June 1, 2010

John Craynon
Chief, Division of Regulatory Support
Office of Surface Mining,
Reclamation and Enforcement
1951 Constitution Avenue, N.W.
MS 202-SIB
Washington, D.C. 20240

Dear Mr. Craynon,

The National Mining Association (NMA) appreciates the opportunity to provide comments on the Office of Surface Mining's (OSM) notice of intent to prepare an environmental impact statement (EIS) to analyze the effects of potential rule revisions under the Surface Mining Control and Reclamation Act of 1977 (SMCRA).

OSM's notice explains that this action is being taken pursuant to a June 2009 memorandum of understanding (MOU) implementing an interagency action plan designed to significantly reduce "the harmful environmental consequences of surface coal mining operations in six Appalachian states, while ensuring that future mining remains consistent with federal law." The agency notes that the MOU requires that it consider revisions to key provisions of its SMCRA rules, including the recently modified (2008) stream buffer zone rule, and approximate original contour requirements. The agency also states that the development of a comprehensive stream protection rule (one that is much broader than the 2008 stream buffer zone rule) would be the most appropriate and effective method of achieving the goals set forth in the MOU and OSM's advanced notice of proposed rulemaking published last November.

While NMA agrees that it would be appropriate to prepare an EIS for changes of this magnitude (should such changes be made), we take exception to the premise upon which this rulemaking is based. Despite the implications in the EIS notice, the MOU and the ANPRM, there has been no showing that the existing regulations under SMCRA, including the 2008 stream buffer zone regulation, are inconsistent with federal law or have failed to reduce any harmful environmental consequences of surface coal mining operations in six Appalachian states.

The SBZ rule resulted from a comprehensive and public regulatory process that took over five years to complete. It included public hearings, an environmental impact statement and consideration of over 43,000 public comments. It not only

clarified existing agency policy on stream buffer zones that was consistently used and applied by both OSM and state regulatory authorities for over 25 years, but added, codified and strengthened new environmental requirements for the placement of excess spoil. Such requirements include, among other things, minimizing excess spoil, avoiding perennial and intermittent streams, requiring an alternatives analysis and requiring the selection of the placement option with the least environmental impact on fish, wildlife and related environmental values.[1]

Many of the actions being proposed appear to be consistent with recent goals of the Environmental Protection Agency (EPA), which has been orchestrating an illegal permit moratorium since March 2009 on surface coal mining permits under color of authority of § 404 of the Clean Water Act.[2] EPA's actions are based primarily on unilaterally-issued guidance documents and policies that have not been appropriately promulgated pursuant to notice and comment rulemaking under the Administrative Procedure Act, and are scientifically unsupported except by a single study containing allegations of impairment to water quality downstream from surface coal mining operations in Appalachia.

Such actions by EPA have occurred despite the fact (or some more cynical would say, *because* of the fact) that courts have upheld both the CWA § 404 permits and the federal program of the Army Corps of Engineers which approved them.[3] Nevertheless, despite the legality of such operations, the administration seems determined to make wholesale changes to regulatory programs at the Corps, EPA and, now, at OSM, without first laying the factual and scientific foundation that would appropriately support such significant shifts in federal policy.

Just as there is no justification for this wholesale rewrite of SMCRA regulations due to violations of laws or regulations in judicial decisions, OSM's settlement agreement in no way obligates the agency to conduct a rulemaking that, in the agency's own words, "is much broader in scope than the 2008 rule."[4] The settlement[5] merely requires the agency to "make best efforts to sign no later than Monday, February 28, 2011, a proposed rule to amend or replace the 2008 SBZ Rule…," to, "sign a 'final action' on the proposed rule…no later than Friday, June 29, 2012…," and to consult, as appropriate, with the U.S. Fish and Wildlife Service prior to signing the final action.[6] It in no way requires OSM to propose or address any rules other than the SBZ rule that was the subject of the litigation.

The notice asks for comment on the scope of the EIS and the proposed federal action, potential alternatives to the proposed federal action and studies and impacts that the EIS should address. The agency must ensure that any proposed rules are

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[1] *See* 30 C.F.R. § 780.35 (2008).

[2] *See* letter from 23 Congressmen to EPA expressing opposition to the agency's April 1 guidance and other actions in Appalachia (May 11, 2010).

[3] *See, e.g., OVEC v. Aracoma Coal Company and U.S. Army Corps of Engineers*, 556 F.3d 177 (4th Cir. 2009); *Kentuckians for the Commonwealth v. Rivenburgh*, 317 F.3d (4th Cir. 2003).

