

# *Documents related to the Office of Surface Mining Stream Protection Rulemaking*

## **Volume: 00037389\_Hastings\_001**

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# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, D.C. 20240

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## Technical Instructions/Information

This production CD is labeled "00037389\_Hastings\_001" and contains 7 documents consisting of 104 pages.

All images on the CD are in a multi-page PDF format. PDF files can be opened with Adobe Reader.

On the CD-ROM there is a copy of the index for the volume. The following fields are included on the index: document name, page count, document date, document type and document title.

The format of the date field is the four-digit year, two-digit month and two-digit date (MM/DD/YYYY).

The index lists the abbreviations for the document types. A list of the abbreviations is as follows:

AFF	Affidavit	CTS	Correspondence Tracking System
AGN	Agenda	CVS	Cover Sheet
AGR	Agreement	DEC	Declaration
ANA	Analysis	DEP	Deposition
APL	Application	DFT	Draft
APP	Appeal	DIA	Diary
APR	Appraisal	DIR	Telephone Directory
ART	News article	DM	Departmental Manual
ATT	Attachment	DRW	Drawing
AUD	Audit	DSK	Disk
AVT	Tape (Audio)	EAR	Errata Sheet
BCK	Background Paper	EDI	Editorial
BIAM	BIAM	EML	Email
BILL	Bill	EVL	Electronic Visitor Log
BRF	Briefing Paper/Material	EXP	Excerpt
BULL	Bulletin	FAX	Facsimile
CAL	Calendar	FOIA	FOIA
CDR	Call Detail Report	FR	Federal Register
CDU	Congressional doc	FRN	Federal Register Notice
CFR	CFR	FST	Fact Sheet
CHK	Check	GRT	Grant
CHT	Chart	INT	Interrogatories
COM	Compact	INV	Invitation
CON	Contract	INX	Index
COO	Court Order/Opinion/D	JUS	Justification
COR	Correspondence	LAT	Land Transfer
CPL	Complaint	LEA	Lease
CRD	Business Card	LEG	Legislative Referral
CRE	Congressional Record	LET	Letter
CRF	Certificate	LIG	Litigation
CRT	Certification	MAN	Manual
CTL	Contact List	MAP	Map

MEM Memorandum  
MIN Meeting Minutes  
MLL Mail Log  
MOT Motion  
MOU MOU/MOA  
MTG Meeting Minutes  
NEW Newsletter  
NRL News release  
NTE Notes  
NTI Notice  
ORG Organizational Chart  
PET Petition  
POL Policy statement  
POT Photograph  
PRO Proposal  
PRS Press Release  
PUB Public Law  
Q&A Q&As  
QUS Questionnaire  
RCP Receipt  
REC Record  
REG Regulation

RPT Report  
RUL Rule  
SEC Secretarial Order  
SMN Summons  
STA Statutes  
STM Statement  
STP Status Paper  
STU Study  
SUB Subpoena  
SUM Summary  
SUR Survey  
TAB Table  
TES Testimony  
TKP Talking Points  
TLL Telephone Logs  
TOC Table of Contents  
TRA Transcript  
TSP Tasking Profile  
TVO Travel document  
USC U.S. Code  
VID Tape (Video)

4310-05-P

**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.

**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. The June 11, 2009, memorandum of understanding (MOU) implementing that plan also calls for us to consider whether revisions to other OSM regulations are needed to better protect the environment and the public from the impacts of Appalachian surface coal mining. In this notice, we list the alternatives that we are considering for the SBZ rule. We also identify certain other OSM regulations that could be revised to achieve the goals of the MOU. We invite comment on the potential rule revisions in terms of both substance and implementation.

**DATES:** To ensure consideration, we must receive your comments on or before [INSERT date 30 days after date of publication in the FEDERAL REGISTER].

**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: [www.regulations.gov](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, N.W. MS-202, Washington, DC 20240; Telephone 202-208-2829.

## **SUPPLEMENTARY INFORMATION:**

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- 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. In 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*”), a total of nine organizations challenged the validity of the rule.

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)<sup>1</sup> implementing an interagency action plan to reduce the harmful environmental consequences of surface coal mining operations in six Appalachian states.<sup>2</sup> 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.

Specifically, the decision contains the following finding:

The APA requires government agencies to follow certain procedures, including providing for public notice and comment, before enacting or amending a rule. 5 U.S.C. § 553(b), (c). An agency must follow the same procedure in order to

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

<sup>2</sup> Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia.

repeal a rule. 5 U.S.C. § 551(5) (“‘[R]ule making’ means agency process for formulating, amending, or *repealing* a rule.”(emphasis added)); *see Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (“[A]n agency changing its course by repealing a rule is obligated to supply a reasoned analysis for the change.”); *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 446 (D.C. Cir. 1982), *aff’d*, 463 U.S. 1216 (1983) (“[T]he APA expressly contemplates that notice and an opportunity to comment will be provided prior to agency decisions to repeal a rule.”). While notice and comment procedure is not required where a court vacates a rule after making a finding on the merits, *see, e.g., Cement Kiln Recycling Coal v. EPA*, 255 F.3d 855, 872 (D.C. Cir. 2001), granting vacatur here would allow the Federal defendants to do what they cannot do under the APA, repeal a rule without public notice and comment, without judicial consideration of the merits.

