



Memorandum

TO: State Coal Associations
Surface Coal Mining Regulation Subcommittee

FROM: Bradford V. Frisby, Associate General Counsel

DATE: August 12, 2009

SUBJECT: Update on Stream Buffer Zone Issues

The purpose of this memorandum is to inform you of two important developments regarding the stream buffer zone rule.

In a major victory for the mining industry, the U.S. District Court for the District of Columbia Circuit today sided with the National Mining Association (NMA) in denying the secretary of the Interior's motion to vacate the final 2008 stream buffer zone rule without going through the proper rulemaking process. Judge Henry Kennedy stated that:

"...the NMA has the better argument that granting the Federal defendants' motion would wrongfully permit the Federal defendants to bypass established statutory procedures for repealing an agency rule. The APA requires government agencies to follow certain procedures, including providing for public notice and comment, before enacting or amending a rule...An agency must follow the same procedures in order to repeal a rule..."

The decision will likely alter the Department of the Interior's plans for addressing the stream buffer zone rule that it announced in the Obama Administration's recent Memorandum of Understanding (MOU) on Appalachian surface coal mining.

The MOU stated that if the stream buffer zone rule was vacated, the Office of Surface Mining (OSM) would issue guidance "clarifying" the 1983 stream buffer zone rule to reduce adverse impacts on streams. Today's ruling, however, requires the secretary to follow the notice and comment procedures of the Administrative Procedures Act in order to repeal or change the final 2008 stream buffer zone rule.

Just days before this court ruling, several environmental groups filed a petition requesting that OSM withdraw approval for the state program in West Virginia, either in whole or in part, due to allegations that the state is not properly enforcing its stream buffer zone regulation.

Although the petition rehashes failed arguments that were clearly rejected by the Fourth Circuit Court of Appeals (in *Kentuckians for the Commonwealth v. Rivenburgh*), the petition will be reviewed by the Obama Administration, which has already publicly stated its disagreement with the way West Virginia and other states have interpreted the stream buffer zone rule.

In addition, while this petition is focused primarily on the stream buffer zone rule, it also expressly states that “we intend to submit several petitions in the near future demonstrating West Virginia’s failure to properly implement its surface mining program.”

Petitioners appear to be attempting to circumvent this federal litigation by collaterally attacking the stream buffer zone rules in state programs. Thus, in addition to the threat of new petitions to come against other aspects of the West Virginia program, we are also concerned that these groups will eventually file petitions in other states to similarly challenge the enforcement of their stream buffer zone rules.

Attached for your consideration and review is an NMA press release on the court decision, a copy of the district court’s memorandum opinion and order, and a copy of the petition to OSM regarding West Virginia’s program.

If you have any information about petitions being filed regarding other state programs, or if you would like to discuss these issues further, please contact me at (202) 463-2643 or via e-mail at bfrisby@nma.org.

Enclosures

National Mining Association 101 Constitution Avenue, NW • Suite 500 East • Washington, DC 20001 •
(202) 463-2600