stream involves the permanent or temporary diversion of such stream.

(2) §§ 816.150, 816.151 and 816.181 of this chapter, as appropriate, for the placement of bridge abutments, culverts, or other structures in perennial or intermittent streams to facilitate crossing of those streams.

(3) § 816.45(a) of this chapter for the construction of sedimentation pond embankments in perennial or intermittent streams.

(4) §§ 816.71(a) and (f) of this chapter for the construction of excess spoil fills in perennial or intermittent streams.

(5) §§ 816.81(a), 816.83(a), and 816.84 of this chapter, as appropriate, for coal mine waste disposal facilities.

§ 784.28 Surface activities in or adjacent to perennial or intermittent streams (underground mines).

Proposed Section 784.28 for underground mines should be revised to reflect the same structure as suggested above for the surface mine reclamation and operation plan requirements. The term “surface activity” and “surface activities” should be substituted as appropriate for “surface mining activity” and “surface mining activities;” and the appropriate cross-references should be substituted for the underground mining performances standards and reclamation and operation plan rules. Moreover, in the underground mine rule, our suggested § 780.28(e)(1) should be omitted, or changed, to avoid any misapprehension that either 784.28 and 817.57 applies to mining beneath such streams. We note that proposed § 817.57(b)(1) refers to mining through a stream, but as the preamble to the proposal explains correctly, and as we discuss further below, the stream buffer zone rule has only applied to surface activities associated with underground coal mining and not mining beneath such streams. Under our suggested revisions and restructuring of § 817.57, that concern and misapprehension is avoided. For purposes of § 784.28 we would suggest inserting in our proposed revisions the following language for paragraph (e)(1) (suggested language in **bold**):

(1) § 817.43(b) if the surface activity involves the permanent or temporary diversion of such stream.

C. Applicability to Underground Coal Mines

The 2007 proposal provides that underground mines may not conduct “surface activities” that would disturb the surface of land within 100 feet, measured horizontally, of WOTUS.⁴⁵ We believe that this language more clearly reflects the longstanding interpretation of the stream buffer zone rule for underground coal mines in that it applied only to surface activities and not to the areas overlying underground mine workings including subsidence from underground mining. To interpret the rule otherwise would place it in direct conflict with the Act which recognizes that mining will occur beneath streams, and only authorizes suspension of “underground coal mining under . . . permanent streams if [the Secretary] finds an imminent danger to inhabitants of urbanized areas, cities, towns, and communities.” 30 U.S.C. § 1260(c).⁴⁶

⁴⁵ See 72 Fed. Reg. 48,925 (Aug. 24, 2007).

⁴⁶ The agency is not free to embellish upon this provision by rule to prohibit underground coal mining beneath streams. An earlier attempt by the agency to create a 1000 foot buffer zone for blasting around dwellings was struck down as beyond the agency’s authority. See *In Re: Surface Mining Regulation Litigation*, 627 F. 2d 1346, 1358-359 (D.C. Cir. 1980). There, the appeals court noted SMCRA did not

Historically, this provision has not been interpreted or applied to areas overlying the underground mine workings. This interpretation is supported by the companion rule at 30 C.F.R. § 817.11(e) that requires that the buffer zone markers for purposes of 30 C.F.R. § 817.57 “be clearly marked to prevent disturbances by *surface operations and facilities*.” Other underground coal mining performance standards in Part 817 use the term underground mining activities, but in their proper context they only apply to the activities in (a) of the definition of “underground mining activities” which refers to surface operations incident to underground extraction of coal.⁴⁷

The 1979 stream buffer zone rule for underground mines clearly stated that it applied to disturbances from “surface operations and facilities”.⁴⁸ This is the same terminology used in the current § 817.11(e) for the buffer zone markers. As originally proposed in 1978, the rule would have applied to “surface or underground areas within 100 feet of a perennial stream.”⁴⁹ The preamble to the final 1979 rule explained that the final rule reduces its scope of application to “surface operations and facilities” which would protect significant streams from “surface disturbances of underground mines caused by coal dust and sediment production along haul roads, the discharge of mineralized water from processing plants or underground sumps, and the disruption of overland-runoff patterns caused by ditching.”⁵⁰ The preamble went on to explain that the performance standards for subsidence control address effects associated with underground mine workings.⁵¹

When the rule was revised in 1983, the terms “underground mining activities” was inserted. However, there was no indication of intent to change the scope of the buffer zone rule’s application. Indeed, the preamble simply notes the change in terminology (as it did for other rules in Part 817), and instructed the public to “consult the preamble to final 816.57 for a discussion of comments and responses relative to final 817.57.”⁵² Reference to the discussion for 816.57 does not disclose any discussion or intent to change the scope of the rule. This is hardly surprising when one consults the proposed rule from 1982. There, OSM states straightforwardly that the “[e]xisting 816.57 and 817.57 provide for buffer zones around certain streams. They are essentially the same, except that 816.57 refers to surface mining and 817.57 to underground mining. The proposed rules would also be

contain a provision authorizing distance limitations on blasting, and that the statute only proscribed surface coal mining within 300 feet of an occupied dwelling. The appeals court held that since the Act expressly established a buffer zone for dwellings (e.g., 300 feet), the law did not permit the agency to expand the distance even if it was done through a variance mechanism that might allow an operator to conduct blasting closer to the dwelling. *Id.*

⁴⁷ See, e.g., 30 C.F.R. § 817.107 (Backfilling and grading: Steep slopes); § 817.131 (Cessation of Operations: Temporary); § 817.11(d) (Perimeter Markers).

⁴⁸ 30 C.F.R. § 817.57, 44 Fed. Reg. 15,430 (March 13, 1979).

⁴⁹ 43 Fed. Reg. 41,908 (Sept. 18, 1978).

⁵⁰ 44 Fed. Reg. 15,268.

⁵¹ *Id.*

⁵² 48 Fed. Reg. 30,316 (June 30, 1983).

essentially the same for surface and underground mines. OSM will discuss proposed changes to 816.57 with the understanding that the discussion will also apply to proposed 817.57.”⁵³

In sum, despite the change in terminology in § 817.57 to “underground mining activities,” neither the proposed nor final rule indicated that the agency was changing the scope of that rule which it interpreted and applied historically to only “surface operations and facilities.” Not only does the lack of any discussion on such a significant point confirm this to be the case, but the retention of the longstanding language in § 817.11(e) provides ample support for this conclusion as well. This intent is confirmed by the Secretary’s statement in response to an industry legal challenge that § 816.57 applies “only to disturbance of surface lands by *surface activities* associated with underground mining.”⁵⁴

D. The Rules Should Apply Only to Perennial and Intermittent Streams

OSM must not expand the scope of the rule beyond its historic application to intermittent and perennial streams to all “waters of the United States” (WOTUS). Indeed, since its inception, the purpose of the stream buffer zone was to protect those streams that support water dependent organisms, i.e. organism communities that need flowing water conditions to complete their life cycles.⁵⁵ WOTUS on the other hand, is a regulatory term which incorporates a much broader universe of aquatic features, including ephemeral streams which flow only in response to precipitation events. WOTUS is a regulatory term in the CWA and its meaning as defined and applied by the Corps and EPA is constantly evolving. OSM should not anchor its regulatory program on such an unstable foundation. To do so, is certain to create confusion, duplication, and delay and would defeat the purpose of this rulemaking. The SBZ rule currently applies only to perennial and intermittent streams, well understood and documented features. It does not apply to ephemeral streams, nor other waters and features included in the definition of ‘waters of the United States’ (WOTUS).

