

Documents responsive to the January 25, 2012, request from Chairman Hastings for documents related to the Office of Surface Mining Stream Protection Rulemaking

Volume: 00035236_Hastings_002

	Document Name	Pages	Document Date	Document Type	Document Title
1	OSM-WDC-B01-00001-000023	1	20091029	MEM	Information Memorandum - Stream Buffer Zone (SBZ) Rule; Advance notice of proposed rulemaking (ANPR)
2	OSM-WDC-B01-00002-000002	2	20100415	MEM	Information Memorandum - Notice of intent to prepare an environmental impact statement
3	OSM-WDC-B01-00002-000003	2	20100430	NTI	Federal Register Notice - Proposed Rule; Notice of intent to prepare an environmental impact statement
4	OSM-WDC-B06-00001-000001	6	20091130	NTI	Federal Register - Advanced notice of proposed rulemaking; notice of intent to prepare a supplemental environmental impact statement (SEIS)

Total Pages: 11

Information Memorandum

TO: Wilma A. Lewis, Assistant Secretary-Land and Minerals Management

FROM: Glenda H. Owens, Acting Director, Office of Surface Mining Reclamation and Enforcement

DATE: October 29, 2009

SUBJECT: Stream Buffer Zone (SBZ) Rule; Advance Notice of Proposed Rulemaking (ANPR)

BACKGROUND:

2008 Rule and Litigation. On December 12, 2008, OSM published a final rule revising the 1983 regulations governing mining within 100 feet of or through perennial or intermittent streams. In January 2009, environmental groups filed two lawsuits challenging the 2008 regulations. In April 2009, Secretary Salazar determined that the 2008 rule had been promulgated improperly because of OSM's failure to initiate consultation under the Endangered Species Act. The Department of Justice asked the court to vacate the 2008 rule and allow the 1983 rule to regain effect. However, on August 12, 2009, the court denied the Government's request. The litigation is proceeding, with an extension to November 12 for the Government to answer the complaints.

Interagency Action Plan to Address Mountaintop Mining in Appalachia. On June 11, 2009, under the direction of the Council on Environmental Quality (CEQ), EPA, the Army Corps of Engineers (Corps), and Interior entered into a memorandum of understanding (MOU) to implement an interagency action plan to significantly reduce the harmful environmental consequences of Appalachian surface coal mining operations. One of OSM's commitments in the MOU is to consider revisions to key provisions of our regulations, including, at a minimum, the SBZ rule and approximate original contour requirements, to better protect the environment and the public from the impacts of Appalachian surface coal mining.

DISCUSSION: After extensive discussions with Justice, EPA, and CEQ regarding the most expeditious way to move forward in revising the SBZ rule and providing sufficient justification to stay the litigation, the decision was made to publish an ANPR. Publication of an ANPR documents our commitment to revise the 2008 SBZ rule to increase stream protection. It also is consistent with the MOU provision concerning the need to consider revisions to our rules and the MOU's commitment to robust public comment. In preparing the ANPR, we sought and considered comments from the Fish and Wildlife Service, CEQ, EPA, and the Corps.

The ANPR lists 12 options for rulemaking. It requests that the public comment on the adequacy of those options and whether we should consider revising other provisions of our rules to achieve the goals of the MOU.

As part of any future rulemaking arising from the ANPR, we will consult with the Fish and Wildlife Service to evaluate the effects on endangered and threatened species, as appropriate.

April 15, 2010

INFORMATION MEMORANDUM

FROM: Joe Pizarchik, Director, Office of Surface Mining Reclamation & Enforcement

SUBJECT: Stream Protection Rule

ISSUE: Notice of Intent to Prepare an Environmental Impact Statement

I. INTRODUCTION

In accordance with a decision approved by the Assistant Secretary-Land and Minerals Management, OSM is developing a comprehensive stream protection rule to better protect streams from the adverse impacts of surface coal mining operations. This approach means that the bureau must prepare a new environmental impact statement (EIS) instead of a supplement to the EIS prepared in connection with the 2008 stream buffer zone rule because the stream protection rule will be much broader in scope than the 2008 rule. Consequently, as required by regulations adopted by the Department and the Council on Environmental Quality, OSM plans to publish a notice of intent to prepare the EIS. This notice is known as a scoping notice. It invites the public to comment on the scope of the EIS and suggest alternatives that should be evaluated. It also invites other governmental entities to submit requests to participate in the process as cooperating agencies.

II. BACKGROUND

On December 12, 2008 (73 FR 75814-75885), OSM published a final rule modifying the circumstances under which mining activities may be conducted in or near perennial or intermittent streams. That rule, known as the 2008 rule, took effect January 12, 2009. A total of nine organizations challenged the validity of the rule in two complaints filed on December 22, 2008, and January 16, 2009 (amended complaint filed February 17, 2009): Coal River Mountain Watch, et al. v. Salazar, No. 08-2212 (D.D.C.) (“Coal River”) and National Parks Conservation Ass’n v. Salazar, No. 09-115 (D.D.C.) (“NPCA”). Under the terms of a settlement agreement signed by the parties on March 19, 2009, the Department agreed to use best efforts to sign a proposed rule by February 28, 2011, and a final rule by June 29, 2012. OSM also agreed to consult with the Fish and Wildlife Service pursuant to the Endangered Species Act, as appropriate, prior to signing the final action. On April 2, 2010, the court granted the parties’ motion to hold the judicial proceedings in abeyance.

