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July 30, 2010

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

Re: Docket Number OSM-EIS-35
Stream Protection Rule EIS
Scoping Comments

To Whom It May Concern:

The Indiana Department of Natural Resources, Division of Reclamation (IDNR) is the regulatory authority for coal mining in the state of Indiana. IDNR received primacy from the Office of Surface Mining Reclamation and Enforcement (OSM) in 1983. Indiana coal production averages approximately 35 million tons annually. Approximately 65% of this production is by surface mining techniques with the remainder produced through room and pillar underground mining methods.

In the notice of intent to prepare an environmental impact statement, OSM states that it believes a holistic approach is necessary to better protect streams and related environmental values, and that it would not be fair, scientifically valid or consistent with the principles of Surface Mining Control and Reclamation Act (SMCRA) to apply this rulemaking only to central Appalachia. Indiana does not agree with that assessment. SMCRA has always recognized there are fundamental differences in the coal producing regions of the nation, including topographic, geologic, and climate factors. In fact, SMCRA's findings state "because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this Act should rest with the States." 30 U.S.C. §1201(f). We concur with that position.

Streams are manifestations of the very factors that contribute to those regional differences. While IDNR agrees that streams can be ecologically significant in every coal producing region, there is no "one size fits all" within the broad general term that fits each region. Furthermore, no scientifically based research has been put forth to substantiate the need for this rulemaking in all areas of the country, including Indiana. Indeed, the issues raised in this rulemaking are much like the pictures in the scoping meeting handouts – predominately Appalachian. If OSM intends to go forward with the rulemaking, any approach must recognize the fundamental differences among the regions. The following comments are put forth with focus on the coal region of

southwestern Indiana, a predominately agricultural region with thick soils and little topographic relief.

Collection of Baseline Data: We know of no oversight reports, no scientific studies, and no other documentation pertinent to Indiana that demonstrates a need for a major overhaul of these parts of the regulations. Wide sweeping changes to a regulatory program based upon opinions formed regarding one specific coal producing region are inappropriate. Collection and analysis of additional data without a clear rationale is wasteful.

Definition of Material Damage to Hydrologic Balance: OSM is correct that this concept has not had a rigid definition – and for good reason. While the term Material Damage clearly indicates a long-term virtually irreversible adverse impact, it must be considered in a local context that considers the resource to be protected. It is logical that an operation with discharges to a high quality trout stream in Pennsylvania would have different limitations and conditions than an operation with discharges to agricultural drains in Southwest Indiana. Yet, we note that West Virginia’s attempt to define Material Damage in terms of the water resource’s capability to support existing uses, while approved by OSM, has been litigated.

Injecting broad biological considerations that are greatly influenced by climatic factors totally independent of mining would increase uncertainty and decrease clarity, inviting even more litigation. For example, some argue the absence of mayflies during mining in a water body where mayflies may have been previously found would be a change so drastic as to constitute Material Damage and be cause for the cessation of mining. We do not believe this position to be supportable. Many factors – including the obvious changes in the surrounding terrestrial environment inherent in surface mining, the revegetation process including a period of growth, and maturing – coupled with factors unrelated to mining, would all contribute to a period of absence or lessening of mayfly presence. We do not find that consistent with SMCRA’s findings, which clearly reiterate the need for balancing environmental and agricultural concerns with the Nation’s need for coal as an essential source of energy.

Similarly, there is no need for OSM to attempt to overlap the clear mandates, policies, and procedures for addressing water quality standards and effluent limitations from the Clean Water Act (CWA). While OSM is correct in observing CWA Section 404 jurisdiction associated with “Waters of the United States” is uncertain and in flux, the application of effluent limits and water quality standards to mining have clearly established history within the jurisdiction of the CWA.

In light of the foregoing, the Scoping Material photo captioned ‘mine water entering stream’ dated 2001 is potentially misleading. Stream impacts such as those depicted in that photo are not reflective of modern mining and regulation, certainly not in the state of Indiana. Rather, the picture more closely represents the very Material Damage that Congress sought to address with SMCRA than a condition related to a current operation. IDNR application of the principles of SMCRA has eliminated such occurrences at mines permitted under SMCRA. Moreover, application of the Abandoned Mine Land program, an innovative SMCRA initiative to provide funds to address pre-SMCRA legacy conditions, has eliminated many problems like that depicted in the Scoping Material.

