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Dennis G. Rice
Office of Surface Mining Reclamation and Enforcement
Administrative Record
Room 252 SIB
1951 Constitution Avenue, N.W.
Washington, DC 20240

In re: Comments on Docket Number RIN-1029-AC04
Excess Spoil, Coal Mine Waste, and Buffers for Waters of the United States

Dear Mr. Rice:

This letter is to provide comments on the proposed rule entitled "Excess Spoil, Coal Mine Waste, and Buffers for Waters of the United States" (regarding 30 CFR Parts 780, 784, 816, and 817). As published in the *Federal Register* on 24 August 2007 (Volume 72, No. 164, pages 48890-48926), your office announced these proposed amendments of your regulations and invited written comments on them. These comments are provided as a public service and not on behalf of any client. They are based on my professional experience during more than 25 years as a private-sector consulting ecologist, during which time I have worked closely with federal and state regulatory programs relating to mining, wetlands, and water quality.

COMMENT 1. The basic premise of the proposed rule, that excess spoil fills, refuse piles, coal mine waste impoundments, and sedimentation ponds can routinely be authorized in and within 100 feet of perennial or intermittent streams in accordance with SMCRA and its implementing regulations, is fundamentally false. Just because OSM and State regulatory authorities may have *historically applied* the stream buffer zone rules at 30 CFR 816.57 and 817.57 in a flawed manner, does not make it a correct application of the rules. Indeed, it seems perfectly clear that routinely allowing these mining activities in streams was never intended. As noted on page 48894 of your Federal Register notice, "*The preamble to the 1979 rules … states that [b]uffer zones are required to protect streams from the adverse effects of*

sedimentation and from gross disturbance of stream channels". Excess spoil fills, refuse piles, coal mine waste impoundments, or sedimentation ponds, if constructed within streams, clearly will and do cause gross disturbance of the stream channels and degrade water quality.

Furthermore, the 1983 revisions of §816.57 (and §817.57) clearly state that "*no land within 100 feet of a perennial or an intermittent stream shall be disturbed by surface (underground) mining activities*". Although those sections of the regulations do anticipate limited exceptions to the blanket prohibition on mining activities within the buffer zone, even those excepted activities may not "*adversely affect the water quantity and quality or other environmental resources of the stream*". In essence, only if the mining activity can be performed without adversely affecting the stream can it be authorized within the buffer. This is very clear and straightforward language, and I see no opportunity for misinterpretation.

If an excess spoil fill, a refuse pile, a coal mine waste impoundment, or a sedimentation pond is placed within a perennial or intermittent stream, it most certainly will adversely affect the water quantity, water quality, and/or other environmental resources of the stream. Replacing a section of a natural stream (which includes not only the physical structure of that stream but also the ecological functions and benefits that stream provides) with a spoil fill, a refuse pile, a waste impoundment, or a sedimentation pond will permanently and adversely change the stream, because those activities will result in the loss of that section of the stream, and there can be no more adverse effect on that section of stream than the entire loss of the stream section itself.

COMMENT 2. The administration of the 100-foot buffer zone rule, which should be a very simple concept to implement, has become an elaborate attempt to rationalize exemptions and variances for activities that clearly were never intended to be allowed. The central focus in implementing the rule has been diverted from protecting and preserving natural watercourses to rationalizing and justifying how the destruction of whole sections of streams does not represent an adverse impact. The same weasel words and phrases keep being repeated in a deceptive attempt to appear to be providing environmental protection:

> "operations must be designed *to minimize* the creation of excess spoil *to the extent possible"*

"excess spoil fill must be *no larger than needed* to accommodate the anticipated volume of excess spoil generated"

"steps to be taken to *avoid* adverse environmental impacts, or *if avoidance is not possible*, to *minimize* those impacts"

"operations must be conducted in a manner that *minimizes* disturbances to, and adverse impacts on, fish, wildlife, and related environmental values *to the extent possible*, using the best technology currently available".

I have dealt with federal and state regulations for many decades and I can recognize hollow directives such as these that may sound protective, but in fact represent giant loopholes. If an applicant agrees to "minimize disturbances to the extent possible", in reality he will do as he always has done and claim that nothing more protective is *possible* (typically because it will raise costs and lower profits). A claim to use the "best technology currently available" also is a charade: while advances in technology for *mining* coal are continually being developed and applied, there have been no comparable technological advances in the methods to protect streams and other environmental resources (because there is no incentive to do so), and so the "best available technology" may be wholly inadequate for stream protection and use of better techniques may be viewed by the applicant as *not possible*. This is unacceptable.