OSM had already begun developing a revised rule following the change of administrations on January 20, 2009. On June 11, 2009, the Secretary of the Department of the Interior, the Administrator of the U.S. Environmental Protection Agency (EPA), and the Acting Assistant Secretary of the Army (Civil Works) entered into a 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. Among other things, the MOU committed OSM to consider revisions to key provisions of rules adopted under the Surface Mining Control and Reclamation Act (SMCRA), including the 2008 rule and approximate original contour requirements, to better protect the environment and public health from the impacts of Appalachian surface coal mining.

Consequently, on November 30, 2009 (74 FR 62664-62668), OSM published an advance notice of proposed rulemaking (ANPR) soliciting comments on ten potential rulemaking alternatives. In addition, consistent with the MOU, we invited the public to identify other rules that we should revise.

OSM received approximately 32,750 comments during the 30-day comment period that closed December 30, 2009. After evaluating those and other comments, OSM determined that development of a comprehensive stream protection rule (one that is much broader in scope than the 2008 rule) would be the most appropriate and effective method of achieving the goals set forth in the MOU and the ANPR. This holistic approach will better protect streams and related environmental values. The broader scope of the stream protection rule means that OSM will need to prepare a new environmental impact statement and conduct scoping.

The principal rule changes that OSM is considering include

[REDACTED]

CONTACT: John Craynon, Chief, Division of Regulatory Programs; (202) 208-2866.

HHSF223200730236G, ERG Task No.
0193.16.001.001.

Dated: April 26, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010-10078 Filed 4-29-10; 8:45 am]

BILLING CODE 4160-01-S

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 780, 784, 816, and 817

RIN 1029-AC63

Stream Protection Rule; Environmental Impact Statement

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule; notice of intent to prepare an environmental impact statement.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), intend to prepare an environmental impact statement (EIS) under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA) to analyze the effects of potential rule revisions under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act) to improve protection of streams from the adverse impacts of surface coal mining operations. We are requesting comments for the purpose of determining the scope of the EIS.

DATES: To ensure consideration, we must receive your electronic or written comments on June 1, 2010.

ADDRESSES: You may submit comments by any of the following methods, although we request that you use electronic mail if possible:

- *Electronic mail:* Send your comments to sra-eis@osmre.gov.
- *Mail, hand-delivery, or courier:*

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

FOR FURTHER INFORMATION CONTACT: John Craynon, Chief, Division of Regulatory Support, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave., NW., MS 202-SIB, Washington, DC 20240; Telephone 202-208-2866.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Why are we planning to revise our rules?
- II. What is the proposed federal action?

III. How do I submit comments?

IV. How do I request to participate as a cooperating agency?

I. Why are we planning to revise our rules?

On December 12, 2008 (73 FR 75814-75885), we published a final rule modifying the circumstances under which mining activities may be conducted in or near perennial or intermittent streams. That rule, which this document refers to as the 2008 rule, took effect January 12, 2009. A total of nine organizations challenged the validity of the rule in two complaints filed on December 22, 2008, and January 16, 2009 (amended complaint filed February 17, 2009): *Coal River Mountain Watch, et al. v. Salazar*, No. 08-2212 (D.D.C.) ("*Coal River*") and *National Parks Conservation Ass'n v. Salazar*, No. 09-115 (D.D.C.) ("*NPCA*"). Under the terms of a settlement agreement signed by the parties on March 19, 2010, we agreed to use best efforts to sign a proposed rule by February 28, 2011, and a final rule by June 29, 2012. We also agreed to consult with the Fish and Wildlife Service pursuant to the Endangered Species Act, as appropriate, prior to signing the final action. On April 2, 2010, the court granted the parties' motion to hold the judicial proceedings in abeyance.

However, we had already embarked on that course following the change of Administrations on January 20, 2009. On June 11, 2009, the Secretary of the Department of the Interior, the Administrator of the U.S. Environmental Protection Agency (EPA), and the Acting Assistant Secretary of the Army (Civil Works) entered into a memorandum of understanding¹ (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. Among other things, the MOU committed us to consider revisions to key provisions of our rules, including the 2008 rule and approximate original contour requirements, to better protect the environment and public health from the impacts of Appalachian surface coal mining.

Consequently, on November 30, 2009, we published an advance notice of proposed rulemaking (ANPRM) soliciting comments on ten potential rulemaking alternatives. See 74 FR

¹ The MOU can be viewed online at <http://www.osmre.gov/resources/ref/mou/ASCM061109.pdf>.

62664-62668. In addition, consistent with the MOU, we invited the public to identify other rules that we should revise. We also announced our intent to prepare a supplement to the EIS developed in connection with the 2008 rule.

We received approximately 32,750 comments during the 30-day comment period that closed December 30, 2009. After evaluating those and other comments, we determined that development of a comprehensive stream protection rule (one that is much broader in scope than the 2008 rule) would be the most appropriate and effective method of achieving the goals set forth in the MOU and the ANPRM. We believe that this holistic approach will better protect streams and related environmental values. The broader scope of the stream protection rule means that we will need to prepare a new environmental impact statement rather than the supplement to the 2008 EIS that we originally intended to prepare.

II. What is the proposed federal action?

The proposed Federal action consists of revisions to various provisions of our rules to improve protection of streams from the impacts of surface coal mining operations nationwide. We do not believe that it would be fair, appropriate, or scientifically valid to apply the new protections only in central Appalachia, as some commenters on the ANPRM advocated. Streams are ecologically significant regardless of the region in which they are located. Principal elements of the proposed action include—

- Adding more extensive and more specific permit application requirements concerning baseline data on hydrology, geology, and aquatic biology; the determination of the probable hydrologic consequences of mining; and the hydrologic reclamation plan; as well as more specific requirements for the cumulative hydrologic impact assessment.
- Defining the term "material damage to the hydrologic balance outside the permit area." This term is critically important because, under section 510(b)(3) of SMCRA, the regulatory authority may not approve a permit application unless the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. This term includes streams downstream of the mining operation.
- Revising the regulations governing mining activities in or near streams, including mining through streams.

