



April 7, 2004

Office of Surface Mining,
Reclamation and Enforcement
Administrative Record
Room 101
1951 Constitution Avenue, N.W.
Washington, D.C. 20240

VIA Email: osmrules@osmere.gov

Dear Sir or Madam:

The National Mining Association (NMA) strongly supports the Office of Surface Mining's (OSM) proposed rule to clarify its regulations on the placement of excess spoil and the stream buffer zone (SBZ). NMA is a national trade association that includes 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 other firms serving the mining industry. NMA's members have numerous surface coal mining operations that will be directly impacted by these clarifications.

NMA members in Appalachia mine in steep slope areas, and generate significant amounts of excess spoil material which will be subject to these rules. In addition, in many places throughout the United States, NMA members conduct surface coal mining operations within the 100 foot buffer zone. Sometimes companies place excess spoil material in the SBZ to create valley fills. Other times, companies must divert and mine through streams in the normal course of their surface coal mining operations. Many times SBZ areas are used to construct sediment ponds to ensure protection of water quality downstream. Accordingly, the rule will have a direct affect upon the manner in which NMA members will design and conduct their surface coal mining operations across the United States.

I. General Comments

This proposal stems from an outreach document that was circulated by OSM for public comment on March 21, 2003. NMA filed comments on that document, and those comments are attached and are hereby incorporated by reference into NMA's comments on this proposed rule, and we ask that OSM add them to the administrative record.

NMA's comments in this document will be tailored to events that have happened since that time, and will focus on the language of the proposed rule.

There has been a longstanding need to clarify the current rules on the placement of excess spoil and the stream buffer zone rule. Particularly, in the last several years, environmentalists have misinterpreted the current regulations in such a manner as to suggest that there can be no placement of excess spoil material in a perennial or an intermittent stream segment¹. As explained in our previous comments, this assertion is just plain wrong, and completely inconsistent with agency practice and precedent over the past 28 years. See *NMA Outreach Comments* at pp. 3-4.

As recently as last month, environmental extremists erroneously argued in a public hearing that SMCRA mandates a stream buffer zone rule.² Using questionable legal precedent, these activists base their discredited claims on vacated opinions of lower court judges and a statement by Justice Department attorneys acting without the benefit and expertise of the very agency that promulgated the rule in the first place--OSM. They do not mention the two decisions by the Court of Appeals that reversed those erroneous views of the law on both substance and procedure, nor the longstanding interpretation and application by OSM and States that have issued thousands of permits contemplating this type of activity time and time again.

Unfortunately, these groups not only make such statements at hearings, but also file lawsuits trying to convince judges to erroneously interpret the intent of the SBZ rule in hopes that the environmental groups can misuse the ambiguity as "the key to controlling the size of these mines..."³ As noted in the preamble, "...there remains considerable misunderstanding regarding the meaning of the SBZ regulation..." 69 Fed. Reg. 1038 (January 7, 2004). These groups have seized upon an ambiguous rule that embodied a simple precautionary principle to evaluate certain impacts, and persist in converting it into a *per se* prohibition on the very activities necessary "to assure that the coal supply essential to the Nation's . . . economic and social well-being is provided," 30 U.S.C. 1202(f). With this anti-mining agenda of so many groups ready, willing, and able to use lawsuits to cripple the permitting process, the need for clarification of these rules becomes obvious.

While the Federal government, including OSM, has made some isolated errors in judgment regarding the meaning of these provisions over recent years, such actions were understandable in light of OSM's, the Interior Department's, and the Justice Department's reliance on faulty legal opinions by a district court judge who was twice overturned on appeal. The fog surrounding these contentious issues was finally lifted when the 4th Circuit issued its recent decision in *KFTC*. OSM is now doing the right

¹ See *Kentuckians for the Commonwealth v. Rivenburgh*, 204 F. Supp. 2d 927 (S.D. W. VA 2002); Rev'd 317 F.3d 425 (4th Cir. 2003)(it is beyond dispute that SMCRA recognizes the possibility of placing excess spoil material in waters of the United States).

