



Kentucky Waterways Alliance

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Office of Surface Mining Reclamation and Enforcement
Administrative Record, Room 101
1951 Constitution Avenue, NW.
Washington, DC 20240.

Via electronic mail: osmrules@osmre.gov

RE: Federal Register: January 7, 2004 (Volume 69, Number 4); 30 CFR Parts 780, 816, and 817; Surface Coal Mining and Reclamation Operations; Excess Spoil; Stream Buffer Zones; Diversions; Proposed Rule

To Whom it May Concern:

I submit these comments regarding the proposed rule (above) on behalf of the Kentucky Waterways Alliance Inc., a statewide nonprofit organization dedicated to protecting and restoring Kentucky's waterways and their watersheds by building effective alliances for their stewardship.

We urge the Office of Surface Mining (OSM) to delay this rulemaking until after a final decision is made on the DEIS for Mountain Top Removal and Valley Fills (MTR/VF). Both the DEIS and this proposed rulemaking could substantially change the Stream Buffer Zone rule and since the DEIS was issued earlier it is in the nations best interest to wait until final action has been taken on the MTR/VF EIS before proceeding with this rulemaking. OSM has confused the public, the regulated community and perhaps even the states by proposing several substantial rulemakings at the same time, all of which propose changes to the same regulations.

If however OSM still intends to move forward with this proposal, KWA offers the following comments. OSM states that the proposal to amend the regulations is to accomplish two basic goals: Minimizing the adverse environmental effects stemming from the construction of excess spoil fills; and clarifying the circumstances in which mining activities, such as the construction of excess spoil fills, may be allowed within the stream buffer zone (SBZ), i.e., within 100 feet of a perennial or intermittent stream.

The proposed changes effectively eliminate the SBZ rule prohibiting the disruption of areas within 100 feet of streams from coal-mining activities. KWA opposes any attempt to eliminate the SZB rule and believes it is contrary to the public interest and illegal under the Clean Water Act.

KWA believes it is clear and OSM states in the proposed rule that SMCRA must be consistent with the CWA. Therefore, nothing in SMRCRA “shall be construed as superseding, amending, modifying, or repealing” the CWA or “any rule or regulation promulgated thereunder”. 30 U.S.C. 1292. Both the SBZ rule and excess spoil disposal rule must be consistent the CWA.

The primary goal of the CWA is “to restore and maintain the chemical, physical and biological integrity of the nation’s waters”. Prohibiting the disruption of areas within 100 feet of streams by coal mining activities, unless a CWA Section 404 permit and a 401 Water Quality Certification are obtained are necessary to achieve the goals of the CWA. OSM should retain the current rules, not only because they are more protective of the environment, but also because these rules serve to implement SMCRA in a manner reasonably consistent with the Clean Water Act. The proposed rule changes would weaken stream protections that have been in effect for two decades and would be inconsistent with the CWA.

This is yet another attempt to eliminate the “apparent conflict” between the SZB rule and the permitting practices currently approved by OSM to dispose of excess spoil resulting from mountain top removal coal mining activities. Aligning the SBZ rule with OSM’s historical application of the regulations amounts to overriding congressional intent and SMCRA and would be illegal under the Clean Water Act (CWA). There is no conflict between the SBZ and the excess spoil rule and KWA urges OSM to refrain from any new rulemaking and simply enforce the current rules.

The current controversy and litigation regarding the enforcement and interpretation of the SBZ and excess spoil rule is a result of mountain top removal activities and associated valley fills that continue to increase in size. Particularly in Appalachia where mountains are steep sloped and valleys are frequent and narrow, the cheapest, easiest way for coal companies to dispose of excess spoil that results from mountain top removal is to fill in the valleys and thus obliterate the headwater streams in those valleys. OSM and state agencies failure to enforce the existing rules lead to citizen suits (lawsuits) and a (perceived) conflict with the CWA.

By attempting to align the SBZ rule with OSMs historical application of the regulations your agency is overriding of congressional intent and SMCRA and legitimizing the continued destruction of the “waters of the US”. OSM should simply require the states to enforce the current rule. **We urge OSM to maintain the current SBZ and excess spoil disposal rule and simply to enforce existing regulations.**

SMCRA (30 U.S.C. § 1202(a) – (f) Sec. 102) states that its purpose is:

- (a) establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations;
- (b) assure that the rights of surface land owners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations;
- (c) assure that surface mining operations are not conducted where reclamation as required by this Act is not feasible;
- (d) assure that surface coal mining operations are so conducted as to protect the environment;