- Adding more extensive and more specific monitoring requirements for surface water, groundwater, and aquatic biota during mining and reclamation.
- Establishing corrective action thresholds based on monitoring results.
- Revising the backfilling and grading rules, excess spoil rules, and approximate original contour restoration requirements to incorporate landform restoration principles and reduce discharges of total dissolved solids.
- Limiting variances and exceptions from approximate original contour restoration requirements.
- Requiring reforestation of previously wooded areas.
- Requiring that the regulatory authority coordinate the SMCRA permitting process with Clean Water Act permitting activities to the extent practicable.
- Codifying the financial assurance provisions of OSM's March 31, 1997, policy statement² on correcting, preventing, and controlling acid/toxic mine drainage and clarifying that those provisions apply to all long-term discharges of pollutants, not just pollutants for which effluent limitations exist.
- Updating the definitions of perennial, intermittent, and ephemeral streams.

We are in the process of developing alternatives for the proposed Federal action. Comments received in response to this notice will assist us in that process.

We will prepare a draft EIS after we complete the initial stages of scoping and identify which rulemaking alternatives will be analyzed in detail. Following release of the draft EIS, we anticipate publishing a notice of proposed rulemaking, unless we select an alternative that makes rulemaking unnecessary.

III. How do I submit comments?

Consistent with 43 CFR 46.235, we invite all interested persons, organizations, and agencies to provide comments, suggestions, and any other information relevant to the scope of the EIS, the scope of the proposed Federal action, potential alternatives for the proposed Federal action, and studies and impacts that the EIS should address. See **ADDRESSES** for the methods by which we will accept comments. We do not anticipate conducting any meetings dedicated to scoping.

Before including your address, phone number, e-mail address, or other

personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. Comments that we receive after the close of the comment period (see **DATES**) or sent to an address other than those listed in **ADDRESSES** may not be considered.

If you previously submitted comments in response to the ANPR, you do not need to resubmit them. We will consider all ANPR comments as part of this EIS scoping process.

IV. How do I request to participate as a cooperating agency?

Consistent with 43 CFR 46.225, we, the lead agency, invite eligible Federal, state, tribal, and local governmental entities to indicate whether they have an interest in being a cooperating agency in the preparation of the EIS. Qualified entities are those with jurisdiction by law, as defined in 40 CFR 1508.15, or special expertise, as defined in 40 CFR 1508.26. Potential cooperating agencies should consider their authority and capacity to assume the responsibilities of a cooperating agency and make the necessary resources available in a timely manner, as discussed in the document entitled "Factors for Determining Cooperating Agency Status,"³ which is Attachment 1 to the Council on Environmental Quality's January 30, 2002, Memorandum for the Heads of Federal Agencies: Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act. We will not be able to provide financial assistance to cooperating agencies.

If you have an interest in participating as a cooperating agency, please contact the person listed in **FOR FURTHER INFORMATION CONTACT** and identify those aspects of the EIS process in which you are interested in participating. The regulations at 43 CFR 46.230 and Items 4 through 6 in the document discussed in the preceding paragraph list the activities in which cooperating agencies may wish to participate.

Dated: April 16, 2010.

Sterling Rideout,

Assistant Director, Program Support.

[FR Doc. 2010-10091 Filed 4-29-10; 8:45 am]

BILLING CODE 4310-05-P

³ See <http://ceq.hss.doe.gov/nepa/regs/cooperating/cooperatingagencyememofactors.html>.

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG-2009-0890]

RIN 1625-AA09

Drawbridge Operation Regulation; Chambers Creek, Steilacoom, WA, Schedule Change

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking; withdrawal.

SUMMARY: The Coast Guard is withdrawing its notice of proposed rulemaking (NPRM) concerning the drawbridge operation regulation for the Burlington Northern Santa Fe Railroad Bridge across Chambers Creek, mile 0.0, at Steilacoom, Washington, by which two-hour notice would have been required for openings from 3:30 p.m. to 7 a.m. every day. The NPRM is being withdrawn because of multiple objections to the proposed change from users of that waterway.

DATES: The notice of proposed rulemaking is withdrawn on April 30, 2010.

ADDRESSES: The docket for this withdrawn rulemaking is available for inspection or copying at the Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find this docket on the Internet by going to <http://www.regulations.gov>, inserting USCG-2009-0890 in the "Keyword" box and then clicking "Search".

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call or e-mail Austin Pratt, Chief, Bridge Section, Waterways Management Branch, Thirteenth Coast Guard District; telephone 206-220-7282, e-mail address william.a.pratt@uscg.mil. If you have questions on viewing materials in the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202-366-9826.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 2009, we published an NPRM entitled "Drawbridge Operation Regulation; Chambers Creek, Steilacoom, WA, Schedule Change" in the **Federal Register** (74 FR 64641). The

² See the document entitled "Acid Mine Drainage Policy" at http://www.osmre.gov/guidance/significant_guidance.shtm.



Federal Register

**Monday,
November 30, 2009**

Part III

**Department of the
Interior**

**Office of Surface Mining Reclamation and
Enforcement**

**30 CFR Parts 780, 784, 816, et al.
Stream Buffer Zone and Related Rules;
Proposed Rule**

DEPARTMENT OF THE INTERIOR**Office of Surface Mining Reclamation and Enforcement****30 CFR Parts 780, 784, 816, and 817**

[Docket ID OSM-2009-0009]

RIN: 1029-AC63

Stream Buffer Zone and Related Rules**AGENCY:** Office of Surface Mining Reclamation and Enforcement, Interior.**ACTION:** Advance notice of proposed rulemaking; notice of intent to prepare a supplemental environmental impact statement (SEIS).