² See Testimony of Joe Lovett, Washington, D.C. (March 30, 2004).

³ See Testimony of West Virginia Highlands Conservancy, Washington, D.C. (March 30, 2004).

thing by admitting that mistakes were made,⁴ and correcting its position in a rulemaking following the *KFTC* ruling in 4th Circuit. In fact, one could argue that OSM has an obligation to clarify its rules in light of the decision in *KFTC*.

II. Specific Comments

A. Reclamation Plan (30 C.F.R. § 780.18(b)(3))

NMA generally supports this proposal to require the applicant to include sufficient supporting information in the reclamation plan to demonstrate, to the satisfaction of the regulatory authority (RA) that the applicant has taken necessary steps to avoid the generation of excess spoil and has minimized the volume of excess spoil to the extent possible. However, NMA believes it is critical that OSM clarify the phrase “to the maximum extent possible.” Certain environmentalist plaintiffs have already argued in proceedings that this phrase in the proposed rule means *anything* that is possible, regardless of cost. NMA believes that such an interpretation is completely at odds with the language in the Surface Mining Control and Reclamation Act (SMCRA). Indeed, the United States District Court for the District of Columbia has ruled so as well:

[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 that standard with some technical support and ability of coal operator’s to meet the standard.

In Re: Permanent Surface Mining Regulation Litigation, 19 Env’t Rep. Cas.(BNA) 1477, 1487-488 (D.D.C. 1980).

The statutory structure and text support standards that are both technically and economically feasible. For example, SMCRA § 515(b)(24) provides that disturbances to the environment should be minimized to the extent possible using best technology currently available (BTCA). That section of SMCRA does not mention the word “maximum,” but does reference BTCA. In order to be consistent with the statute, and to avoid unnecessary confusion on the part of the regulated community and other members of the public, **OSM must modify the language in the final rule to say that creation of excess spoil should be minimized “to the extent possible using BTCA.”** Without this important qualification from Congress, certain activist lawyers may be able to convince judges that mines must minimize excess spoil even if the only alternative is an unprofitable one.

The regulations must be crystal clear that the applicant will not be forced to evaluate or opt for an alternative that is not economically feasible. 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

⁴ See, e.g., 69 Fed. Reg. 1039, *quoting* DOJ brief in *Bragg* appeal (April 17, 2000); 69 Fed. Reg. 1040, *quoting* Department of Interior Solicitor’s Letter (April 17, 2000) and Acting OSM Director’s letters to KY, VA, WV (May 22, 2000).

Nation's need for coal as an essential source of energy." 30 U.S.C. § 1202(f). When considering costs of alternatives, the agency must recognize all of those costs, including construction of new roads, adding haulage vehicles, and additional considerations regarding use of more and different spoil placement locations, such as traffic on public roads, etc.

Moreover, OSM must 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 resource," which is mandated by the Act. 30 U.S.C. § 1202(k). 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. A myopic view of environmental protection that includes only minimizing excess spoil material may result in MORE impacts to the environment. Even the Government's recently issued Mountaintop Mining/Valley Fill Environmental Impact Statement (EIS)(June 2003) recognized the danger of this approach. *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). 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. Disposal of Excess Spoil (§§ 780.35 & 816.71)

OSM proposes to require that each permit application contain alternative analyses of the environmental impacts of constructing fills in different locations and under different configurations, with different sizes and numbers of fills to accommodate the excess spoil. Although NMA generally supports this proposed regulation, there are several important clarifications that must be made to the rules before they are made final.

To begin with, 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 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 nonsteep 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).

With regard to alternatives analyses, for activities proposed in “waters of the United States,” the U.S. Army Corps of Engineers already requires an alternatives analysis for individual permits and a minimal impact determination in the case of a general permit. In these instances, an applicant should be permitted to use the same alternatives analysis required by the Corps for the application with OSM or the regulatory authority. Put another way, there should be coordination so that such regulatory requirements are not duplicative among the regulatory agencies. If the operator is mining in an area where no § 404 permit is required, then the requirement to perform an alternatives analysis should not apply at all.