Although NMA supports coordination, and the reduction of duplication, with the CWA, as we explain later in more detail, we do not see any real probability of such efficiencies or reduction of duplication by changing the focus of the SMCRA program to WOTUS. To the contrary--based upon our experience with the Army Corps of Engineers (Corps), we do not see any indications that the Corps will view the SMCRA rule changes as obviating the need for it to perform its own CWA § 404 independent analysis. Moreover,

⁵³ 47 Fed. Reg. 13,466 (March 30, 1982).

⁵⁴ *In re: Permanent Surface Mining Regulation Litigation*, 21 Env’t. Rep Cas. (BNA) 1725, 1741, n. 21 (D.D.C. 1984).

⁵⁵ 44 Fed. Reg. 15,178 (March 13, 1979).

given the current confused state of affairs regarding the meaning of WOTUS, we fail to see how greater consistency can arise from OSM changing its SMCRA program in order to coordinate with an “inconsistent” and understaffed CWA program. Instead, we anticipate a more confused and burdensome permit process under SMCRA as states attempt, or resist, the implementation of this substantially changed focus of the permitting and performance standards after 30 years. Finally, we do not see these changes resulting in greater environmental benefits or protection. Rather, we anticipate that the change in focus to WOTUS will compromise the overall integrity of the SMCRA hydrologic balance protection analysis and performance standards through the introduction of a vague and poorly understood term WOTUS.

1. Expanding the SBZ Rule to WOTUS Makes the Rule Less Clear

Expanding the SBZ rule to WOTUS will make the rule less clear, not more. WOTUS is a CWA term that has been further embellished in regulations and guidance issued by the Corps and EPA, and has been the subject of decades-long conflict, confusion and litigation. Even with a more stable history, it would be unwise for OSM to incorporate a concept from another agency’s regulations, even if the term is clear and well-understood, since an amendment or change by the other agency of its rule or policy would effectively change OSM rules without any consideration by OSM of whether such changes are appropriate for the coal mining industry and the SMCRA regulatory program. Therefore, anchoring an important OSM regulation to another agency’s rules which are subject to future change is problematic at best. But when the other agency’s regulatory term is not clearly defined and poorly understood, then importing such a term in another agency’s regulatory program is not only problematic, but dangerous and ill-advised. In short, OSM should not make its program and those of the states a hostage to the ebb and flow of the unpredictable meaning surrounding WOTUS.

OSM states that the agency is not soliciting comments on the interpretation of the term WOTUS, because that issue is outside the scope of this rulemaking. Fair enough—but since OSM is proposing to adopt and incorporate that definition by reference into OSM’s own regulations, it is entirely appropriate to comment on the fact that the definition is complicated, confusing, subjective, and ill-suited to be used as the jurisdictional benchmark for applying OSM’s rules including the stream buffer zone rule.

The CWA regulates the discharge of pollutants into navigable waters. Navigable waters are in turn defined by the statute as “waters of the United States.”⁵⁶ The regulatory history associated with the meaning of the term WOTUS is long and tortured, and demonstrates that its meaning is not well

⁵⁶ 42 U.S.C. § 1362(7).

understood. As a result the regulatory program is highly unstable and unpredictable.

The Corps initially adopted a definition of WOTUS that was consistent with the traditional definition of the CWA term “navigable waters”—interstate waters that were navigable in fact.⁵⁷ A district court enjoined that rule as too narrow, and the Corps subsequently promulgated a new one intended to extend the definition of WOTUS to the outer limits of Congress’s commerce clause power.⁵⁸ As presently defined by regulation, WOTUS *may* include such waters or features as: interstate navigable waters, intrastate lakes, streams, mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, natural ponds and tributaries to such waters as well as wetlands adjacent to such waters.⁵⁹ But this is just the beginning of the analysis and the CWA program has never meaningfully established where WOTUS begins or ends.

As a consequence, the Corps, EPA and courts have all struggled to find the end point. The result has been interpretations that reach to ephemeral streams and ditches as tributaries that are part of WOTUS; storm sewers that contained flow to other waters during rainfall; dry arroyos connected to remote waters through the flow of groundwater over centuries; a wide array of land features over which rainwater or drainage passes and leave a visible mark such as litter or debris; and manmade features such as drain tiles, storm drain systems and culverts.⁶⁰

The literature, studies and cases are legion in showing the complexity and variability in the Corps and EPA’s interpretation and application of the definition of WOTUS. Indeed, a recent General Accountability Office study documented how inconsistent and variable the Corps’ practices were from district to district.⁶¹ GAO found that the variability, confusion and poorly understood application of WOTUS are the direct result of definitions that are deliberately left vague.⁶²

The Supreme Court has dedicated considerable attention to this subject over the past twenty years and, apart from acknowledging that WOTUS is tied to traditionally navigable waters, it remains unsuccessful in furnishing any clearer lines about those connections.⁶³ The Court’s latest attempt in *Rapanos v. United States*, failed to establish any clearer definitional lines, or even agreement on a single governing principle for CWA jurisdiction in

⁵⁷ See 39 Fed. Reg. 12,119, codified at 33 CFR §209.120(d)(1) (1974).

⁵⁸ 42 Fed. Reg. 37,144 (1977).

⁵⁹ See 33 C.F.R. 328.3(a).

⁶⁰ See generally *Rapanos v. United States*, 126 S. Ct. 2208, 2217-218 (2006).

⁶¹ GAO, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, GAO-04-297 (Feb. 2004).

⁶² *Id.* at 26.

⁶³ See *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159 (2001)(*SWANCC*); *U.S. Riverside Bayview Homes, Inc.* 474 U.S. 121 (1985).

interpreting WOTUS. The decision was a split opinion 4-1-4.⁶⁴ To interpret *Rapanos*, the Corps and EPA has recently issued a twelve-page guidance document,⁶⁵ accompanied by an additional sixty-page “technical guidance,” which is essentially more guidance on how to interpret the guidance.⁶⁶ But this latest guidance is largely a recycling of former guidance that also focused on the so-called “significant nexus” concept Justice Kennedy articulated in *SWANCC* and resurrected in *Rapanos*.

The product is a cumbersome, dual-agency process which renders EPA the final decision maker where disagreements exist between the Corps and EPA. Under the guidance, certain waters will come under federal jurisdiction if the agencies find, based upon a case-by-case analysis, that a “significant nexus” to a traditionally navigable water exists. To establish that a significant nexus exists, the agencies will assess a checklist of hydrologic and ecologic factors to determine if they significantly affect the chemical, physical, and biological integrity of downstream traditional navigable waters. But the guidance is so subjective regarding the distance downstream that the guidance is being interpreted to mean that jurisdiction established pursuant to a significant nexus finding may extend to the entire reach of the stream. Mine sites cover vast amounts of acreage and span a variety of different geographic and physical features, including drainage ditches that flow only in response to precipitation and may or may not be considered WOTUS under the current guidance.