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are seeking comments on our intention to revise our regulations concerning the conduct of mining activities in or near streams. We have determined that revision of the stream buffer zone (SBZ) rule published on December 12, 2008, is necessary to implement the interagency action plan that the Administration has developed to significantly reduce the harmful environmental consequences of surface coal mining operations in Appalachia, while ensuring that future mining remains consistent with Federal law. In this notice, we describe and seek comment on the alternatives that we are considering for revision of the SBZ rule. In addition, we request your help in identifying significant issues, studies, and specific alternatives that we should consider in the SEIS for this rulemaking initiative.

The June 11, 2009, memorandum of understanding (MOU) implementing the interagency action plan also calls for us to consider whether revisions to other OSM regulations (including, at a minimum, approximate original contour requirements) are needed to better protect the environment and the public from the impacts of Appalachian surface coal mining. We have identified addition of a definition of "material damage to the hydrologic balance" as one such possibility. We invite comment on that option as well as whether there are other OSM regulations that could be revised to implement this provision of the MOU.

DATES: To ensure consideration, we must receive your comments on or before December 30, 2009.

ADDRESSES: You may submit comments by any of the following methods, although we request that you use the Federal e-rulemaking portal if possible:

- *Federal e-Rulemaking Portal:* <http://www.regulations.gov>. The document has

been assigned Docket ID: OSM-2009-0009. Follow the online instructions for submitting comments.

- *Mail, hand-delivery, or courier to:* Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 252-SIB, 1951 Constitution Avenue, NW., Washington, DC 20240. Please include the Docket ID (OSM-2009-0009) with your comment.

Comments that we receive after the close of the comment period (*see DATES*) or sent to an address other than those listed above will not be considered or included in the docket.

Please submit all comments and related materials that you wish us to consider. We are not able to consider comments and materials that were previously submitted in connection with a different rulemaking.

For information on the public availability of comments, *see* Part VII of this preamble, which is entitled "Will comments received in response to this notice be available for review?"

FOR FURTHER INFORMATION CONTACT: Dennis Rice, Division of Regulatory Support, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave., NW. MS 202-SIB, Washington, DC 20240; Telephone 202-208-2829.

SUPPLEMENTARY INFORMATION:**Table of Contents**

- I. Why Are We Publishing This Notice?
- II. What Does SMCRA Say About Streams?
- III. What Provisions of SMCRA Form the Basis for the SBZ Rule?
- IV. What Is the History of the SBZ Rule?
- V. What Are the Major Provisions of the 2008 Rule?
- VI. How Do We Plan To Revise Our Regulations?
- VII. Will Comments Received in Response to This Notice Be Available for Review?

I. Why Are We Publishing This Notice?

On December 12, 2008 (73 FR 75814-75885), we published a final rule modifying the circumstances under which mining activities may be conducted in or near perennial or intermittent streams. That rule, which this notice refers to as the 2008 rule, took effect January 12, 2009. A total of nine organizations challenged the validity of the rule in two complaints filed on December 22, 2008, and January 16, 2009: *Coal River Mountain Watch, et al. v. Salazar*, No. 08-2212 (D.D.C.) ("*Coal River*") and *National Parks Conservation Ass'n v. Salazar*, No. 09-115 (D.D.C.) ("*NPCA*").

In *NPCA*, the Government filed a motion on April 27, 2009, for voluntary remand and vacatur of the 2008 rule. The motion was based on Secretary of

the Interior Ken Salazar's determination that OSM erred in failing to initiate consultation with the U.S. Fish and Wildlife Service under subsection 7(a)(2) of the Endangered Species Act, 16 U.S.C. 1536(a)(2), to evaluate possible effects of the 2008 rule on threatened and endangered species. Granting of the Government's motion likely would have had the effect of reinstating the 1983 version of the SBZ rule. In *Coal River*, the Government filed a motion on April 28, 2009, to dismiss the complaint as moot if the court granted the motion in *NPCA*.

On June 11, 2009, the Secretary of the Department of the Interior, the Administrator of the U.S. Environmental Protection Agency (EPA), and the Acting Assistant Secretary of the Army (Civil Works) entered into a memorandum of understanding (MOU)¹ implementing an interagency action plan designed to significantly reduce the harmful environmental consequences of surface coal mining operations in six Appalachian States,² while ensuring that future mining remains consistent with Federal law. Among other things, the MOU required that OSM develop guidance clarifying how the 1983 SBZ rule would be applied to reduce adverse impacts on streams if the court granted the Government's motion in *NPCA* for remand and vacatur of the 2008 SBZ rule.

However, on August 12, 2009, the court denied the Government's motion in *NPCA*, holding that, absent a ruling on the merits, significant new evidence, or consent of all the parties, a grant of vacatur would allow the government to improperly bypass the procedures set forth in the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, for repealing an agency rule. On the same date, the court denied the government's motion to dismiss in *Coal River*.

The Secretary of the Interior remains committed to reducing the adverse impacts of Appalachian surface coal mining operations on streams. Accomplishing that goal will involve revision or repeal of certain elements of the 2008 rule. The rulemaking process will adhere to the requirements of the Administrative Procedure Act, including any applicable notice and comment requirements, consistent with the court's decision in *NPCA*.

The notice that we are publishing today is the first step in the rulemaking

¹ The MOU can be viewed online at <http://www.osmre.gov/resources/re/mou/ASCM061109.pdf>.

² Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia.

process. We are publishing this notice to seek public input into how the 2008 rule should be revised to better protect streams and implement the MOU. The MOU identifies the stream buffer zone rule and our regulations concerning approximate original contour as two rules that we will consider revising. In this notice, we describe options that we are considering for revision of the stream buffer zone rule. We invite you, the public, to comment on those options, to suggest other options, and to identify other provisions of our regulations that should be revised to better protect the environment and the public from the impacts of Appalachian surface coal mining. After considering the comments, we intend to move expeditiously to develop a proposed rule that will further clarify how streams must be protected within the framework established by SMCRA.

At the appropriate time, we also will initiate consultation with the U.S. Fish and Wildlife Service under subsection 7(a)(2) of the Endangered Species Act, 16 U.S.C. 1536(a)(2), to evaluate possible effects of a new rule on threatened and endangered species.

II. What Does SMCRA Say About Streams?

SMCRA contains three references to streams, two references to watercourses, and several provisions that indirectly refer to activities in or near streams:

- Section 507(b)(10) requires that permit applications include “the name of the watershed and location of the surface stream or tributary into which surface and pit drainage will be discharged.”
- Section 515(b)(18) requires that surface coal mining and reclamation operations “refrain from the construction of roads or other access ways up a stream bed or drainage channel or in such proximity to such channel so as to seriously alter the normal flow of water.”
- Section 515(b)(22)(D) provides that sites selected for the disposal of excess spoil must “not contain springs, natural water courses or wet weather seeps unless lateral drains are constructed from the wet areas to the main underdrains in such a manner that filtration of the water into the spoil pile will be prevented.” The term “natural water courses” includes all types of streams—perennial, intermittent, and ephemeral.

• Section 515(c)(4)(D) provides that, in approving a permit application for a mountaintop removal operation³, the

³ Under section 515(c)(2) of SMCRA, a mountaintop removal operation is a surface coal

regulatory authority must require that “no damage will be done to natural watercourses.”⁴ Section 515(c)(4)(E) of the Act specifies that “all excess spoil material not retained on the mountaintop shall be placed in accordance with the provisions of subsection (b)(22) of this section.”

• Section 516(c) requires the regulatory authority to suspend underground coal mining adjacent to permanent streams if an imminent danger to inhabitants of urbanized areas, cities, towns, or communities exists.

III. What Provisions of SMCRA Form the Basis for the SBZ Rule?

Paragraphs (b)(10)(B)(i) and (24) of section 515 of SMCRA served as the basis for all four versions (1977, 1979, 1983, and 2008) of the stream buffer zone rule with respect to surface mining activities. Section 515(b)(10)(B)(i) requires that surface coal mining operations be conducted so as to prevent the contribution of additional suspended solids to streamflow or runoff outside the permit area to the extent possible using the best technology currently available. Section 515(b)(24) requires that surface coal mining and reclamation operations be conducted to minimize disturbances to and adverse impacts on fish, wildlife, and related environmental values “to the extent possible using the best technology currently available.”

In context, section 515(b)(10)(B)(i) provides that the performance standards adopted under SMCRA must require that surface coal mining and reclamation operations—

(10) Minimize the disturbances to the prevailing hydrologic balance at the minesite and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation by—

(A) * * *

(B)(i) Conducting surface coal mining operations so as to prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow, or runoff outside the permit area, but in no event shall contributions be in excess of requirements set by applicable State or Federal law.

* * * * *

mine that will remove an entire coal seam or seams running through the upper fraction of a mountain, ridge, or hill by removing all of the overburden and creating a level plateau or a gently rolling contour with no highwalls remaining, and capable of supporting certain specified postmining land uses. This term is a subset of the various types of mining commonly referred to as mountaintop mining.

⁴ The regulations implementing this provision interpret the prohibition as applying only to natural watercourses “below the lowest coal seam mined.” See 30 CFR 824.11(a)(9).

Section 515(b)(24) requires that surface coal mining and reclamation operations be conducted in a manner that—

To the extent possible using the best technology currently available, minimize[s] disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve[s] enhancement of such resources where practicable.

Paragraphs (b)(9)(B) and (11) of section 516 of SMCRA form the basis for the stream buffer zone rule at 30 CFR 817.57, which applies to surface activities associated with underground mines. Those provisions of section 516 are substantively equivalent to paragraphs (b)(10)(B)(i) and (24) of section 515 of SMCRA, respectively, except that section 516(b)(9)(B) also includes the provisions found in section 515(b)(10)(E) regarding the avoidance of channel deepening or enlargement.

Commenters responding to this notice should explain how their suggestions concerning revision of the SBZ rule are consistent with these statutory provisions.

IV. What Is the History of the SBZ Rule?

We have had an SBZ rule in place since 1977, but the rule and its application did not receive widespread attention until the 1990s when concerns arose over the environmental impacts of large-scale surface coal mining operations in central Appalachia. Surface mining in this mountainous area of steep slopes and narrow valleys produces more spoil material than can be returned to the site of the excavation created by the mining operation. The excess spoil material is most commonly placed in the valleys adjacent to the mine excavation. These valleys often contain headwater streams. In Appalachia, intermittent streams begin in watersheds as small as 15 acres and perennial streams begin in watersheds as small as 41 acres, according to a study conducted by the U.S. Geological Survey.⁵

The 1983 version of the SBZ rule prohibited disturbance of land within 100 feet of an intermittent or perennial stream unless the regulatory authority found that the conduct of mining activities “closer to, or through, such a stream” would not cause or contribute to the violation of State or Federal water quality standards and would not adversely affect the water quantity or

⁵ Katherine S. Paybins, *Flow Origin, Drainage Area, and Hydrologic Characteristics for Headwater Streams in Mountaintop Coal-Mining Region of Southern West Virginia*, Water Resources Investigations Report 02-4300, U.S. Geological Survey, 2003, p. 1.

quality or other environmental resources of the stream. The 1983 rule has been the subject of litigation.⁶ For a more detailed history of the SBZ rule, please refer to the discussion in the preamble to the 2008 rule (73 FR 75816–75818, December 12, 2008).