*NPCA*, Slip Op. at 4-5.

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 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. In this notice, we also invite you, the public, 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, consistent with the requirements of SMCRA and the long-term goals of the MOU.

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. Springs and seeps are groundwater discharges. To the extent that those discharges result in intermittent or continuous flows in a channel, they are included within the scope of our definitions in 30 CFR 701.5 of “intermittent stream” and “perennial stream,” respectively. The definition of “intermittent stream,” which is based upon technical literature, includes any “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.”
- Section 515(c)(4)(D) provides that, in approving a permit application for a mountaintop removal operation, the regulatory authority must require that “no damage will be done to natural watercourses.” 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). Furthermore, 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.

\* \* \* \* \*

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.

The common thread in both provisions is the requirement to minimize disturbances and adverse impacts to the extent possible using the best technology currently available.

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<sup>3</sup>. Consequently, the construction of excess spoil fills in those valleys generally involves burying ephemeral streams, often involves burying the upper reaches of intermittent streams, and occasionally involves burying the upper reaches of perennial streams.

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<sup>3</sup> 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.

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 water quality standards and would not adversely affect the water quantity or quality or other environmental resources of the stream. While this language may be interpreted as prohibiting the approval and construction of excess spoil fills that would bury intermittent or perennial streams, SMCRA allows the construction of excess spoil fills in areas containing “springs, natural water courses, and wet weather seeps” if lateral drains are built to prevent infiltration of water into the fill. See section 515(b)(22)(D) of SMCRA, 30 U.S.C. 1265(b)(22)(D). The 1983 rule has been the subject of litigation.<sup>4</sup>

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

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<sup>4</sup> In 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).

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), activities within a perennial or intermittent stream are 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 goals of the MOU. As directed in the MOU, we seek to better protect the environment and the public from the harmful impacts of Appalachian surface coal mining.

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)<sup>5</sup>. 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.

Any proposed revisions of our rules must be consistent with the provisions of SMCRA, as discussed in Parts IV and V of this notice. They also must be consistent with section 102(f) of SMCRA, which 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 considered in preparing 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.

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<sup>5</sup> OSM-EIS-34, “Proposed Revisions to the Permanent Program Regulations Implementing the 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 [www.regulations.gov](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.

The following list briefly describes the rulemaking alternatives that we are considering. These alternatives are not necessarily mutually exclusive. After evaluating the comments received, we may decide not to propose some of the alternatives listed here or we may decide to propose some combination of the alternatives or variations thereof.

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 may include a proposal to repeal 30 CFR 780.25(d)(1), 780.35(a)(3), 784.16(d)(1), and 784.19(a)(3), which contain permitting requirements for 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. It also may 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.
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. We seek comment on the desirability of this alternative and its variations as well as whether these measures are authorized under SMCRA.

3. Proposing to establish siting, design, construction, monitoring, and adaptive management requirements for excess spoil fills and coal mine waste disposal facilities.
4. Proposing to prohibit mining activities that are likely to cause or contribute to a violation of applicable state and federal water quality standards during or after mining and reclamation. In effect, this alternative would mirror 40 CFR 230.10(b) with respect to discharges of dredged or fill material in waters of the United States; it would mirror 30 CFR 816.42 and 817.42 with respect to discharges of water.
5. Proposing to prohibit mining activities that are likely to cause material differences in overall stream flows within the cumulative impact area<sup>6</sup> in terms of biological function and water use. We invite comment on the desirability of this alternative as well as how the term “material differences” could be defined. We also seek comment on whether this alternative differs in a meaningful fashion from 30 CFR 773.15(e), which provides that the regulatory authority may not approve any permit application unless the applicant affirmatively demonstrates, and the regulatory authority finds, after assessing the probable cumulative impacts of all anticipated mining on the hydrologic balance in the

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<sup>6</sup>“*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.” 30 CFR 701.5.

cumulative impact area, that the proposed operation has been designed to prevent material damage outside the permit area.

6. Proposing to prohibit mining activities that would cause significant long-term impairment of aquatic and riparian communities in the cumulative impact area, as that term is defined in 30 CFR 701.5. We invite comment on the desirability of this alternative as well as how the term “significant long-term impairment of aquatic and riparian communities” could be defined.
7. 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.<sup>7</sup> We seek comment on whether this statement remains true today.
8. Proposing a threshold beyond which further damage to water quality or aquatic life in a particular stream would be prohibited. We encourage commenters to identify potential thresholds, explain why those thresholds should be established, and discuss whether such thresholds are authorized under SMCRA. We also encourage commenters to discuss how

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<sup>7</sup> “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>.

thresholds could be harmonized with Clean Water Act (CWA) requirements and the CWA permitting process.