It is clear that this regulatory change is primarily 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. But in other parts of the U.S., such as Alaska, there are about 375 million acres and only one valley fill that encumbers less than one mile of stream. 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 changes to the excess spoil regulations to situations where (1) steep slope areas are involved; and (2) where such materials will be placed in stream channels.

Failure to limit the proposed modifications to the excess spoil rules as suggested above may create unintended consequences. For example, in certain non-steep slope areas, there may be situations where the rule would be counterproductive. 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 returned to the pit would actually cause increased disturbance, contrary to the primary intent of the changes.

In addition, it is important that the rules retain sufficient flexibility so that the regulatory authority can maintain discretion to address changing conditions. Geologic uncertainties, economic, or other changes may require unnecessary permit revisions as conditions change if sufficient flexibility is not preserved.

The proposal on excess spoil material requires operators to locate fills so as to minimize, to the extent possible, adverse impacts to the prevailing hydrologic balance, fish, wildlife, and related environmental values. This requirement to “minimize” should

be interpreted to mean “minimizing the impacts,” and should not be read to mean that fill sizes should be minimized in all cases. In addition, when determining the manner in which the applicant will minimize the impacts of the fills, OSM should clarify in the preamble to the final rule that this requirement may be fulfilled through post-mining mitigation measures.

C. Stream Buffer Zone (SBZ) Proposal

1. General Comments on the SBZ Proposal

As noted in our previous comments, we still believe that there is no need for the regulation at all, and suggest that it be deleted. *See NMA Outreach Comments* at 4-7. Accordingly, NMA supports Alternative Six in OSM’s Environmental Assessment (EA), which calls for amending the applicable regulations on excess spoil and eliminating the SBZ rule. *See EA* at p. 11. OSM’s comment in the EA regarding the reason for not selecting Alternative Six is in error. The agency says:

...The SBZ rules are a way to minimize environmental harm to stream and riparian habitat...this alternative would eliminate an effective and proven means of reducing environmental harm.

EA at 14.

There are many other protections for the environment and streams aside from the SBZ rule. The Clean Water Act (CWA), as well as OSM regulations, provides ample protection for streams. CWA § 404 permits provide extensive protection, including mitigation requirements that are beyond that required by SMCRA. In addition, almost a dozen other SMCRA regulations provide protection for the hydrologic balance and fish & wildlife. *See NMA Outreach Comments* at pp. 5-6. The current SBZ rule is therefore not only redundant, but even worse, its vague language has resulted in unnecessary costly litigation, permit delays, and uncertainty in the SMCRA regulatory programs. Therefore, this rule needs to be eliminated, or at the very least, clarified.

In addition, SMCRA does not mention, let alone mandate, a requirement that there needs to be a “buffer zone” around a stream. Quite the contrary, SMCRA is replete with references to mining near, under, and/or through streams. Instead of prohibiting stream disturbance altogether, the law requires an effort to minimize adverse effects *outside the permit area and downstream*. *See, e.g.* SMCRA §§ 515(b)(10)(B)(i)(prevent to the extent possible using BTCA additional contributions of suspended solids to stream flow or runoff outside the permit area); 515(b)(22)(D)(allowing disposal in springs, natural water courses or wet weather seeps as long as drains are constructed); 516(b)(9)(B)(focusing on limiting additional contribution of suspended solids to stream flow outside the permit area); 516(b)(11)(minimize, to the extent possible using BTCA disturbances & adverse impacts of operations on fish & wildlife); 516(c)(allowing mining under streams, except where imminent danger to human inhabitants exists). Congress reiterated its concerns in SMCRA’s legislative history, which emphasized that Congress

was not primarily concerned with the footprint of excess spoil fills, but rather with the downstream impact, both in terms of safety to populations and the environment. *See* Senate Report No. 95-128, 1st Session, p. 83.