Past experience under guidance using similar principles already informs that the determinations under this latest guidance will remain highly variable and inconsistent. In some jurisdictions the nonnavigable waters must have a “close, direct and proximate link to navigable waters” to be WOTUS.⁶⁷ In other jurisdictions the connection may be extremely tenuous, so much so a roadside ditch which passes water through a thirty-two mile path that *may* drain into a navigable body of water suffices to convert the water or feature into a WOTUS.⁶⁸

We contrast the confused state of affairs under WOTUS with the well-understood and documented meaning of perennial and intermittent streams. Definitions of what constitutes perennial and intermittent stream have existed since OSM’s the initial program regulations and those definitions are similar to those used in other programs and literature.⁶⁹ Scientifically precise distinctions between perennial and intermittent streams are readily available from various sources, including OSM’s sister agency the U.S. Geological

⁶⁴ See *Rapanos v. U.S.*, 126 S.Ct. 2208 (2006)

⁶⁵ See “Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States*,” Jointly issued by U.S. EPA and Corps, June 5, 2007.

⁶⁶ U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Handbook (May 2007).

⁶⁷ See *Rice v. Harken Exploration Co.*, 250 F. 3d 264, 272 (5th Cir. 2001).

⁶⁸ See *U.S. v. Deaton*, 332, F. 3d 698, 702 (4th Cir. 2003).

⁶⁹ See 30 C.F.R. § 701.5.

Survey. They are also well documented and readily available on maps and other national and state sources.

In sum, the focus of the existing stream buffer zone rule on perennial and intermittent streams is clear and predictable. The meaning and application of the term WOTUS under the CWA is not. The agency should not hitch its regulatory ship to another one which continues to founder on the regulatory rocks of the vague and continually evolving meaning of the term WOTUS. Coal mines require a substantial capital investment---tens to hundreds of millions of dollars to start. Delays and uncertainty impair the viability of new and ongoing operations. We strongly urge the agency not to run the SMCRA program aground on the unpredictable waters of the CWA jurisdiction and, in turn, take the coal mining industry down with it.

2. Expanding the Scope of the Stream Buffer Zone Rule Is Inconsistent with the Basis and Purpose of the Rule

The stream buffer zone rule was promulgated by OSM and is unique to the surface mining program. It has always applied only to perennial and intermittent streams. Although the regulatory requirements under the Clean Water Act apply more generally to WOTUS, there is no stream buffer zone regulation counterpart under the CWA. If one of the reasons for OSM using the WOTUS term is to “harmonize” the scope of the rule with the CWA and coordinate the SMCRA permitting process with the Corps’ regulatory program, then using WOTUS for the SBZ rule will not accomplish this objective, since each statute has a distinct structure, scope and means for achieving their objectives. In this case, and as we explain in more detail later, SMCRA’s hydrologic analysis and protection measures are not bound by the same jurisdictional construct found in the CWA. (i.e., navigable waters). In a sense, SMCRA covers more than just WOTUS, but it has a distinct means for addressing impacts on the surface waters in a permit area. OSM must remain mindful that the stream buffer zone rule is not the only, and not even the primary, regulatory means under the program for achieving the objectives in SMCRA §§ 515(b)(10)(B)(i) and (24) (and the underground mining counterparts).

Further, the SBZ rule is based in large part upon Congress’ instruction to avoid, to the extent possible, contributions of suspended solids to streamflow outside the permit area.⁷⁰ The rule was appropriately tied to perennial and intermittent streams because these bodies conveyed flowing water with the potential to adversely affect water quality outside the permit area. Expanding the rule to all WOTUS would inappropriately decouple the regulation from its statutory mooring and technical justification. There are many examples of WOTUS that would not be likely to cause or contribute additional sediment to streamflow outside the permit area. Therefore, OSM

⁷⁰ See 30 U.S.C. § 1265(b)(10)(B)(i).

would be on much firmer ground if it limited the rule's application to perennial and intermittent streams.

When OSM revised the rule in 1983, the principal reason for limiting the rule to perennial and intermittent streams was because the earlier version referencing "streams with a biological community was confusing and difficult to apply."⁷¹ This, according to the agency, "led to confusion on the part of operators" attempting to apply the amorphous and ill-defined biological community standard.⁷² In response to challenges from several environmental groups, the federal district court upheld the agency's reasoning holding that "it is precisely this type of justification, based on practical experience and expertise that justifies such a change."⁷³ Moreover, the court noted that the stream buffer zone rule is not the only, or the most important, one in OSM's regulation to implement §§ 515(b)(10) and (24).⁷⁴

Here the practical experience discloses that changing the scope of the rule to WOTUS will be even more confusing and difficult to apply than the 1979 rule due to the vague and confusing status of the meaning of waters of the United States. Furthermore, there is no supporting justification in the proposal for what environmental benefits will follow from applying the stream buffer zone to the wide range of waters and features potentially captured under WOTUS including, ephemeral stream channels, ditches, dry washes, prairie potholes, wet meadows, ponds and drains, to name a few.⁷⁵

While it may be true as OSM states that the statutory provisions which form the basis for the existing stream buffer zone rule, e.g., §§ 515(b)(10)(B)(i) and (24), are not limited to preventing or minimizing adverse impacts on perennial or intermittent streams.⁷⁶ However, it is equally true that the stream buffer zone rule is not the only rule that implements and achieves the objectives of those statutory provisions for any surface waters on or adjacent to the permit area during and after mining. The agency as indicated as much in prior rules and in federal court as the district court recognized when it upheld the revision of the rule in 1983 to focus upon perennial and intermittent streams.⁷⁷ Moreover, there is no explanation or analysis as to whether a buffer zone would be an effective tool for meeting those purposes as it relates to these other features that fall within the ambit of WOTUS—some which contain water on a relatively permanent basis and others that do not.

In sum, the proposal does not articulate a sufficient basis for now saddling the stream buffer zone rule as the primary regulatory mule for achieving the

⁷¹ See 48 Fed. Reg. at 30,313 (June 30, 1983).

⁷² *Id.*

⁷³ *In re: Permanent Surface Mining Regulation Litigation*, 21 Env't Rep. Cas. (BNA) at 1742.

⁷⁴ *Id.*

⁷⁵ See, e.g. 33 C.F.R. 328.3(a)(3) (definition of 'waters of the United States').

⁷⁶ 72 Fed. Reg. at 48,900.

⁷⁷ *In re: Permanent Surface Mining Regulation Litigation*, 21 Env't Rep. Cas. (BNA) at 1742.

purposes of §§ 515(b)(10(B)(i) and (24). The regulatory program contains numerous provisions that are aimed at achieving these purposes as it relates to all mining activities or specific activities or facilities.⁷⁸ These provisions, as assisted by their correlative permit application requirements, have worked effectively to address the environmental resources protected under the Act, and there is nothing in the explanation of the proposal that suggests otherwise.

3. Expansion of the SBZ to WOTUS will Slow SMCRA Mining Permits

It is unclear from the proposed rule exactly how this jurisdictional determination process would work in the context of the SMCRA permitting process. However, OSM's preamble states that: "Permit applicants may request a jurisdictional determination from the U.S. Army Corps of Engineers before submitting a SMCRA permit application in situations in which there is question as to whether waters within or adjacent to the proposed permit area are waters of the United States under the Clean Water Act . . . In effect, under the proposed rule, permit applicants must receive a jurisdictional determination from the [Corps] before the SMCRA permitting process can be completed if there is any question as to whether the proposed permit area includes or is adjacent to any [WOTUS]."⁷⁹ Some interpret the *Rapanos* guidance to mean that applicants must get a Jurisdictional Determination (JD) for every single reach of stream within the permit boundary. The result of this approach is that a mine operator may need over one hundred final JDs from the Corps before moving forward with the SMCRA permit.

