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west virginia department of environmental protection

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July 30, 2010

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

Re: RIN 1029-AC63

Proposed rule and notice of intent to prepare an environmental impact statement

To Whom It May Concern:

Thank you for the opportunity to once again comment on the proposed environmental impact statement (EIS) that will analyze the effects of potential rule revisions for new stream protection measures under the Surface Mining Control and Reclamation Act (SMCRA) This proposal was published in the June 18, 2010 Federal Register (Vol. 75, No. 117, p. 34666).

Even though the June 2010 Notice of Intent supersedes the April Notice of Intent, it raises many of the same issues. Accordingly, the West Virginia Department of Environmental Protection, Division of Mining and Reclamation (DMR) reiterates the comments made in its December 30, 2009 and May 28, 2010 letters. It is obvious that, due to the number of Federal Register notices on this issue, the Office of Surface Mining (OSM) neglected to fully evaluate the circumstances of the subject it is proposing to regulate before beginning the rulemaking process and was too hasty in going forward without a full evaluation. It is also obvious that the process is being driven by concerns other than programmatic ones. The DMR is not aware of any problems identified through the approved oversight process that are of the magnitude that would require such a radical overhaul of the SMCRA regulations. This was described in more detail in our May 28, 2010 letter. This appears to be more about change just for the sake of change than it is about genuine improvements in the regulatory program.

This reposting in the Federal Register also supports our comment in the May 28, 2010 submittal that the timetable for this EIS and a proposed rule are unrealistic given the requirements of the federal rulemaking process and the broad scope of the contemplated changes which are radical departures from the current rule and laws.

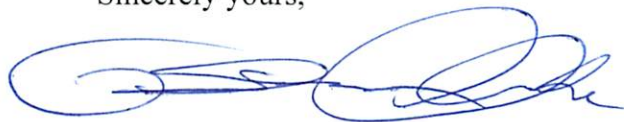
After a little more study and thought, OSM has added some alternatives for each of the elements in the **“What is the proposed Federal action?”** Although these alternatives provide a wee bit more insight into the proposed changes, the DMR reiterates its concern about the lack of pertinent detail. The alternatives being considered raise many questions and again show that the process is proceeding in a hasty manner. As an example, the alternatives for *Definition of Material Damage to the Hydrologic Balance* raise the question of what is “any impairment”, “any quantifiable adverse impact”, “any ongoing violation” and where would you draw the line between short and long term impairment? There are wide ranges of thought on this issue.

The West Virginia regulatory programs already contain some of the features generally mentioned in the federal notices, which are implemented and updated to protect the environment of the State. West Virginia strongly agrees with the sentence on page 34667 of the current notice that “it would not be fair, appropriate, scientifically valid or consistent with the principles of SMCRA to apply the new protections only in central Appalachia.”

Finally, West Virginia is developing criteria for application of our narrative water quality standard, which is the primary impetus behind all Federal efforts to curtail mining. Court decisions rendered nearly thirty years ago make it clear that OSM has no place in the development of water quality standards. Some of the alternatives and regulatory proposals under consideration put OSM squarely in the middle of the debate between EPA and the states as to what these water quality standards mean and how they should be applied. The DMR believes that SMCRA prohibits OSM from establishing its own approach to the manner in which water quality standards adopted by states under the Clean Water Act are to be applied.

Once again, the opportunity to comment on the new stream protection measures under consideration by OSM is appreciated and we look forward to hearing from you about becoming involved in the process. If you have any questions about these comments do not hesitate to contact this agency.

Sincerely yours,



Thomas Clarke  
Director