The original purpose of the stream buffer zone (SBZ) rule was to protect a stream from sediment bearing water flowing from the disturbed area. *See* 44 Fed. Reg. 30619 (May 25, 1979). This purpose confirms the fact that the rule was never meant to apply to valley fills in the first place. Instead, it was directed at mining near a stream. As OSM recognized in its 1983 rule, “It is impossible to conduct surface mining operations without disturbing a number of minor natural streams, including some which contain biota.” 48 Fed. Reg. 30313 (June 30, 1983).

If the rule cannot be eliminated, then NMA strongly supports OSM’s effort to clarify the stream buffer zone regulations. The clarifications that OSM has made are still a significant improvement over the current language. The proposed rule is much more similar and faithful to the language of the SMCRA which the regulation is supposedly based on.

The two primary sections of SMCRA cited by OSM to support the rule provide as follows:

§ 515(b)(10): Prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to stream flow, or runoff outside the permit area.

§ 515(b)(24): to the extent possible using the best technology currently available, minimize disturbances and adverse impacts of the operations on fish, wildlife, and related environmental values.

Examining these two provisions, certain elements of Congressional intent become clear. First, it is clear that Congress did not create an absolute prohibition against disturbances and adverse impacts to fish, wildlife, and related environmental values. Congress recognized that there would indeed be impacts to the environment, but believed that as long as precautions were taken to the extent possible, such harm could be minimized. Read together, the “to the extent possible” language and the BTCA reference clearly express intent to consider only alternatives that are economically feasible. We agree with OSM preamble statement that: “It is virtually impossible to conduct mining activities within 100 feet of an intermittent or perennial stream without causing some adverse impacts, even if those impacts are very small. We believe SMCRA recognizes that an absolute standard of ‘no adverse impacts’ is unattainable. This is reflected in the fact that SMCRA in most cases requires the mining operation to minimize, rather than completely prevent, adverse environmental impacts.” 69 Fed. Reg. at 1043.

In addition, § 515(b)(10) clearly is targeted towards the control of suspended solids (sediment) in stream flow *outside of the permit area*. *See also* 48 Fed. Reg. 30315 (June 30, 1983). This language is entirely consistent with the original purpose of the

SBZ, which was to avoid sediment laden water from escaping outside the permit area and causing environmental harm *downstream*. As the 4th Circuit has observed, there is no prohibition in SMCRA that would prevent the placement of excess spoil material in a stream, so long as certain protections are observed. *See KFTC*, 317 F.3d at 442. Congress was fully aware that surface coal mining operations would occur in streams, and in fact praised some such activities specifically as examples of BTCA:

One example of the best available technology for sediment control, which is applicable throughout the U.S. and can be used on a mine-by-mine basis, is that technology employed at the surface coal mine in Washington Irrigation and Development Co... This mine is located in... Washington [State]... the company designed a relatively inexpensive method of settling virtually all of the sediment in the surface runoff from the mining operation. Several sets of double **siltation entrapment ponds were constructed on small tributaries leaving the mine property.**

Elimination of sediment loads is achieved through a two stage process, with the initial gravity settling occurring in the first pond and the introduction of a biologically inert flocculating compound into the flow between ponds. This results in a discharge that contains even less silt than the normal background flow.

House Report No. 95-218; 95th Congress, 1st Session on H.R. 2 (April 22, 1977)(emphasis added).

In this report, not only did Congress acknowledge that stream segments could be directly impacted in the permit area, but they considered this practice to be the best available technology! Clearly, then, if Congress considered such structures constructed right on streams to be best available technology, then it did not intend to prohibit disturbances to stream segments within the permit area. Rather, Congress was concerned with ensuring that operators remove sediment from discharges to downstream, offsite stream segments. Such necessary impacts on streams are also recognized by OSM in the EA. *See EA at 18* (In order to minimize sedimentation and comply with the CWA an operator may need to place sediment control structures or ponds in streams below the mine).

