



United States Department of the Interior

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

Appalachian Regional Coordinating Center
Three Parkway Center
Pittsburgh, Pennsylvania 15220

March 25, 2003

Lowell P. Braxton, Director
Utah Div of Oil, Gas & Mining
1594 W. North Temple, Suite 1210
Box 145801
Salt Lake City, UT 84114-5801

Dear Mr. Braxton:

We at the Office of Surface Mining are considering amending our regulations to ensure the adverse environmental effects stemming from the construction of excess spoil fills are minimized and to clarify our stream buffer zone requirements.

Because of your past interest and participation in the regulation of surface coal mining, we are writing to you, as well as others like you, to get your views regarding the conceptual direction of our anticipated rulemaking. We have enclosed for your review a document that describes in more detail the reasons, background, and tentative direction of rulemaking. Your views and suggestions are very important to us as we develop a draft rule, which we anticipate publishing for comment in the Federal Register later this summer.

Please feel free to share this letter and enclosure with your affiliates. Also, please try to have your comments to me by April 15, 2003. You may send comments to my email address at dhartos@osmre.gov or regular mail to the following address:

David G. Hartos, Office of Surface Mining – ARCC,
3 Parkway Center, Pittsburgh, PA 15220

If you have any question, please give me a call at 412-937-2909. Thank you for your assistance.

Sincerely,

David G. Hartos
Physical Scientist

Enclosure

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DIV. OF OIL, GAS & MINING

OUTREACH DOCUMENT

Planned Rulemaking to Clarify Excess Spoil / Stream Buffer Zone Requirements

Why are we contemplating rulemaking?

There is much concern and controversy in the central Appalachian coalfield over the construction of excess spoil fills associated with surface coal mines. This controversy has enveloped several State and Federal agencies and has led to lawsuits, conflicting court decisions, demonstrations, and extensive media attention.

To settle one such lawsuit, the Office of Surface Mining, Environmental Protection Agency, U.S. Fish and Wildlife Service, Corp of Engineers, and West Virginia Department of Environmental Protection voluntarily agreed to prepare an environmental impact study (EIS) to consider possible ways that policies, guidance, and coordinated decision making could help minimize the adverse environmental effects from surface mining and valley fills. While work on this EIS continues, OSM recognized the immediate need to move forward to address conflicting interpretations over key regulations related to excess spoil fills: Stream buffer zone (SBZ) rule and excess spoil disposal rule.

The SBZ rule, as interpreted by the Federal District Court (a 1999 decision later vacated on jurisdictional grounds), seems in direct conflict with OSM's excess spoil rules (and their underlying provision in SMCRA), which expressly authorize the disposal of excess spoil in areas containing springs, natural watercourses and wet weather seeps so long as underdrains are provided. Therefore, OSM needs to resolve that apparent conflict in a manner fully consistent with its underlying statutory authority that the SBZ does not preclude disposal of excess spoil in areas SMCRA expressly contemplates, while, at the same time, developing excess spoil rules that recognize SMCRA's mandate to minimize, to the extent possible, adverse impacts to fish, wildlife, and related environmental values by minimizing the impact of valley fills on those values.

Rulemaking Part 1 - Excess Spoil Minimization

Purpose:

To ensure that the adverse environmental disturbances stemming from the construction of excess spoil fills are minimized to the extent practicable.

Background:

Surface mining in steep terrain generates excess spoil. A recent inventory of excess spoil fills constructed between 1985 through 2001 shows 724 miles (1.2 percent) of intermittent and perennial streams in central Appalachian coalfields have been covered by excess spoil. The headwaters of streams have unique environmental value that is not

considered in the current excess spoil rules, which are focused on safety and stability issues and do not address minimizing the size or the impact of valley fills.

Section 515 (b) (3) of SMCRA requires all surface coal mining and reclamation operations backfill, compact, and grade overburden and other spoil material to restore the approximate original contour (AOC). However, it also provides an exception to AOC in situations where the volume of overburden is large relative to the thickness of coal. In those situations the operator is required to *demonstrate* that due to volumetric expansion the amount of overburden and other spoil and waste material is more than sufficient to restore the approximate original contour.

Section 515 (b) (22) specifies excess spoil material handling and placement requirements. Section 515(b)(22)(I) requires that all other provisions of SMCRA are met. Section 515(b)(24) requires minimizing disturbance and adverse impacts to fish, wildlife, and related environmental values to the extent possible using the best technology currently available. These two statutory provisions (i.e. §515(b)(3) and §515(b)(22)) seem to provide clear statutory authority to require a demonstration that the volume of excess spoil will be minimized as well as minimizing the extent to which excess spoil disposal impacts streams.

Outreach and Rulemaking Objectives:

The objective of this outreach is to solicit comments and suggestions from a diverse audience representing the coal industry, environmentalists, regulators, and others regarding the anticipated direction of rulemaking. These views and suggestions will ultimately shape and lead to a proposed rule.

Conceptually, this is where we contemplate heading in rulemaking:

We anticipate amending the regulations to require an applicant for a surface mining permit in which excess spoil fills are proposed to demonstrate, to the satisfaction of the regulatory authority, three things: first, that the volume of excess spoil is no more than necessary; second, that fills are not designed any larger than necessary to accommodate the anticipated spoil; third, that the location and configuration of the excess spoil fills will result in the least environmental harm after considering alternative sites and designs.