V. What Are the Major Provisions of the 2008 Rule?

The 2008 rule replaced the 1983 version of the SBZ rule at 30 CFR 816.57(a)(1) and 817.57(a)(1), which prohibited disturbance of land within 100 feet of a perennial or intermittent stream unless the regulatory authority authorized the proposed activities after finding that conducting those activities “closer to, or through, such a stream” would not cause or contribute to the violation of applicable State or Federal water quality standards and would not adversely affect the water quantity or quality or other environmental resources of the stream. The 2008 rule replaced that requirement with new provisions at 30 CFR 780.28(d) and (e) and 784.28(d) and (e).

Under the 2008 rule at 30 CFR 780.28(d) and 784.28(d), the conduct of activities within a perennial or intermittent stream (with the exception of activities conducted in connection with construction of a stream-channel diversion or in connection with a coal preparation plant located outside the permit area of a mine) is prohibited unless the regulatory authority finds that avoiding disturbance of the stream is not reasonably possible and that the plans submitted with the application meet all applicable requirements in paragraphs (b) and (c) of 30 CFR 816.57 or 817.57. Among other things, those paragraphs require that, to the extent possible, the operator use the best technology currently available to prevent the contribution of suspended solids to streamflow or runoff outside the permit area and to minimize

disturbances and adverse impacts on fish, wildlife, and related environmental values. Under 30 CFR 780.28(d)(2) and 784.28(d)(2), every permit approving disturbance of a perennial or intermittent stream must include a permit condition requiring that the permittee demonstrate compliance with the Clean Water Act before conducting any activities that require authorization or certification under the Clean Water Act.

Under the 2008 rule at 30 CFR 780.28(e) and 784.28(e), activities on the surface of land within 100 feet of a perennial or intermittent stream are prohibited unless the permit applicant demonstrates, and the regulatory authority finds, either that it is not reasonably possible to avoid disturbance of the buffer zone or that avoidance of disturbance is not necessary to meet the fish and wildlife and hydrologic balance protection requirements of the regulatory program. The regulatory authority also must find that the plans submitted by the applicant demonstrate that the operation will, to the extent possible, use the best technology currently available to prevent the contribution of suspended solids to streamflow or runoff outside the permit area and to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values.

Under the 2008 rule at 30 CFR 816.57(a)(1) and (b) and 817.57(a)(1) and (b), certain activities are exempt from the buffer zone requirements of 30 CFR 780.28(e) and 784.28(e) to the extent that the regulatory authority has approved filling the stream segment under 30 CFR 780.28(d) or 784.28(d) or diverting the stream segment under 30 CFR 816.43(b) or 817.43(b). In other words, if a stream segment will cease to exist in its original location as a result of mining activities, the rule provides that there is no need to protect the buffer zone for that stream segment. The activities to which this exemption applies include stream-channel diversions, construction of stream crossings, construction of sedimentation pond embankments, and construction of excess spoil fills and coal mine waste disposal facilities.

The 2008 rule provides that mining operations must return as much of the overburden as possible to the excavation created by the mine. See 30 CFR 780.35(a)(1) and 784.19(a)(1). The 2008 rule also requires that mine operators minimize the volume of excess spoil generated by mining operations and design and construct fills to be no larger than needed to accommodate the anticipated volume of excess spoil to be

generated. See 30 CFR 780.35(a)(2) and 784.19(a)(2).

The 2008 rule further provides that the operator must avoid constructing excess spoil fills, refuse piles, or slurry impoundments in perennial and intermittent streams to the extent possible. When avoidance is not possible, the rule requires that the operator identify a range of reasonable alternatives for disposal and placement of the excess spoil or coal mine waste, evaluate the environmental impacts of each alternative, and select the alternative with the least overall adverse impact on fish, wildlife, and related environmental values. See 30 CFR 780.25(d)(1), 780.35(a)(3), 784.16(d)(1), and 784.19(a)(3).

The 2008 rule states that issuance of a SMCRA permit is not a substitute for the reviews, authorizations, and certifications required under the Clean Water Act, and does not authorize initiation of surface coal mining operations for which the applicant has not obtained all necessary authorizations, certifications, and permits under the Clean Water Act. See 30 CFR 780.28(f)(2), 784.28(f)(2), 816.57(a)(2), and 817.57(a)(2). In particular, the rule requires that the SMCRA permit include a condition prohibiting any disturbance of a perennial or intermittent stream before obtaining all necessary Clean Water Act authorizations. See 30 CFR 780.28(d)(2) and 784.28(d)(2).

VI. How Do We Plan To Revise Our Regulations?

We intend to revise our regulations in a manner consistent with the provisions of SMCRA and the MOU. Part III.A. of the MOU provides that we will review our “existing regulatory authorities and procedures to determine whether regulatory modifications should be proposed to better protect the environment and public health from the impacts of Appalachian surface coal mining.” It further provides that, at a minimum, we will consider revisions to the stream buffer zone rule and our requirements concerning approximate original contour. This notice focuses on revisions to the stream buffer zone rule, but we invite commenters to suggest other provisions of our regulations that could or should be revised to accomplish the objectives of the MOU.