OSM should recognize in the Preamble of the final rule⁵ that the placement of ponds and ditches within the stream buffer zone is often most desirable, because such erosion and sedimentation control facilities are designed to protect the stream from increased sedimentation. Construction of these facilities should be considered a minimal effect. Prohibiting the placement of such facilities within the SBZ would make protection of the stream from sedimentation more complicated and less effective.

OSM should also include a Preamble discussion of the fact that geology dictates that for surface coal mining to occur, some impact within the buffer zones of streams must be allowed. The geology of coal is such that the coal bed is almost always

⁵ OSM does recognize the appropriate use of these structures in streams in the Environmental Assessment. *See EA at 18.*

underlain by clay. Normally, the clay has low hydraulic conductivity, making it largely impermeable to vertical water flow. Consequently, these clays aquitards perch water within the coal bed and overlying beds. These perched water zones provide temporary water storage based on seasonal recharge but can develop as aquifers. Point-source springs and non-point source seeps and wetlands commonly occur at coal outcrops as a result of perched water. These form the headwaters for many streams.

To deny any encroachment within the SBZ or wetland would deny access to large areas of the coal cropline. This would be devastating to the Appalachian coal industry as recognized by SMCRA. It is not reasonable to assume that mining in direct contact with the groundwater source for a stream and disturbing the recharge strata can be done without some adverse impact. Therefore, OSM's interpretation of SMCRA's position that a standard of "no adverse impacts" is unattainable, is correct. *See* 69 Fed. Reg. 1043. It is the only reasonable position.

OSM should put greater emphasis on SMCRA § 515(b)(22) as one of the primary bases for the clarification to the regulations. If one examines § 515(b)(22), it becomes obvious that: (1) Congress authorized the placement of excess spoil material in springs and natural water courses; and (2) the primary concern of the Congress regarding such fills was not affects to the environment in the permit area, but rather the risks to people living outside the permit area in terms of their safety due to stability concerns of the spoil pile. *See KFTC*, 317 F.3d at 442; 30 U.S.C. § 1265(b)(22)(A-I)(mentioning stability and engineering in almost every subparagraph). OSM must remain cognizant of all of the provisions of SMCRA to ensure that its regulations properly balance all of the critical elements intended by Congress.

Finally, OSM is correct in its observation that SMCRA cannot conflict with the Clean Water Act (CWA). 69 Fed. Reg. 1043. Section 702 of SMCRA prohibits construing SMCRA to supersede the CWA. The SBZ rule cannot be interpreted to prohibit mining because of water quality standards that would otherwise be consistent with the CWA. Such a reading of the SBZ rule would violate SMCRA § 702. *See also NMA Outreach Comments* at pp. 7-8.

2. Specific Comments on the SBZ Proposal

There are several clarifications and/or changes that should be made to the proposed SBZ rule, which are discussed below.

First, OSM must clarify in the final rule that the proposal is not intended in any way to prohibit or limit any practice that is currently authorized under the existing regulations. OSM has been clear that this proposal is intended as a clarification of existing policies and practices that have gone on for the past 28 years. As such, **it is vital for the agency to reiterate that the new rule is not intended to stop any of the practices that are currently authorized** by OSM or the State regulatory authorities.

Second, a related but more specific concern involves underground coal mining beneath a stream. As NMA pointed out in our previous comments: “The underground coal mining counterpart should be revised to substitute the phrase ‘surface operations and surface activities incident to underground coal mining’ for the term ‘underground mining activities.’ The current rule uses the term ‘underground coal mining activities’ which is defined in a manner that includes both the surface operations and underground operations. This could lead to suggestions that the rule applies to areas overlying the underground mine workings which was never the intent...More precise language will avoid future problems and confusion.” *NMA Outreach Comments* at 8.