[4] *See* 75 Fed. Reg. 22723 (April 30, 2010).

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

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

scientifically documented by studies and information contained in the EIS. NMA is currently sponsoring some new scientific research with respect to conductivity in waters in Appalachia, and plans to submit the results of our studies to both EPA and OSM for purposes of this EIS. While this research has yet to be completed, we will share it with OSM as soon as it is available so that it can be considered for this rulemaking initiative. We also believe it is important for the agency to document the economic impacts that its proposed regulatory revisions would have on industry and on the communities that would be affected by such changes.

In the absence of validated scientific evidence to support major changes in longstanding regulatory policy, NMA urges the agency to reconsider whether new regulations are warranted, and to also consider, as part of the EIS analysis, the "no action" alternative of allowing the 2008 stream buffer zone rule to continue in force and effect. The 2008 rule was barely in place for six months when the administration pledged to reverse it in a 2009 MOU. Adequate opportunity has not been provided to demonstrate whether or not the rule's new requirements regarding excess spoil placement will have a significant improvement in environmental performance.

There are some aspects of the stream protection rule that cause immediate concern, although it is difficult to provide detailed input on most of the concepts until specific regulatory language is developed and made available for public comment. The concept of stream "sequencing," or prohibiting approval of mining through streams until the operator demonstrates that the last stream has been fully restored, is impractical and unachievable for many mining operations. The law provides many mechanisms to ensure appropriate restoration of streams, including a reclamation plan, enforcement authority, bonding and even permit-blocking sanctions for operators that fail to address notices of violation. SMCRA does not authorize regulatory authorities to stop mining projects and delay them for months or years in the manner described in this proposal. Therefore, we strongly advise the agency to remove this aspect of the stream protection rule before it is proposed in the *Federal Register*.

Another concern involves the concept of "corrective action thresholds." Although it is unclear without regulatory text exactly how this would operate in practice, courts have been clear from the beginning of the program that under SMCRA § 702(a)(3), nothing in SMCRA shall supersede the CWA. Thus, OSM cannot establish water quality standards that are the purview of the States and EPA under the CWA.[7] Any action the agency pursues in this area must be done with due regard for the respective roles established by Congress and the individual States in the governing statues. Specific examples of potentially overreaching provisions in the Notice of Intent (NOI) are the references to reducing total dissolved solids and the regulation of "…all long-term discharges of pollutants, not just pollutants for which effluent limitations exist…"[8]

[7] *See* OSM EIS-34 (April 2007) at p. III-95, *quoting In re Permanent Surface Mining Regulation Litigation*, 627 F.2d 1346, 1369 (D.C. Cir. 1980).

[8] See 75 Fed. Reg. 22724 (April 30. 2010).

Several of the agency's proposals will encounter significant problems because they are attempting to establish national standards for situations that vary significantly throughout the United States. For example, developing a one-size-fits-all definition of "material damage to the hydrologic balance outside the permit area" is extremely difficult without site-specific information. Similarly, the concept of equilibrium is a slippery slope with the divergent physical, chemical, biological and climatic conditions that exist between operations and regions. In some areas, equilibrium may not be fully achieved for dozens or even hundreds of years. The addition of a biological component to the success criteria for stream reconstruction is also tremendously susceptible to natural and regional variations in precipitation, temperature, elevation, aspect and other factors that affect biological community structure. The magnitude of the inherent variability of the biological component of reference streams unaffected by mining has been reported in the literature to be sufficient to result in the change of a full condition category (e.g., good to fair) due to natural variation alone. Therefore, extreme care must be exercised in pursuing each of these matters so as not to infringe upon water rights, coal leases, and authorizations or adjudications under other State and Federal programs.

Assuming the agency can justify the need for these regulations and provides appropriate scientific support, there are serious implications regarding the timing of how the agency implements any new rules. Although we agree that any new rules should be prospective in nature, any new rules should also clarify that permit applications submitted before the effective date of the rule will be processed under the existing regulations. Due to the nature of the baseline data-gathering requirements, applying the new rules to applications that have already been submitted could set back permitting by years in certain parts of the country and cause a significant crisis. Likewise, the concept of permit coordination between EPA, the Corps and OSM should not be used to delay the permit process or to allow non-SMCRA agencies a veto over a valid SMCRA permit.

Thank you for your consideration of our views. NMA will provide more detailed comments after regulatory language has been developed by OSM. Until that time, should you have any questions, please feel free to contact me at (202) 463-2643 or via email at bfrisby@nma.org.

Sincerely,

Bradford V. Frisby

Bradford V. Frisby
Associate General Counsel