This is a significant burden, even in a pre-*Rapanos* guidance world. For example, the average applicant for a CWA § 404 individual permit spends 788 days and \$271,596 to complete the process. The average applicant for a nationwide permit spends 313 days and \$28,915 and in the mining context this number is much higher, in the \$100,000 range for NWP 21 associated with mining operations. And these costs do not include the costs for mitigation or design changes.⁸⁰

These costs are likely to skyrocket in a post-*Rapanos* guidance world, particularly where decisions are elevated because the agencies fail to agree on jurisdiction. To date, only a handful of elevated decisions have actually resulted in JDs. And in those limited issuances, the Corps and EPA estimate an investment of 1500 or more man-hours to reach a decision. OSM has not

⁷⁸ See, e.g., 30 C.F.R. §§ 816.41-47 (hydrologic balance—surface and groundwater); 816.56 (post mining rehabilitation of sediment ponds, diversions); 816.71-74 (excess spoil); 816.81-84, 816.95 (coal mine waste); 816.97 (fish and wildlife resources); 816.100-102 (contemporaneous reclamation and backfilling and grading); 816.111-116 (revegetation, timing, success); and 816.150-151 (roads).

⁷⁹ See 72 Fed. Reg. 48,900 (August 24, 2007).

⁸⁰ Sunding & Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Natural Resources J. 59, 74-76 (2002). See also William L. Want, *Law of Wetlands Regulation* 6, 8-9 (2003) (discussing the delays inherent in the Corps' permitting process including obtaining jurisdictional determinations).

considered the Corps' ability to timely issue JDs, even under the current workload. The reality is that, prior to issuance of the *Rapanos* Guidance which only increased JD demand, the Corps performed over 110,000 JDs per year already. Furthermore, the Corps currently operates with a backlog of JDs that number in the tens of thousands. Therefore, the proposed approach of tying the SBZ to the CWA definition of WOTUS has the potential to grind the permitting process to a halt.

An additional concern that must be considered is that any final Corps issued JD may only be administratively appealed. In order to obtain judicial review of any decision a project proponent is dissatisfied with requires that an operator seek a CWA Section 404 permit, decline it, and then exhaust "all applicable administrative remedies" before seeking judicial review.⁸¹ By adopting this scheme, OSM must recognize that it places timely permit issuance at risk of being tied up in court until such time as the scope of a mine operator's permit obligations can be settled.

SMCRA directs the regulatory authority to make a decision on a permit application within a reasonable time.⁸² Many state regulatory authorities are subject to firm time lines for rendering decisions within 60 or 90 days of an application. These mandates cannot be met if the SMCRA permit process is held hostage to the vagaries of the meaning of WOTUS or requirements to seek jurisdictional determinations from the Corps.

Further complicating things, a Corps issued JD is only good for five years. Inevitably, the term of the JD and the term of the mining permit will not coincide and it is very likely that jurisdiction may change in the midst of a mining permit cycle, thereby upsetting the entire authorization. OSM has failed to consider such complications that will result in the context of mining permit issuance.

We also disagree with OSM's assessment that the change in terminology is unlikely to result in a significant expansion of the applicability of the agency's rules because the vast majority of waters that may be affected by coal mining operations are perennial and intermittent streams.⁸³ This assessment discloses a fundamental misapprehension of the scope of WOTUS. As we explained above, WOTUS can encompass ephemeral streams, ditches, channels and various other features which are encountered in mining operations. Some of these features do not even have to have water flowing through them except episodically or momentarily to be classified as WOTUS under the current state of affairs. The rules that OSM has proposed are national in scope, and not limited to the steep slope areas of parts of Central Appalachia where much of the data has been gathered under the multi-

⁸¹ See 33 C.F.R. § 331.12 (2000) (establishing that a person may not file for judicial review based on a permit denial or failure to accept a proffered permit without exhausting administrative remedies).

⁸² SMCRA § 510(a). See also 30 C.F.R. § 773.15(a) (decision issued within a reasonable time as set by the regulatory authority).

⁸³ 72 Fed. Reg. 48,900.

agency EIS. Consequently, the agency cannot make an informed assessment that the change will have an insignificant impact on operations nationwide. But even in Central Appalachia we disagree with the assessment that the change to WOTUS will not result in a significant expansion of the applicability of the stream buffer zone and related rules. This is simply incorrect and without any foundation in the proposed rule or Draft EIS.

4. The Change to WOTUS Will Not Result in More Environmental Protection or Benefits

OSM asks for comment on whether the “benefits” (increased environmental protection and consistency with the CWA) from changing in the scope of the stream buffer zone and related rules to incorporate WOTUS will outweigh any of the problems.⁸⁴ Frankly, we disagree with the underlying premise that the changes will result in increased environmental protection. Neither the proposal nor the Draft EIS contain any discussion regarding any environmental benefits that accrue from this drastic change in the stream buffer zone rule scope from perennial and intermittent streams to WOTUS. Apart from the spoil minimization aspects of the rulemaking which we comment on below, we are hard pressed to identify any benefits.

SMCRA and the CWA embody different structures, scope and means for achieving their objectives. When one examines SMCRA’s detailed requirements for protection of the hydrologic balance, it is evident that it is more comprehensive as it relates to the analysis and attendant performance standards related to the hydrology. To begin with, SMCRA’s standards address the impact of one activity upon a wide range of resources. The CWA, on the other hand, addresses the impact of a wide range of commercial and other activities upon one—surface waters. SMCRA addresses both surface and groundwater while the CWA only addresses certain surface waters (WOTUS) and only certain discharges into those waters. SMCRA is not encumbered with a jurisdictional barrier related to whether the waters on the mine site are tied to navigable waters.⁸⁵

SMCRA and its implementing regulations set forth comprehensive data and analysis for conducting a probable hydrologic consequence of the proposed operations and cumulative hydrologic impact assessment of the proposed operation and all anticipated mining on the surface and groundwater systems.⁸⁶ The water bodies considered under this analysis are all surface water bodies as well as any discharge into those water bodies---not just water bodies that are considered waters of the United States. The SMCRA program has proven effective in achieving its results without focusing on WOTUS as the principal target for the hydrologic protection measures. The National Water Quality Assessment performed by the U.S. Geological Survey

⁸⁴ 72 Fed. Reg. 48,900.

⁸⁵ See e.g., SMCRA §§ 507(b)(10)-(11), (14), 515(b)(10), (17), (18).

⁸⁶ See 30 C.F.R. § 780.21/784.14.

compared water quality trends between 1979 and 1998. For the Appalachian Coal Region the study found a general improvement in overall water quality on a regional basis over the first twenty years of SMCRA implementation.

The SMCRA analysis is more comprehensive in terms of hydrologic impacts than the CWA focus upon surface waters with a significant nexus to navigable waters. So it is difficult to understand how the extension of the stream buffer zone and those attendant revisions of the permitting rules to focus on waters of the United States will result in any greater environmental benefits. Overall, we believe it will result in less environmental benefits, and certainly it will result in severe problems in implementation as we explained earlier.

An examination of the Draft EIS reveals no data or analysis that would support the proposition that changing the scope of the stream buffer zone rule to encompass waters of the United States will result in any greater environmental benefits than the existing rule which applies to perennial and intermittent streams. The Draft EIS does not discuss specifically any potential improved environmental protection or benefits from including waters of the United States in the scope of the stream buffer zone rule. Rather, the environmental benefits forecasted in the Draft EIS arise almost exclusively from the excess spoil minimization rules. And even then the Draft EIS predicts no discernable changes to the direct stream impact trend. Draft EIS at IV-124. This is most likely because as the agency reports in the Draft EIS the in the Appalachian states the number and size of excess spoil fills are becoming smaller over the past five years.⁸⁷ This trend can be attributed to various factors, but certainly the initiative of central Appalachian states to adopt excess spoil minimization policies is among the principal reasons.