(e) assure that adequate procedures are undertaken to reclaim surface areas as contemporaneously as possible with the surface coal mining operations;
(f) 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 agricultural productivity and the Nation's need for coal as an essential source of energy;

Environmental standards in SMCRA to implement (a), (d) and (f) above prescribe that mining operations must “minimize the disturbances to the prevailing hydrologic balance at the mine-site,” and “minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values.” 30 U.S.C. § 1265(b)(10), (b)(24)

If OSM and the states were to more diligently review permit applications for mountain top removal and valley fills under (c) and (e) above some of the newer very large-scale permit applications would not be approved as proposed. These permit applications would be modified or denied since it would be apparent that reclamation as required under the SMCRA was not feasible nor was it feasible to enforce contemporaneous reclamation of the disturbed areas. The enforcement of these primary purposes of the SMCRA alone would greatly reduce the apparent “need” for valley fills and the apparent “conflict” between the current implementation of SMCRA by OSM and the states and overriding goals and regulations found in the CWA.

The buffer zone rule applies only to “intermittent” and “perennial” streams, and not to “ephemeral” streams. As those terms are defined by SMCRA regulation, ephemeral streams are streams “which flows only in direct response to precipitation in the immediate watershed or in response to the melting of a cover of snow and ice, and which has a channel bottom that is always above the local water table.” An intermittent stream is: (a) a stream or reach of a stream that drains a watershed of at least one square mile, or (b) a stream or reach of a stream that is below the local water table for at least some part of the year, and obtains its flow from both surface runoff and ground water discharge. A perennial stream is defined as “stream or part of a stream that flows continuously during all of the calendar year as a result of ground-water discharge or surface runoff. The term does not include intermittent stream or ephemeral stream.” 30 CFR 701.5.

Protection of intermittent and perennial streams is required by SMCRA and by the CWA. Restricting negative stream impacts to ephemeral streams is economically achievable, helps to minimize damage to headwaters and downstream navigable waters, is a goal under both SMCRA and CWA and is in the public interest. A disturbance to these “waters of the US” is allowed only under limited circumstances and is regulated under Sections 401, 402 and 404 of the CWA. SMCRA does not have the authority to amend the CWA and should not try by administrative rulemaking to override the congressional intent to “to restore and maintain the chemical, physical and biological integrity of the nation’s waters”.

KWA also submitted comments on the recent Mountaintop Mining/Valley Fills in Appalachia, Draft Programmatic Environmental Impact Statement. The studies included in the DEIS report document the extensive environmental damage caused by mountaintop removal/valley fills in Appalachia between 1985 and 2001 and the consequences of OSM’s lack of enforcement of the current rules. Some of the environmental damage documented in the report include:

- 724 miles of streams across the Central Appalachian region were buried by valley fills between 1985 and 2001;
- twice that number of stream miles are currently approved for destruction in existing permits;
- an additional 1,200 miles of streams have already been impacted by valley fills;
- selenium was found only in those coalfield streams below valley fills (selenium is a metalloid that, according to the EPA, “can be highly toxic to aquatic life even at relatively low concentrations”);
- amphibians and other aquatic life forms including fish in impacted areas and downstream of valley fills are being harmed or killed, changing the entire native species balance in Appalachia;
- Streams in impacted watersheds have higher base flows and are subjected to higher runoff rates during larger rainfall events. Both of these facts contribute to the increased frequency and severity of flooding in Appalachia and the loss of life and property in our communities in recent years due to flash flooding.
- without additional restrictions, a total of 2,200 square miles of Appalachian forests (6.8 percent) would be eliminated by 2012 by large-scale mining operations;
- without additional environmental restrictions, mountaintop removal mining will destroy an additional 600 square miles of land and 1000 miles of streams in the next decade.

The environmental impacts documented in the DEIS are clear and compelling proof that OSM and the states are not properly implementing and enforcing the provisions and even the overall purpose of SMRCA. Rather than attempting to amend SMRCA and causing surface mining laws to conflict with the CWA, OSM and the state agencies must begin to consistently enforce the SBZ and other provisions of SMRCA that are a necessary and integral part of the law.

In summary, KWA urges OSM to refrain from rulemaking and enforce the SBZ rule as is legal under both the CWA and SMRCA. This would require the enforcement of the SBZ rule for intermittent and perennial streams and restricting negative impacts to ephemeral streams. OSM should also begin to properly enforce the excess spoil disposal rule and stop “permitting” the illegal destruction of headwater streams as evidenced in the DEIS on Mountain Top Removal and Valley Fills.

Thank you for the opportunity to comment. Please add KWA to your list for updates on this action.

Sincerely,

Judith D. Petersen
Executive Director