Based on the new proposed language of 30 C.F.R. § 817.57, the agency should substitute the phrase “surface operations and surface activities incident to underground coal mining” for the term “underground mining activities.” If OSM does not make this clarification, it may lead to confusion later on, or worse, more claims by plaintiffs’ lawyers that mining beneath a stream is prohibited without RA approval. The preamble should also clarify that the rule is intended to require approval from the RA only for surface operations and surface activities incident to underground coal mining, but not for mining beneath a stream. 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).⁶

Historically, this provision has not been interpreted or applied to areas overlying the underground mine workings even though the regulation refers to “underground mining activities.” 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 paragraph (a) of the definition of “underground mining activities” which refers to surface operations incident to underground extraction of coal. *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).

The 1979 stream buffer zone rule for underground mines clearly stated that it applied to disturbances from “surface operations and facilities.” 30 C.F.R. § 817.57, 44

⁶ 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 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.*

FR 15430 (March 13, 1979). 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.” 43 FR 41908 (Sept. 18, 1978). 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.” 44 FR at 15268. The preamble went on to explain that the performance standards for subsidence control address effects associated with underground mine workings. *Id.*

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.” 48 FR 30316 (June 30, 1983). 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 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.” 47 FR 13466 (March 30, 1982).

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. However, to avoid the type of ambiguity that may later cause grave uncertainty and consequences, we request that OSM change the language of § 817.57 to substitute for the term “underground mining activities” either one of the following phrases that would more clearly set forth the longstanding scope of the underground mining version of the rule: “surface operations and facilities”; or “surface operations and surface activities incident to underground coal mining.”

Third, in applying the proposed rule, it should be made clear exactly how the 100 foot measurement should be taken. It should be clarified that the 100 foot measurement downstream of the surface mining activities is from the end of the mining activity. This would be the sediment pond and does not include the reach of the “stream” between the toe of the fill and the sediment pond. We believe that this was OSM’s intent, but it should be clarified in the final rule.

Fourth, the SBZ rule should not be applied to watercourses in small watersheds. OSM acknowledges in the preamble that: "...we did not anticipate regulatory authorities to apply the SBZ to watercourses in small watersheds (less than 1 square mile)." 69 Fed. Reg. 1042 (January 7, 2004). OSM should hold firm on its definitions and recognize that its jurisdiction should not be applied to ephemeral streams. The agency should not redefine intermittent streams based on studies by other agencies.

Prohibiting mining in SBZ would result in severe economic harm. As noted in the EA, a recent study in the central Appalachian coalfields indicates the draconian effect that prohibiting all mining in the SBZ would have on our nation's energy supply. This study found that 92.5% of the reserves in this region would not be mined if the SBZ were interpreted in this manner. *See* EA at 15, *quoting* Sanberg, et al., July 2000, p. 1. Clearly this is not what Congress intended when it stated its primary purpose of the statute to "assure that the coal supply essential to the Nation's energy requirements, and to its economic and social well being is provided and strike a balance between protection of the environment and...the Nation's need to for coal as an essential source of energy." SMCRA § 102(f).

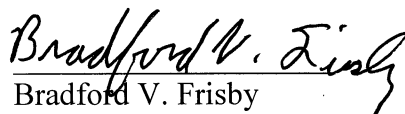
Not only would a misinterpretation of the SBZ to prohibit mining in such areas violate the law as expressed by Congress, but it would also run afoul of Executive Order 13211 regarding energy. The failure to allow minimal adverse impacts within the SBZ would therefore not only violate SMCRA and be devastating to the Appalachian surface coal mining industry, but it would also have significant ramifications to our nation's energy supply. *See* EA at 16 (noting that the Appalachian region supplies 396 million tons of coal for our nation's energy supply).

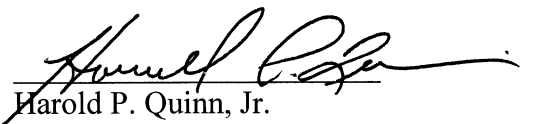
D. Stream Diversions

We agree with the proposed changes to the rules on diversions of streams. Striking the words from that section will eliminate redundancy and make the regulations clearer.

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 on 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, and improve the environment.

Sincerely,


Bradford V. Frisby
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National Mining Association


Harold P. Quinn, Jr.
Senior Vice President & General Counsel
National Mining Association