For the same reasons we can not identify any discernable environmental benefits from adopting an alternatives analysis for disposal of excess spoil or coal mine waste. Such an analysis is already conducted by the Corps for individual permits, and it is apparent from the proposal that the one envisioned by OSM will not obviate the need to do one under CWA § 404. In short, the proposal imposes a greater regulatory burden without any commensurate environmental benefit.

In sum, on balance the changes related to extending the stream buffer zone to all waters of the United States and the alternatives analysis for excess spoil and coal mine waste disposal does not produce any discernable environmental benefits. However, these changes can cause a substantial disruption to a stable and predictable regulatory program which could have adverse environmental effects and cause severe disruptions to our nation's energy supply.

⁸⁷ *Id.*; see also *id.* at III-61

5. The Change to WOTUS Will Not Produce Greater Permitting Efficiencies or Reduce Duplication.

The agency suggests that the changes are motivated by anticipated benefits from increased coordination, consistency and reduction of duplication between SMCRA and the CWA. We support measures that accomplish these goals, but our experience under both the SMCRA and CWA programs indicates that such benefits will not result from the changes to extend the stream buffer zone rule to waters of the United States or requiring alternatives analysis for disposal of excess spoil or coal mine waste. To begin with, given SMCRA's more detailed and comprehensive analysis on hydrology and related environmental values, the best way for the agencies to accomplish the goals of reduced duplication and better coordination would be for the Corps to accept the analysis in whole or in part performed under SMCRA rather than the SMCRA agencies having to adjust their programs to fit a subset of waters regulated under the CWA. As OSM's discussion of the proposal reveals, there is an equal, if not greater, likelihood that the proposal will simply add rather than reduce duplication. As explained by OSM, it will be up to the state SMCRA regulatory authority whether it will accept an alternative analysis performed under CWA § 404 to satisfy the new alternative analysis proposed here. 72 Fed. Reg. 48899. At best, the proposal creates a paradox for SMCRA permit applicants. There is no indication by OSM that the Corps has stated that it will accept the proposed alternatives analysis for purposes of CWA § 404; and the OSM rule does not even require the SMCRA state authorities to accept the CWA § 404 alternatives analysis for SMCRA permits. This is not efficiency, but simply redundancy.

For the past seven years, NMA has expended considerable resources attempting to develop a regulatory and permitting platform that would produce efficiencies and reduce duplication for SMCRA and CWA § 404 permitting. NMA was also a proponent of the multi-agency Memorandum of Understanding for the "Purpose of Providing a Concurrent and Coordinated Review and Processing of Surface Coal Mining Applications Proposing the Placement of Dredged and/or Fill Material in Waters of the United States" (Feb. 2005). To date we have been unsuccessful in reaching the goal of a coordinated and efficient permit process integrating the SMCRA and CWA § 404 elements. What we have determined is that differences in substantive requirements or analysis are not the most significant impediment. Rather, the most difficult problem has been obtaining sufficient interest and commitment by the multitude of state and federal agencies involved in administering the SMCRA and CWA programs. Depending on the state, the agencies include the state SMCRA regulatory authority, the state CWA agencies administering § 402 NPDES programs and § 401 water quality certifications, and the federal Army Corps of Engineers for the CWA § 404. All of these agencies have different mechanisms and agency structures for coordinating SMCRA and CWA programs. And even within the Corps, the

commitment and consistency in policy varies not unlike what we described earlier about the variability in jurisdictional determinations for waters of the United States. The Corps is a highly decentralized organization so “most of the authority for administering the [§404] program has been delegated to the thirty six district engineers and eleven division engineers.” 33 C.F.R. § 320.1(a)(2). So, much like SMCRA state regulatory authorities, we find the numerous district engineers implementing the same requirements in the Corps rules in different ways and with different approaches to meet their local needs, workloads and interpretations of the relevant rules. Even in a single state, the approach to § 404 analysis and permitting process can vary if that state has more than one Corps district engineer’s office.

We submit that the best course for reaching the goal of obtaining more efficiency and consistency while reducing duplication is by exploring appropriate changes in policy and process through state-by-state initiatives. An effort to force this through a national rule—and one that addresses only part of the calculus—will not be successful. For all of these reasons we urge OSM not to adopt revisions that extend the stream buffer zone rule to waters of the United States or require an alternatives analysis for the disposal of excess spoil and coal mine waste.

IV. Excess Spoil and Coal Mine Waste

A. An Alternatives Analysis Should Not be Required in the SMCRA Regulatory Program

1. Excess Spoil

The original purpose of the excess spoil provisions, as initially proposed in 2004, was to codify the existing practices in a handful of Appalachian states that had adopted policies addressing spoil minimization. From this goal, the proposal has vastly and inappropriately expanded into areas that are not supported by SMCRA and are unnecessarily burdensome, over-inclusive, and in some cases, environmentally counterproductive.

It should be noted at the outset that Congress has already specified with particularity how the agency is to regulate the placement of excess spoil in § 515(b)(22). The requirements of this section can be grouped into two main categories. These are: (1) ensuring stability and preventing mass movement, and (2) preventing water from filtering through the spoil pile. Essentially, by virtue of the comprehensive list of factors enumerated in § 515(b)(22), Congress has already limited the alternatives available, and assigned priorities to the factors that are listed in that section. These include: requiring the excess spoil to be transported in a controlled manner and position to ensure mass stability; ensuring that the placement is within the bonded permit area; ensuring proper drainage to prevent erosion and movement; placing the spoil on the most moderate slope; ensuring that the

toe of the fill is properly constructed; consideration of drainage patterns; and ensuring that the fill is certified by a qualified registered professional engineer.⁸⁸

Requiring an alternatives analysis which considers so many non-SMCRA factors and elevates them over the priority considerations enumerated by the statute raises great potential for conflict with the Act. Although aquatic and terrestrial impacts may be important, that is not what Congress directed OSM to focus on when considering the placement of excess spoil material. Rather, the law gives priority to the controlled placement of all excess spoil material using sound engineering practices to ensure the long-term stability of the fill, a goal expressly recognized by OSM in promulgating the existing rules in 1983.⁸⁹ Since the alternatives analysis creates conflicting priorities and goals that may in many cases be inconsistent with SMCRA, OSM should abandon the alternatives analysis requirement.

Furthermore, there is no requirement in § 515(b)(22), or any other provision of SMCRA, for an alternatives analysis on every excess spoil placement, let alone for a requirement to select "the alternative with the least overall adverse environmental impact."⁹⁰ SMCRA is not based on the premise that there will not be environmental impacts within the permit area. The statute is meant to balance protecting the environment with a critical economic activity.

OSM's latest iteration vastly expands these requirements to an unreasonable extreme that is inconsistent with SMCRA. The agency has taken an appropriate concept and piled on so many onerous requirements that it is no longer a workable standard. In addition to the spoil minimization provisions that were contained in the 2004 proposed rule, permittees are now expected to identify a reasonable range of alternatives, considering impacts on both terrestrial and aquatic ecosystems. For placement in WOTUS, permittees must evaluate the short term and long term impacts on the aquatic ecosystem, both individually and on a cumulative basis, for each alternative proposed. This must include consideration of the impacts on physical, chemical, and biological characteristics of downstream flows, including seasonal variations in temperature and volume, changes in stream turbidity or sedimentation, contaminants, the effects on aquatic organisms, and the extent to which wildlife is dependent upon these organisms.