We also urge OSM to consider the ability of the regulatory authority to enforce any outcome of this rulemaking concerning Material Damage and corrective action thresholds. SMCRA applies the term Material Damage to the hydrologic balance outside the permit area. 30 U.S.C. §1260(b)(3). The regulatory authority must assess the probable cumulative impact of all anticipated mining in the area on the hydrologic balance specified in 30 U.S.C. §1257(b), and find the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. OSM regulations use the term in both a permitting and a performance standard context. For example, 30 CFR 816.41(a) and 817.41(a) require mining and reclamation activities be conducted “to prevent material damage to the hydrologic balance outside the permit area”. The concepts of this rulemaking proposal indicate the definition of Material Damage to the Hydrologic Balance will include streams downstream of the mining operation. Typically compliance points are located at the permit boundary. This rulemaking appears to place numerous monitoring and reporting requirements, as well as a determination of material damage, to areas that may be well beyond the permit boundary. We have concern that access to these areas could be problematic as they may not be within the permit area or within an area the permittee, and thus the regulatory authority, has right of entry. We urge OSM to consider this in the rulemaking to ensure any ultimate regulatory change does not place requirements upon any entity in areas right of entry may not be possible.

In summary, this area of the proposed rule represents a potentially significant deviation from the existing approach, notwithstanding the fact that no information has been presented documenting discernable adverse impacts resulting from modern mining practices in Indiana. In fact, nearly 23,000 acres of previously mined land and water has been incorporated into IDNR managed areas in southwest Indiana, supporting diverse fisheries and wildlife communities. These features are now available in an area generally lacking natural lakes and substantial water bodies. Despite the presence of these public fishing sites, we are aware of no attempt to acknowledge the presence of these important ecological features, much less gain any data about the fishery and utilization of these water bodies.

Mining Activities In or Near Streams: Prior discussion of the elements of this rulemaking indicated OSM was considering requiring a sequencing of sorts when mining through streams. OSM advocated the concept that an operator would be required to restore and accept any stream that was mined through prior to the operator being allowed to mine through a successive stream(s). This concept appears to have a mindset toward a specific region of the country where operations might make this possible; however, such a practice is not practical or of any documented value in Indiana coal mining operations. Indiana mining operations often have lengthy pit excavations. As mining reaches the end of a cut, it then turns back to remove overburden associated with the next cut. The spoil material from this cut is then placed in the cut finished in the previous cut sequence. There may be dozens of cuts associated with one pit and, while the width may be narrow, it can be a great length. There may be more than one stream encountered in each cut. To require sequencing in Indiana’s coal region such that a stream must be restored prior to affecting the next stream would be extremely detrimental to the ability to perform mining operations. We urge OSM not to require sequencing but instead to ensure that stream channels are reconstructed following mining to approximate their pre-mine characteristics, the same provision currently in place at 30 CFR 816.43(a)(4) and 817.43(a)(4). Few large streams, such as those with drainage areas greater than a square mile, are mined

through in the state of Indiana. Indiana has years of experience, predating SMCRA, in regulating projects in and near streams. State statute created the statewide applicability threshold for both flood plain management and consideration of the potential project impact on fish, wildlife and botanical resources at a drainage area of one square mile. While we do not suggest that this has any relevance to the inclusion or deletion of that drainage area component in the definition of intermittent stream, we do believe the long history of this threshold is of significance in understanding Indiana streams.

Additional Monitoring Requirements: These proposed requirements lack any demonstration of need for the state of Indiana's coal mine operations. Implementation of these additional requirements and the associated data will be very expensive, which is unwarranted in the absence of documentation supporting the need for such information for all operations in Indiana.

Corrective Action Thresholds: We do wish to point out that water quality standards are to be promulgated under the authority of the Clean Water Act and OSM does not have authority to set such standards.

Land Forming and Fill Optimization: We are perplexed as to why OSM believes this is necessary for areas with topography such as that within the coal region of Indiana. Topographic relief is low within the coal region of Indiana, with prime farmland being the dominant land use. 30 CFR 785.17(e) requires all prime farmland to have a post mining land use of cropland. No loss of pre-mine prime farmland can occur. We urge OSM to consider this requirement while undertaking this rulemaking to ensure that any land forming or mitigation requirements do not adversely impact the ability to meet this requirement, and that it does not prevent landowners from farming replaced prime farmland in the most efficient and productive manner. As previously cited, Congress recognized the importance of restoration of agricultural productivity at the time of passage of SMCRA.