9. Proposing to adopt by regulation the watershed approach described in the following language from the preamble to the 2008 rule<sup>8</sup>:

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.

Permit applicants must work with federal and state regulatory authorities to identify appropriate and available information, such as existing watershed plans, or in the absence of such plans, existing information on current watershed conditions and needs, past and current mining (and other

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<sup>8</sup> 73 FR 75849, December 12, 2008.

development) trends, cumulative impacts of past, present, and reasonable foreseeable future mining activities, and chronic environmental problems (e.g., poor water quality, CWA 303(d)-listed streams, etc.) in the watershed. The regulatory authorities can also provide information on the appropriate watershed scale to consider. The level of data and analysis for implementing a watershed approach must be commensurate with the scale of the project, to the extent appropriate and reasonable.

We invite comment on the desirability of this approach to the review of applications for mining permits, as well as whether there is sufficient authority under SMCRA to adopt regulations implementing this approach.

10. 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 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 impacts assessment (CHIA), and finds that the proposed operation “has been designed to prevent material damage to the hydrologic balance outside the permit area.” At the time that we adopted our hydrologic information regulations at 30 CFR 780.21 and 784.14 implementing section 510(b)(3) in part, we did not adopt a definition of material damage to the hydrologic balance or establish fixed criteria “because the gauges for measuring

damage may vary from area to area and from operation to operation.<sup>9</sup> We seek comment on whether we should now reconsider that position and define “material damage to the hydrologic balance,” and, if so, how. We also seek comment on whether, pursuant to SMCRA, we could, or should, revise our 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) concerning determination of the probable hydrologic consequences of mining to be 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.

11. 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), and the U.S. Army Corps of Engineers to facilitate coordinated permitting under SMCRA and the Clean Water Act.
12. Proposing more detailed permit application requirements and performance standards for stream-channel diversions and restoration of streams. We are also considering establishing 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

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<sup>9</sup> 48 FR 43973, September 26, 1983.

should adopt additional requirements of this nature and, if so, what those requirements should include.

Finally, we invite you to identify other provisions of our regulations that we should consider revising in order to better protect the environment and the public from the impacts of Appalachian surface coal mining, consistent with the requirements of SMCRA and the long-term goals 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.

Any rules ultimately proposed and adopted in response to this notice would not have an immediate effect on state regulatory programs. Existing approved state regulatory program provisions will remain in effect until the states revise those program provisions, either on their own initiative or in response to a notification from OSM under 30 CFR 732.17 that amendments are needed for the program to remain no less effective than the federal regulations implementing SMCRA. In either case, under 30 CFR 732.17(g), no state program amendment may take effect prior to OSM approval.

**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 [www.regulations.gov](http://www.regulations.gov). Before including your address, phone number, email 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: October 30, 2009

Wilma A. Lewis /s/  
Assistant Secretary  
Land and Minerals Management

4310-05-P

**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 [INSERT date 30 days after date of publication in the FEDERAL REGISTER].

**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: [www.regulations.gov](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 MS202-SIB, Washington, DC 20240; Telephone 202-208-2829.

**SUPPLEMENTARY INFORMATION:**

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- 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)<sup>1</sup> implementing an interagency action plan designed to significantly reduce the harmful environmental consequences of surface

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

coal mining operations in six Appalachian states,<sup>2</sup> 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 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

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<sup>2</sup>Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia.

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 operation<sup>3</sup>, the regulatory authority must require that “no damage will be done to natural watercourses.<sup>4</sup>” 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.

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<sup>3</sup>Under section 515(c)(2) of SMCRA, a mountaintop removal operation is a surface coal 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.

<sup>4</sup>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).

### 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 mine site 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.

\* \* \* \* \*

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.<sup>5</sup>

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 quality or other environmental resources of the stream. The 1983 rule has been the subject of

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<sup>5</sup>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.

litigation.<sup>6</sup>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

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<sup>6</sup>In 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).

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)<sup>7</sup>. 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

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<sup>7</sup>OSM-EIS-34, “Proposed Revisions to the Permanent Program Regulations Implementing the 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 [www.regulations.gov](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.

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.<sup>8</sup>

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

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<sup>8</sup>“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>.

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 rule<sup>9</sup>:

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.

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<sup>9</sup> 73 FR 75849, December 12, 2008.

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 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.<sup>10</sup>” 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<sup>11</sup>, the CHIA regulations at 30 CFR

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<sup>10</sup>48 FR 43973, September 26, 1983.

<sup>11</sup> “*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.

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.

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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.”

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 [www.regulations.gov](http://www.regulations.gov). Before including your address, phone number, email 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 /s/  
Assistant Secretary  
Land and Minerals Management