To comply with the National Environmental Policy Act, we intend to prepare a supplement to the final environmental impact statement (FEIS) for the 2008 rule (OSM–EIS–34).⁷ The

⁶In 1999, the U. S. District Court for the Southern District of West Virginia held that the West Virginia version of the SBZ rule prohibited the creation of fills that bury streambeds because (1) nothing in the State or Federal rules supports an interpretation that would exempt the regulatory authority from its obligation to make the buffer zone findings for the segment of the stream that lies within the footprint of the fill, and (2) burying a stream segment would impermissibly destroy that segment. *Bragg v. Robertson*, 72 F. Supp. 2d 642 (S.D. W. Va. 1999). That decision was overturned on appeal on other grounds (lack of jurisdiction under the Eleventh Amendment to the U. S. Constitution). *Bragg v. West Virginia Coal Ass'n*, 248 F.3d 275 (4th Cir. 2001), cert. denied, 534 U.S. 1113 (2002). In a second case, the appellate court stated in its opinion that it is beyond dispute that SMCRA recognizes the possibility of placing excess spoil material in waters of the United States. *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 442–443 (4th Cir. 2003).

⁷OSM–EIS–34, “Proposed Revisions to the Permanent Program Regulations Implementing the

supplement (SEIS) will include and discuss additional information on the impacts of mining on streams and related resources. It also will evaluate additional action alternatives in detail, while incorporating by reference the programmatic analyses in the FEIS, to the extent appropriate. This approach will enable us to meet our National Environmental Policy Act obligations in a cost-effective and timely manner. As provided in 40 CFR 1502.9(c)(4), we will prepare and process the SEIS in the same fashion as a standard environmental impact statement, exclusive of scoping. In other words, we will prepare both a draft SEIS, which will be subject to public comment, and a final SEIS.

Any proposed revisions of our rules must be consistent with the provisions of SMCRA, as discussed in Parts II and III of this notice. We also note that section 102(f) of SMCRA provides that one of the purposes of SMCRA is to “strike a balance between protection of the environment and agricultural productivity and the Nation’s need for coal as an essential source of energy.”

Comments that you provide in response to this advance notice will help us determine which alternatives will be developed in the SEIS and the proposed rule. We encourage commenters to be as detailed as possible and to explain how any suggested regulatory changes are consistent with SMCRA and the rulemaking authority that we have under SMCRA.

The alternatives described below are not necessarily mutually exclusive. After evaluating the comments received, we may decide not to propose some of the alternatives listed here. We also may decide to propose some combination of the listed alternatives, variations of those alternatives, new alternatives suggested by commenters, or new alternatives that we develop. The public will have another opportunity to comment when the proposed rule is published.

We are considering the following alternatives for revising the stream buffer zone rule and related rules:

1. Proposing to repeal the existing SBZ rules (30 CFR 780.28, 784.28, 816.57, and 817.57) and replace them with the 1983 version of the SBZ rule at 30 CFR 816.57 and 817.57, with

conforming revisions to the signs and markers requirements of 30 CFR 816.11 and 817.11. This alternative also would include a proposal to either repeal or make conforming revisions to 30 CFR 780.25(d)(1), 780.35(a)(3), 784.16(d)(1), and 784.19(a)(3), because those provisions contain permitting requirements specific to applications that propose to construct coal mine waste impoundments, refuse piles, or excess spoil fills in or within 100 feet of perennial or intermittent streams. In addition, this alternative could include a proposal to replace the 2008 version of the stream-channel diversion requirements of 30 CFR 816.43 and 817.43 with the 1983 version of those requirements, which includes a reference to the SBZ rule.

We request comment on whether reinstatement of the language in the 1983 SBZ rule would be appropriate, and, if so, how that language should be interpreted to promote stream protection in a way that is fully consistent with SMCRA.

2. Proposing to apply the prohibitions and restrictions of the stream buffer zone rule to all segments of all perennial and intermittent streams and to the surface of all lands within 100 feet of those streams. One variation of this alternative could be to establish a rebuttable presumption that the placement of excess spoil or coal mine waste in an intermittent or perennial stream is prohibited because it would result in an unacceptable level of environmental damage. Another variation could be to prohibit placement of excess spoil or coal mine waste in perennial and intermittent streams and restrict placement in ephemeral streams.

3. Proposing to revise 30 CFR 816.57 and 817.57 to provide that the SMCRA regulatory authority may authorize mining activities in a perennial or intermittent stream, or on the surface of land within 100 feet of such a stream, only if those activities (1) would not violate Sections 401 and 402 of the Clean Water Act; (2) would not violate Section 404 of the Clean Water Act; (3) would not significantly degrade the water quantity or quality or other environmental resources of the stream; and (4) would minimize disturbances and adverse impacts on fish, wildlife, and other related environmental values of the stream to the extent possible using the best technology currently available. A variation on this option would revise criterion (3) to prohibit significant degradation of the water quantity or quality or other environmental resources of the stream “outside the permit area.”

4. Proposing numerical limits on fill size, the percentage of a watershed disturbed by mining operations at any one time, or total stream miles covered by fills in each watershed. The 2005 final programmatic environmental impact statement on mountaintop mining and valley fills found that existing studies provided an insufficient basis to determine a bright-line threshold of the nature described in this alternative.⁸

We invite comment on whether scientific information is now available that might provide a sufficient basis for establishing numerical limits of the nature described in this alternative. We encourage commenters to suggest specific thresholds, together with the rationale for those thresholds.

5. Proposing a quantitative or qualitative threshold beyond which further damage to water quality or aquatic life in a particular watershed would be prohibited. We encourage commenters to identify potential thresholds and explain why those thresholds should be established. We also encourage commenters to discuss how thresholds could be harmonized with Clean Water Act requirements and the Clean Water Act permitting process.