This concept within the proposed rulemaking again seems to be rooted in issues from other regions of the country. We note that excess spoil valley fills do not exist within Indiana operations. OSM has not put forth concerns that Indiana operations fail to meet approximate original contour (AOC). In its June 17, 2010, review titled "Approximate Original Contour Review," OSM concluded "the Indiana Program's implementation of its approved program is achieving AOC." Changes to elevations and widths of floodplains combined with larger mitigation ratios/standards for streams will result in increased elevations due to spoil placement. Again, we urge OSM carefully consider consequences to prime farmland crop, specifically corn and soybean, farming and production resultant of requirements within this proposed rulemaking.

Reforestation: This concept would require reforestation of previously wooded areas. Again, this requirement appears to be focused on other regions of the nation. IDNR requires reforestation of all pre-mine forest lands at a post-mine rate of 80%. We believe this to be a rate appropriate to ensure post-mine forest and post-mine forest habitat resources are restored. Indiana operations often provide additional acres of water resources following mining than existed prior to mining. This is often desired by landowners and provides for excellent fishery and wildlife resources. There must be some latitude within post-mine land use requirements to ensure all prime farmland acres are returned as cropland, appropriate forest lands are restored, and to provide for beneficial

water resources. We urge OSM to ensure nothing within this rulemaking is counter to balancing all of these post-mine land uses.

We also wish to note that due to Indiana's low topographic relief, the lack of deep valleys promoting sizable groundwater discharge, and revegetation requirements making for enhanced evapotranspiration, requirements for reducing total dissolved solids needs careful consideration. Compaction is detrimental to prime farmland restoration and to reforestation. Moreover, compaction is not necessary in most instances at Indiana coal mine operations due to little concern of stability issues. This concept appears to be pointed toward possible reclamation requirements for excess spoil valley fills which Indiana does not utilize.

Permit Coordination: IDNR does not have issue with ensuring coordination is such that factors for review are present at the time of permit submittal. We do oppose any requirements that will delay our permit actions beneath SMCRA.

Financial Assurances for Long-Term Discharges of Pollutants: Indiana has no history of permanent program acid mine discharge issues. OSM has not provided any demonstration of pollution issues to us. We again believe this concept to be in relation to considerations to other regions of the country yet every appearance indicates that Indiana will be affected.

Stream Definitions: If OSM determines it must update the definitions of perennial, intermittent, and ephemeral streams, it should be based upon a tiered approach that addresses the presence of adequate moisture levels to support aquatic organism viability, the current use, and evaluation of the aquatic community of those streams. Replacement/mitigation of these resources should be dependent upon these initial findings. The primary function of agricultural ditches, a common feature in Southwestern Indiana, is to convey water in support of agricultural production. We urge OSM to consider impacts to agricultural operations as a result of any mitigation requirements based upon classification of streams, particularly those of an ephemeral nature.

In regard to alternatives, IDNR has not been provided justification for this rulemaking as it relates to reclamation at Indiana coal mine operations. The Memorandum of Understanding between the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency, and the U.S. Department of Interior dated June 11, 2009 that ultimately initiated this rulemaking is titled Implementing the Interagency Action Plan on Appalachian (emphasis added) Surface Coal Mining. The April 1, 2010 U.S. Environmental Protection Agency detailed guidance to Regions 3, 4, and 5 is titled Improving EPA Review of Appalachian (emphasis added) Surface Coal Mining Operations under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order. Neither of these, and no others we are aware of, have indicated problems in regard to coal mining operations in the state of Indiana.

Any rulemaking should be based upon scientifically valid and accepted study. We are not aware of any such study that has taken place in Indiana for Indiana coal mining operations that demonstrate the need for these sweeping reforms. IDNR has years of annual evaluations performed by OSM indicating appropriate implementation of the program. Indiana operations have received numerous national awards for their efforts based upon reclamation techniques promoting agriculture, reforestation, and fish and wildlife resources. We believe an obvious

alternative is to keep stream protection rules as they currently exist. A “one size fits all” approach will be very difficult to implement and could have far reaching consequences simply due to the variability of regions. If OSM must put forth a new stream protection rule, it must take into account region specific habitat, ecology, operations, and land use. Any effort must also ensure that adequate resources are available to state regulatory authorities to implement eventual outcomes.

We look forward to working with OSM on this and any other coal related regulatory issues. Should you wish to discuss further or need additional information then please contact me at bstevens@dnr.IN.gov or (812) 665-2207.

Sincerely,



Bruce A. Stevens, Director

Division of Reclamation