The permittee then must select the alternative with the least environmental impact possible. Applicants may not select the least costly alternative at the expense of environmental protection solely on the basis of cost. Such a provision may result in an endless analysis of alternatives that are not driven by cost effective and efficient mining operations. Some may interpret this

⁸⁸ See, generally, 30 U.S.C. § 1265(b)(22)(A)-(H).

⁸⁹ See 48 Fed. Reg. 32910 (June 19, 1983).

⁹⁰ 72 Fed. Reg. 48920 (Aug. 24, 2007).

rule to imply that permittees may not consider cost in determining which alternative to select, unless the cost is so high that it would be impossible to mine there. Such a proposal is inappropriate because it has no support in SMCRA, and essentially transforms OSM and state regulators into mine managers who make planning decisions for the mine. OSM should abandon this *ultra vires* and ill-advised expansion of the proposed alternatives analysis and return to the original concept of ensuring stability and minimizing excess spoil.

2. Coal Mine Waste

For the same reasons articulated above, an alternatives analysis should not be required for the placement of coal mine waste or refuse. As pointed out in the preamble, "coal mine waste disposal facilities are similar to excess spoil fills in that they are often placed in valleys containing perennial and intermittent streams and other waters of ecological significance."⁹¹ OSM's rules already contain detailed requirements for the placement of coal mine waste and refuse.⁹² Requiring additional alternatives analysis is duplicative, burdensome, and establishes potential conflict with the existing regulatory requirements.

OSM's existing requirements for the placement of coal mine waste are well-grounded in SMCRA, which directs that surface disposal of mine wastes and coal processing waste should be, above all else, stabilized.⁹³ Like excess spoil, Congress gave the highest priority to the safety and stability of coal mine waste piles and established specific standards and criteria for their design, location, operation, and maintenance.⁹⁴ Congress explained in no uncertain terms that safety was the overriding consideration:

In order to assure that mine waste impoundments used for the disposal of liquid or solid waste material from coal mines are constructed or have been constructed so as to safeguard the health and welfare of the downstream populations, H.R. 2 gives the Army Corps of Engineers a role in determining the standards for construction, modification, and abandonment of these impoundments.

Authority for the issuance of regulations and inspections of impoundments rests with the Secretary of the Interior; however such regulations should be developed by the Chief of Engineers. It is the intent of the conferees that the safety, engineering, and design standards of the Corps of Engineers will apply, through the rules and regulations of the Secretary, to such structures

⁹¹ See 72 Fed. Reg. at 48898 (Aug. 24, 2007).

⁹² See 30 C.F.R. §§ 816.81; 816.83; 816.84; 817.81; 817.83, 817.84.

⁹³ See 30 U.S.C. § 1265(b)(11).

⁹⁴ See 30 U.S.C. § 1265(f).

and waste disposal banks which may serve as temporary or permanent impoundments. However, it is not the intent that the Chief of Engineers must therefore monitor or sign off on every such structure. That duty belongs to the Secretary of the Interior.

H.R. Rep. No. 95-218, at 125 (1977).

OSM should not attempt to replace the safety and stability priorities set by Congress in SMCRA with a broad-ranging alternatives analysis that threatens to compromise the purposes of § 515(f). This is especially true when the alternative considerations proposed here are borrowed from other statutes with other purposes in mind, such as the Clean Water Act or the National Environmental Policy Act.

3. OSM Should Consider Only Economically-Feasible Alternatives

Another flaw in the alternatives analysis is that it is not limited to economically feasible alternatives. Such an alternative is not really a choice at all—and it eliminates the critical balance created by Congress when it directed OSM to: “strike a balance between protection of the environment . . . and the Nation’s need for coal as an essential source of energy.”⁹⁵ The United States District Court for the District of Columbia has ruled that: “[T]he Secretary cannot impose an arbitrary standard that may prove prohibitively expensive, or even impossible, to achieve. This would constitute arbitrary action. The Secretary must demonstrate the rationality of the standard with some technical support and ability of the coal operators to meet the standard.”⁹⁶

SMCRA obligates the operator to come up with a permit application and reclamation plan that meets the stringent requirements of the Act and the regulations. But SMCRA doesn’t require the operator to dream up dozens of different alternatives, and to select the one that gives him the lowest possible return on his investment. Such a reading of the Act is unreasonable, and inconsistent with SMCRA’s balance between environmental protection and assuring that the coal needed for the Nation’s energy supply is provided.

4. SMCRA Also Requires Maximizing the Coal Resource

Finally, yet another reason why the alternatives analysis is misguided is that OSM is required to ensure that, in weighing the new standard of “minimize[ing] adverse environmental effects,” the agency also ensures that it is pursuing policies that will “encourage the full utilization of the coal

⁹⁵ 30 U.S.C. § 1202(f).

⁹⁶ See *In re: Permanent Surface Mining Regulation Litigation*, 19 Env’t Rep. Cas. (BNA) 1477, 1487-88 (D.D.C. 1980).

resource,” which is mandated by the Act.⁹⁷ Maximizing the recovery of coal reserves in a given area should be at least equal to other performance standards, such as minimizing the volume of excess spoil. In fact, it is the very first item listed by Congress in the general environmental performance standards of SMCRA § 515(b). A myopic view of environmental protection that includes only minimizing excess spoil material may result in more impacts to the environment. The Government’s Mountaintop Mining/Valley Fill Environmental Impact Statement (EIS)(June 2003) recognized the danger of this approach.⁹⁸ This is because elevating the singular goal of limiting fill sizes over other equally important considerations will result in larger numbers of excess spoil fills, more disturbances, and potentially more coal mining in other areas to make up for reserves that are rendered uneconomical by the new rules.

B. OSM’s Rule Should Focus on Spoil Minimization

NMA supports the original 2004 proposal on the placement of excess spoil,⁹⁹ which was much more appropriately focused on spoil minimization. That proposal required permittees to ensure mass stability and prevent mass movement, ensure that the final fill is suitable for reclamation and revegetation compatible with the natural surroundings and approved post mining land use, and ensure that the cumulative volume of excess spoil is no larger than necessary to accommodate the cumulative excess spoil generated. The proposal also retained the requirement in the existing regulations¹⁰⁰ that the disposal area be located on the most moderately sloping, stable areas, and that fill locations and sizes would be placed to minimize, to the extent practicable, adverse impacts on the prevailing hydrologic balance and on fish, wildlife, and related environmental values. These proposals were reasonable and appropriate, because they could trace their lineage directly to requirements in SMCRA §§ 515(b)(22) and (b)(24). Several of the key Appalachian States have already moved to address excess spoil placement within their borders. These policies are in effect in Kentucky, Tennessee, Virginia, and West Virginia. OSM should look to state programs and only codify those provisions that are working at the state level, such as spoil minimization. Indeed, OSM has already recognized this fact in the EIS, noting that: “States of central Appalachian coalfields have taken various steps in accordance with approved programs to implement similar actions [with respect to fill minimization]; so, the impacts that might result from the Federal action, if implemented, would be limited by the changes already made by those States.”¹⁰¹

⁹⁷ 30 U.S.C. § 1202(k).

⁹⁸ See EIS at p. IV.B-8 (although a minimum impact threshold [on fill size] 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).

⁹⁹ 69 Fed. Reg. 1035, 1048 (January 7, 2004).

¹⁰⁰ 30 C.F.R. 816.71(c).