6. Proposing to adopt by regulation the watershed approach described in the following language from the preamble to the 2008 rule⁹:

A watershed approach expands the informational and analytic basis of site selection decisions to ensure impacts are considered on a watershed scale rather than only project by project. The idea being locational factors (*e.g.*, hydrology, surrounding land use) are important to evaluating the indirect and cumulative impacts of the project. Watershed planning efforts can identify and prioritize where preservation of existing aquatic resources are important for maintaining or improving the quality (and functioning) of downstream resources. The objective of this evaluation is to maintain and improve the quantity and quality of the watershed’s aquatic resources and to ensure water quality standards (numeric and narrative criteria, anti-degradation, and designated uses) are met in downstream waters.

We invite comment on how we could best incorporate this approach into our regulations in a manner that is consistent with SMCRA.

7. Proposing a definition of the term “material damage to the hydrologic balance.” Section 510(b)(3) of SMCRA, 30 U.S.C. 1260(b)(3), prohibits the

⁸ “Mountaintop Mining/Valley Fills in Appalachia Final Programmatic Environmental Impact Statement,” (EPA 9-03-R-05002, EPA Region 3, October 2005), pp. 27–28; available at <http://www.epa.gov/region03/mtntop/eis2005.htm>.

⁹ 73 FR 75849, December 12, 2008.

Surface Mining Control and Reclamation Act of 1977 Concerning the Creation and Disposal of Excess Spoil and Coal Mine Waste and Stream Buffer Zones,” is available on the Internet at <http://www.regulations.gov>. The Document ID number is OSM-2007-0008-0553. A copy of the FEIS is also available for inspection in the South Interior Building, Room 101, 1951 Constitution Avenue, NW., Washington, DC 20240.

regulatory authority from approving any permit application unless the regulatory authority first prepares an "assessment of the probable cumulative impact of all anticipated mining in the area on the hydrologic balance," which is known as the cumulative hydrologic impact assessment (CHIA). That section of SMCRA also provides that, after preparing the CHIA, the regulatory authority must make a finding as to whether the proposed operation "has been designed to prevent material damage to the hydrologic balance outside the permit area."

When we adopted our hydrologic information regulations at 30 CFR 780.21 and 784.14, which implement section 510(b)(3) in part, we did not include a definition of "material damage to the hydrologic balance" or establish fixed criteria for that term "because the gauges for measuring damage may vary from area to area and from operation to operation."¹⁰ We seek comment on whether understanding of the relevant hydrology and the associated technology have advanced since 1983 to the degree that there is now support for a definition that would include specific criteria and consistent measures for material damage to the hydrologic balance, and, if so, what that definition might be.

We also seek comment on how we could, or whether we should, propose to revise the definition of cumulative impact area at 30 CFR 701.5,¹¹ the CHIA regulations at 30 CFR 780.21(g) and 784.14(f), and the regulations at 30 CFR

780.21(f) and 784.14(e), which concern the determination of the probable hydrologic consequences of mining, to incorporate elements that are consistent with the manner and standards by which the Corps of Engineers determines potential cumulative adverse impacts on waters of the United States when evaluating a permit application for the discharge of fill material under section 404 of the Clean Water Act.

8. Proposing to require that a SMCRA permit applicant concurrently submit the SMCRA permit application to the SMCRA regulatory authority, the National Pollutant Discharge Elimination System permitting entity (EPA or a delegated State agency), the U.S. Army Corps of Engineers, EPA, and the State agency responsible for certification under section 401 of the Clean Water Act. This alternative would facilitate coordinated permitting under SMCRA and the Clean Water Act for projects proposing mining or related activities in waters of the United States.

9. Proposing more detailed permit application requirements and performance standards for stream-channel diversions and restoration of streams. We also are considering proposing specific requirements for premining stream condition surveys and monitoring or bond release requirements apart from compliance with stream-channel construction criteria and revegetation requirements. We invite comment on whether we should propose additional requirements of this nature and, if so, what those requirements should include.

10. Proposing provisions that would apply only to mountaintop removal operations and operations on steep slopes. This approach would largely limit the impact of the rulemaking to portions of Kentucky, Virginia, and West Virginia, the three States in which the vast majority of fills are constructed. States that do not have steep slopes or that do not allow mining on steep slopes would not be affected. In addition, we

could propose to modify 30 CFR 824.11(a)(9), which applies to mountaintop removal operations, to apply the prohibition in section 515(c)(4)(D) of SMCRA on damaging natural watercourses to all natural watercourses, not just to natural watercourses "below the lowest seam mined."

Finally, we invite you to identify other provisions of our regulations, such as the provisions concerning approximate original contour, that you believe we should consider revising in order to better protect the environment and the public from the impacts of Appalachian surface coal mining, consistent with Part III.A. of the MOU.

Consistent with the requirements of the Administrative Procedure Act, we will publish in the **Federal Register** any regulations that we may subsequently propose. That notice will provide the public with an opportunity to review and comment on the proposed regulations.

VII. Will Comments Received in Response to This Notice Be Available for Review?

Yes. All comments that we receive prior to the close of the comment period (*see DATES*) will be available for review on <http://www.regulations.gov>. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. You may request in your comment that we withhold your personal identifying information from public review, but we cannot guarantee that we will be able to do so.

Dated: November 20, 2009.

Wilma A. Lewis,

Assistant Secretary, Land and Minerals Management.

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¹⁰ 48 FR 43973, September 26, 1983.

¹¹ "Cumulative impact area means the area, including the permit area, within which impacts resulting from the proposed operation may interact with the impacts of all anticipated mining on surface- and ground-water systems. Anticipated mining shall include, at a minimum, the entire projected lives through bond release of: (a) The proposed operation, (b) all existing operations, (c) any operations for which a permit application has been submitted to the regulatory authority, and (d) all operations required to meet diligent development requirements for leased Federal coal for which there is actual mine development information available."