Rulemaking Part 2 – Stream Buffer Zone Waiver Conditions:

Purpose:

To clarify those conditions in which a stream buffer waiver may be authorized by the regulatory authority

Background:

Recent events indicate that many divergent interpretations of the stream buffer zone (SBZ) regulations exist among the regulated coal industry, environmentalists, the public, and even among the regulators, whether those regulations authorize a waiver of the SBZ requirements for excess spoil fills.

There have been three different versions of the SBZ rule. The first in 1977 precluded mining disturbance within 100 feet of an intermittent or perennial stream unless mining through the stream was authorized by the regulatory authority. However, it included no criteria for such authorization. The rationale for the rule was the control of sediment.

The second version was in 1979 and precluded mining within 100 feet of a perennial stream or a stream with a certain biological community unless mining closer or through the stream was authorized. However, such authorization could only be granted if the stream would be diverted, the original stream channel would be restored, and the water quality and quantity of that portion of the stream within 100 feet of mining activities would not be adversely affected. Again, the rationale was based largely upon the prevention of sediment from reaching streams. However, the FEIS accompanying these rules also discussed the importance of protecting riparian vegetation in the western States because of their value to fish and wildlife.

The current version of the Federal SBZ regulations at 816/817.57 have been in place since 1983. It returned to protecting intermittent streams rather than those with a certain biological community and removed the requirement that the stream channel be restored. It also included, for the first time, a reference to not causing or contributing to the violation of applicable state or Federal water quality standards as well as not adversely affecting other environmental resources of the stream. It also just referenced the stream instead of "the stream section within 100 feet of the surface mining activities" as was done in the 1979 rule. Although the definition of intermittent stream includes a two part test; a watershed of at least one square mile, or stream that is below the water table for at least some portion of the year, in the 1983 final environmental impact statement (FEIS) that analyzed the impacts of the current version of the SBZ regulations assumed that the SBZ rule would not extend to streams draining less than 1 square mile. The shift from protecting streams with a biological community back to protecting intermittent streams was litigated and upheld in Federal District Court.

For nearly 20 years, SMCRA regulatory authorities have applied the SBZ requirements in a manner that limited impact upon valley fill placement without OSM raising concerns in oversight. However, in the past few years, citizen and environmental groups have argued in litigation that the current SBZ rule prohibits major mining activity – like construction of excess spoil fills – in the SBZ. At least one, Federal District Court, agreed with this narrow interpretation; however, this interpretation could preclude the regulatory authorities' granting a waiver of SBZ requirements. While the District Court's ruling was overturned on jurisdictional grounds in Federal Appeals Court, a concern remains about the validity of OSM's interpretation of the rule. The District Courts interpretation could prohibit virtually all mining activities within the SBZ.

While some may applaud an interpretation prohibiting mining activities in the SBZ, OSM never intended the current SBZ regulations to be interpreted in this manner. Otherwise, the SBZ regulation would have been written without a SBZ waiver. Additionally, this strict interpretation of the SBZ regulations would conflict with SMCRA statutory provisions (such as §515(b)(22) the provision dealing with excess spoil disposal) where mining activities were contemplated to directly involve streams, and would make the SBZ regulations more stringent than the statutory provisions in which the rules are based.

The SBZ regulations are based primarily on two SMCRA provisions - §515(b)(10) and §515(b)(24). Section 515(b)(10) basically requires operators to minimize disturbance to the prevailing hydrologic balance at the mine-site and offsite and to the quality and quantity of water in surface and ground water systems. To achieve this requirement, §515(b)(10)(B)(i) requires coal mine operators to prevent, to the extent possible using the best technology currently available (BTCA), additional contributions of suspended solids to stream flow or runoff outside of the permit area, but in no event shall the contributions be in excess of requirements set by applicable State or Federal law.

Section 515(b)(24) requires operators, to the extent possible using BTCA, minimize disturbances and adverse impacts of the operation on fish, wildlife, and other related environmental values to the extent possible, and achieve enhancement of such resources where practicable.

Outreach and Rulemaking Objectives:

The objective of this outreach is to solicit comments and suggestions from a diverse audience representing the coal industry, environmentalists, regulators, and others regarding the anticipated direction of rulemaking. These views and suggestions will ultimately shape and lead to a proposed rule, which will be published along with rule to minimize excess spoil.

Conceptually, this is where we contemplate heading in rulemaking:

We anticipate amending the SBZ regulations at 816/817.57 to more closely align with the provisions of SMCRA and OSM's historical application of the regulations. Current exemption criteria would be removed and replaced with the requirement that the applicant demonstrate that the mining operation has been designed using the BTCA to minimize adverse impacts to hydrology, fish and wildlife, and related environmental values, and to prevent to the extent possible using BTCA, additional contribution of sediment to stream flow and runoff outside of the permit site.

Schedule for Outreach and Rulemaking:

04/15/2003	Initial outreach complete
8/15/2003	Proposed rule published in <u>Federal Register</u>