¹⁰¹ See Draft Environmental Impact Statement, Excess Spoil Minimization and Stream Buffer Zones at IV-120-121 (April 2007).

The newly proposed alternatives analysis is unnecessary and has the potential to conflict with existing SMCRA requirements. SMCRA and its implementing regulations already dictate where excess spoil fills should be located, and properly prioritize protection of public safety through requirements regarding stability and the prevention of mass movement.¹⁰² The accomplishment of this objective is evident from the statistics provided in the SBZ EIS, which demonstrates that:

“...major slope movements on valley fills were neither commonplace nor widespread. Only 20 occurrences of major valley fill instability were recorded out of more than 4,000 fills constructed over a 23-year period. None of the occurrences resulted in the loss of life or significant property damage...all but one were repaired prior to bond release.”¹⁰³

Imposing a cornucopia of regulatory requirements taken from other statutes has the potential to significantly and inappropriately impede the permitting process, and contradict the priorities established by Congress in SMCRA. If the placement of excess spoil material will require a permit to fill a WOTUS under the CWA § 404, then additional requirements may be imposed *by the Corps or other authority* [not by OSM]. Other considerations may also apply such as water quality parameters imposed by the State department of environmental quality. But once again, those are external requirements from other programs that must not be imported into the SMCRA program without thorough and purposeful consideration and justification. In sum, OSM should not impose a knee-jerk alternatives analysis requirement on any placement of excess spoil material, particularly when such requirements have not been adequately considered and justified in the rulemaking record.

C. Rules on Spoil Placement Should be Limited to Placement of Fill Material in the Stream Beds of Steep-Sloped Areas

It is clear that this regulatory change regarding the placement of excess spoil is a direct result of the controversy involving the generation of excess spoil material from mountaintop mining operations, and more specifically, to the placement of such material in stream channels. Over the past decade, the discussion in the public and among regulators focuses almost exclusively on the practice of placing fill material in Appalachian streams, and the generation of excess spoil in non-steep slope operations has never been identified as a significant issue.¹⁰⁴

¹⁰² See e.g. 30 U.S.C. § 1265(b)(4)(requiring stabilization of all surface areas including specifically, spoil piles); 30 U.S.C. § 1265(b)(11)(requiring stable mine waste piles); 30 U.S.C. § 1265(b)(22)(ensuring that excess spoil is stable and safe);

¹⁰³ See SBZ EIS at III-63.

¹⁰⁴ See *Mountaintop Mining/Valley Fills in Appalachia, Draft Programmatic Environmental Impact Statement* (June 2003)(focusing an entire 5,000 page analysis exclusively on mountaintop mining and valley fills in Appalachia).

Given this reality, and the fact that there have been no problems identified by the agency in the administrative record regarding significant issues with the generation and placement of excess spoil material in non-steep slope areas or stream channels, the agency should limit the applicability of the excess spoil minimization regulations to situations where (1) steep slope areas are involved; and (2) where such materials will be placed in stream channels. The agency has not provided any significant justification in the rulemaking record to support a need for applying the excess spoil rule to any other areas. To promulgate such a rule without adequate support would be arbitrary and capricious under the Administrative Procedure Act.¹⁰⁵

Furthermore, failure to limit the proposed modifications to the excess spoil rules as suggested above would unnecessarily burden mining operations in many parts of the country where excess spoil placement is simply not a significant environmental issue, violating SMCRA's mandate to balance essential coal production with environmental protection.¹⁰⁶ Establishing a national rule with a one-size-fits-all alternatives analysis requirement for the placement of excess spoil also inappropriately frustrates Congress' intent regarding state primacy.¹⁰⁷ States are free to regulate according to local climatic, geologic, and topographic conditions. Applying this rule to areas of the country that don't need it will increase regulatory burdens without corresponding environmental benefits.

Finally, applying this requirement too broadly could actually be environmentally counter-productive in some situations. For example, consider a mine pit with a 25 year life—by the time the final pit is mined, the initial spoil that has been stockpiled is generally well vegetated and has dense woody species growth throughout. Mandating that the spoil be re-disturbed and returned to the pit would actually cause increased impact to the environment, contrary to the primary intent of the changes.

If OSM decides to enact rules for the minimization of excess spoil material in stream beds of steep sloped areas, such rules would more appropriately be placed in 30 C.F.R. § 785.14 (mountaintop mining) or 30 C.F.R. § 785.15 (steep slope mining) and **not** in the general permitting standards on excess spoil in 30 C.F.R. § 780.35. This would confirm their applicability only to those areas that are supported in the rulemaking record.

For the same reasons, OSM should not revise 30 C.F.R. § 784.19 (excess spoil from underground mining operations). The agency has provided no evidence that a significant problem exists with respect to the generation of excess

¹⁰⁵ See 5 U.S.C. § 706(2)(A).

¹⁰⁶ See 30 U.S.C. § 1202(f).

¹⁰⁷ See 30 U.S.C. § 1211(c)(9)(requiring the Secretary of Interior to assist States in developing their own State programs, and making sure that such programs reflect local requirements and local environmental conditions); *See also* 30 U.S.C. § 1253(a)(authorizing states to apply for the exercise exclusive jurisdiction over the regulation of surface coal mining operations within their borders).

spoil material from underground mining operations or that the existing rules have not been effective in addressing the performance standards in § 516. Without such a justification, the imposition of these burdensome requirements are unwarranted and fail to account for the distinct differences between surface and underground coal mining operations as required under § 516(a) and (b)(10).

V. Definition of Excess Spoil

OSM must clarify exactly what it means to cover in these new regulations as they pertain to non-steep slope areas, and what is considered “excess spoil.” The term is defined in 30 C.F.R. § 701.5, and means spoil material disposed of in a location other than the mined out area; provided that spoil material used to achieve the approximate original contour or to blend the mined-out area with the surrounding terrain in accordance with §§ 816.102(d) and 817.102(d) of this chapter in non-steep slope areas shall not be considered excess spoil. But the preamble to the final rule should clarify that the term does not include, for example, initial box cut spoil from the first cut in an area mine, even though it will be placed outside the mined area. Applying the requirements of this proposal to such situations in non-steep slope areas would not further the purposes of the rule. Moreover, it would assure consistency and continuity in the agency’s regulation of these situations. In adopting the present definition of “excess spoil,” the agency explained:

[S]poil from box cuts or first cuts in non-steep slope areas would not be excess spoil when it is used . . . to blend the mined-out area into the surrounding terrain. Even though the spoil in these cases is disposed of in a location other than the mined out area, specifically around the box cut or first cut to blend into the terrain, the rules for excess spoil would not be applicable.

48 FR 32911 (July 22, 1983).

Although we are pleased that this issue was recognized in the Draft EIS,¹⁰⁸ OSM must clarify in the Preamble to the final rule that the excess spoil rules are not meant to be applied to these non-steep slope situations.

VI. Underground Development Waste

The rule proposes to subject underground development waste to the performance standards for refuse piles at 30 CFR Part 817.83 and the requirements of 30 CFR Part 784.16. This essentially reclassifies underground development waste as coal refuse, which is inappropriate and counterproductive in many instances. Reclassification in this matter has the potential to require approval from the Mine Safety and Health Administration

¹⁰⁸ See SBZ EIS at III-80-81.

(MSHA) as well as the preparation and submittal of annual certifications to MSHA if the underground development waste is placed outside an authorized coal refuse storage facility. This will likely discourage the use of underground development waste that is determined to be suitable for face up areas, bench construction or other beneficial uses.

As stated in the proposed rule, excess spoil *"...does not include spoil needed to achieve restoration of the approximate original contour. In most cases, spoil used to construct the bench for an underground mine will later be used to reclaim the face-up area when the underground mine is finished. That is, the bench will be regraded to cover the mine entry and eliminate any highwall once mining is completed and the bench is no longer needed for mine offices, parking lots, equipment storage, conveyor belts, and other mining-related purposes."*¹⁰⁹ As such, underground development waste should not be classified as excess spoil or coal refuse. Instead, the manner in which such material is being used should dictate how it is classified.

VII. Incorporation of Clean Water Act Issues in the SMCRA Program

A. The Completion of CWA Authorizations Should Not Be Incorporated into SMCRA Permits as Permit Conditions

OSM requests comment on whether the provision at proposed 30 C.F.R. § 780.28(f)(2) should be incorporated as a permit condition under SMCRA. That provision says that the permittee may not initiate any activities for which CWA authorization or certification is required until that authorization or certification is obtained by the CWA authority. According to the preamble of the current proposed rule, this provision is "informational."

This provision should not be included in the SMCRA permit as a permit condition. To do so would make the provision independently enforceable under SMCRA. If OSM keeps this provision in the rules at all, it should remain "informational" and should not be included as a SMCRA permit condition. Congress vested authority in the EPA to enforce the CWA. Any mining activities pursued without the necessary permits or state certifications are violations of that statute, and should remain enforceable by EPA.

There is no need for OSM to incorporate CWA provisions into the SMCRA permit, and the agency has not provided any justification in the rule for making such a change. Incorporating these provisions would be duplicative, confusing, and contrary to the objective of this rule, which is to clarify the regulations.

¹⁰⁹ See 72 Fed. Reg. 48889, 48911 (Aug. 24, 2007).

B. CWA § 404(b)(1) Guidelines Should Not be Incorporated into OSM's Regulations

OSM requests comments on whether CWA Section 404(b)(1) guidelines should be incorporated into OSM's regulations. NMA strongly opposes this proposal. First, OSM provided no support in the rulemaking record to incorporate these requirements into OSM's regulations. Second, like the turmoil surrounding the definition of WOTUS, the interpretation of the requirements of Section 404(b)(1) has been the subject of contentious litigation in the 404 permitting arena for many years. A decision to incorporate guidelines, specifically designed by EPA and the Corps for use in analyzing impacts to waters from discharges authorized under CWA Section 404 would be an invitation for the same litigation in the SMCRA permit context. Since such guidelines are already addressed under the CWA program, there is no reason to duplicate them in the SMCRA realm. To do so would unnecessarily invite litigation and spawn additional uncertainty.

C. OSM Should Not Amend 30 C.F.R. § 816.42/817.42

NMA strongly supports OSM's decision to remove the provision in existing 30 C.F.R. § 816.57(a)(1) and 817.57(a)(1) that specifies that the regulatory authority must find that the activity will not cause or contribute to a violation of applicable state or federal water quality standards.¹¹⁰ OSM is correct that this requirement is not found in either of the primary sections of SMCRA (§ 515(b)(10) nor 515(b)(24)) which provide the authority for the SBZ rule. Neither section is absolute in its requirements on permittees, and both are written with the recognition that there will be adverse impacts in the permit area from surface coal mining operations. For example, both sections use the phrase "to the extent possible," rather than absolute language. Moreover, the only constituent of concern mentioned in section 515(b)(10) is sediment. It therefore would be inappropriate for the SMCRA authority to make such determinations, because, in addition to lacking the statutory authority to do so, the SMCRA regulatory authority is not in the best position of determining whether state and federal water quality standards are being met. That is the job of the state authority under the Clean Water Act. Accordingly, we believe that this change makes the rule much more consistent with its authority under SMCRA.

OSM also specifically seeks comment on "whether we should amend 30 C.F.R. § 816.42 and 817.42, which currently address only discharges water, to include a paragraph specifying, for informational purposes, that discharges of dredged or fill materials in waters of the United States must comply with all applicable state and federal requirements."¹¹¹ OSM should not amend that section to include such a paragraph. There is no reason to add a redundant

¹¹⁰ See 72 Fed. Reg. 48902.

¹¹¹ See 72 Fed. Reg. 48903.

requirement that parrots the requirements of the Clean Water Act. If the permittee needs to comply with the Clean Water Act, then the requirements of that statute should be enforced according to that statutory scheme. Adding such a provision for “informational purposes” is unnecessary and may create unintended mischief. In addition, adding specific language regarding fill material may erroneously imply that OSM’s position is that the placement of fill material in a stream segment is a violation of water quality standards, even if such activity is approved by the SMCRA regulatory authority. This is directly contrary to the intent of the SBZ rule, which is to clarify the situation. In addition, there are already requirements under CWA sections 401, 402, and 404 regarding the placement of fill material in waters of the U.S. If anything, OSM should delete § 816.42 and 817.42 altogether, since such requirements are independently enforceable under another regulatory program.

VIII. The Environmental Impact Statement

The environmental impact statement (EIS) shows that the rule will be a net plus for the environment. The clarification of the SBZ rule will enhance agency cooperation, clarify the existing rule, and will not authorize any new mining activity. Therefore, there will be no change to the environment based on the new SBZ rule. However, the addition of the excess spoil placement rules will add new regulatory requirements for spoil minimization, and will therefore drive improvements in environmental performance in terms of minimizing spoil placement and ensuring that the most environmentally protective alternative is selected.

OSM should consider that expansion of the rule to all WOTUS would not only be a bad idea, but it could actually lessen environmental protection in some cases. This is because there could be situations in which intermittent streams would be included in the existing rule, but excluded from the definition of WOTUS. In addition, the agency should recognize that expanding the rule to WOTUS will discourage companies from conducting remining operations because of the new duplicative and burdensome requirements. As EPA has noted, remining is a critical and effective means of improving the environment:

“...there are over 1.1 million acres of abandoned coal mine lands and over 9,709 miles of streams polluted by acid mine drainage in Appalachia alone...EPA recognizes that one of the most successful means for improvement of abandoned mine land is for coal mining companies to remine abandoned areas and extract coal reserves that remain...”¹¹²

¹¹² See 67 Fed. Reg. 3369, 3375 (January 23, 2002).

OSM should be doing whatever it can to encourage remining operations, especially in light of Congress' recently-enacted amendments to SMCRA which clearly express a policy of encouraging more remining operations.¹¹³

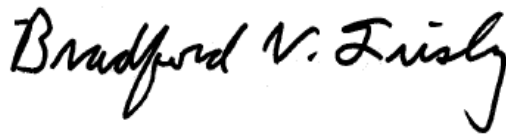
IX. Conclusion

Thank you for the opportunity to share our views on this proposed rule. NMA generally supports the agency's attempts to improve environmental protection through modifications to the rules to minimize the placement of excess spoil, and strongly supports the proposal to clarify, the SBZ rule. These actions are necessary following the decision in *KFTC*, and will improve the regulatory process, provide additional clarity, minimize litigation, avoid duplicative regulation, and improve the environment.

Sincerely,



Harold P. Quinn, Jr.
Sr. Vice President & General Counsel



Bradford Frisby
Associate General Counsel



Karen Bennett
Director, Water Quality

¹¹³ See Surface Mining Control and Reclamation Act Amendments of 2006. Pub. L. No. 109-432, § 415 (2006).