COMMENT 3. The best protection a stream can receive is to prevent mining within 100 feet of it. This fact is acknowledged in the Draft EIS: "... *in general, stream buffer zones continue to be the best technology currently available for implementation of SMCRA Sections 515(b)(10)(B)(i) and (24)".* It may not be necessary to have an absolute prohibition on all mining activities within the entire 100-foot buffer. Mining activities in some part of the 100-foot buffer, however, should be prohibited in all except the most extraordinary circumstances; it certainly should not be allowed routinely. Most mining activities when conducted in the stream itself (especially excess spoil fills, refuse piles, coal mine waste impoundments, or sedimentation ponds) cause irreversible adverse impacts that cannot be mitigated adequately, and so they should not be allowed in the first place.

COMMENT 4. You propose to include a requirement that applicants submit an alternatives analysis and an environmental evaluation of each alternative proposed to allow certain mining-related activities in waters of the United

States. This alternatives analysis proposal is fatally flawed by the inclusion of the loophole that allows the applicant to select an alternative other than the one with the least overall environmental impact if he can "*demonstrate why implementation of that* [least impact] *alternative is not possible*". This proposed "requirement" is just another spurious attempt to justify allowing mining activities that are not appropriate in or near streams. There are many different methods of mining coal. The method used should be the most compatible with the land being mined. If the topography is so steep that mountaintop removal cannot be done without filling in streams, then another mining method should be used. An applicant may produce reams and reams of documents describing how it has tried to *avoid* and *minimize* adverse impacts to a stream, and measures it will propose to implement to try to mitigate the impacts, but at the end of the day, if a stream or some section of it is allowed to be used as an excess spoil pile, or for some other mining-related activity, then it will not be available for fishing, hiking, or other recreation, it will not support aquatic life or riparian habitat, it will not store floodwaters, and it will not be able to provide the other ecological functions and benefits it provided previously.

COMMENT 5. Your attempt to justify impacts to streams under SMCRA by relying on Clean Water Act (CWA) protections associated with Nationwide Permits (NPs) authorized by the Corps of Engineers (Sections 780.28 and 784.28) is disingenuous. This is nothing more than circular regulatory logic which goes like this: if the proposed work in streams and wetlands already is authorized by a CWA Nationwide Permit, then it should automatically be authorized under SMCRA. That might make sense if the Nationwide Permit authorizations entailed a comprehensive review of the proposed work, but they do not; in fact: a) Nationwide Permits are not carefully reviewed by the Corps in any manner even approaching the review that is required under Individual Permits, b) there are no acreage limitations on impacts associated with the referenced Nationwide Permits (NP 21, NP 49, and NP 50), and c) the Nationwide Permits themselves are considered valid if the proposed work either has been approved or is "*being processed*" by OSM (the circular logic again). Your rules should require independent review of any and all mining activities that will affect wetlands or other waters of the United States, even if those activities undergo separate Clean Water Act approval.

COMMENT 6. Your proposal to expand the protections of the stream buffer rule to all waters of the US, and not just to perennial and intermittent

streams, would be laudable if it were not so ludicrous. The so-called "protection" that you propose to expand is the watered-down version which allows major mine-related activities (excess spoil fills, refuse piles, coal mine waste impoundments, and sedimentation ponds) to occur within those waters. If you are going to lock the henhouse, it hardly can be called "protection" if you lock the fox inside too. If, however, you would propose to retain the same standards of protection as the existing rule ostensibly provides, I would applaud your expanding those protections to <u>all</u> waters of the US, including lakes, ponds, and wetlands.

COMMENT 7. You propose to replace the phrase "adversely affect" with the phrase "significantly degrade" in the conditions under which a variance to the 100 foot buffer could be authorized. This change should <u>not</u> be made. The phrase "significantly degrade" is less restrictive than the existing phrase "adversely affect". To change it would unnecessarily weaken the stream protection currently afforded under the existing rule. You should keep the buffer rule language as it is, and allow no mine-related activities within the buffer except in extraordinary cases where no adverse impact will result.

COMMENT 8. The alternatives you proposed and reviewed are fundamentally flawed because they fail to include the most reasonable alternative, which is to protect streams by <u>enforcing</u> the 100 foot buffer zone under the existing regulation. This seems to be an obvious alternative for consideration, and it is outrageous that it was not included.

COMMENT 9. You say that if mining is not allowed within streams and within the 100 foot buffer zone it would result in a significant detrimental effect on US coal production, which you say would be contrary to one of the stated purposes of SMCRA. However, three of the other stated purposes of SMCRA, all of which are listed *before* the one quoted which refers to "*the Nation's need for coal*", are as follows:

> (a) establish a nationwide program to **protect society and the environment from the adverse effects of surface coal mining operations**;
>
> (b) **assure that the rights of surface landowners** and other persons with a legal interest in the land or appurtenances thereto **are fully protected from such operations**; …
>
> (d) **assure that surface coal mining operations are so conducted as to protect the environment**. [30 U.S.C. 1202 Sec. 102; emphasis added]

Environmental protection obviously is meant to be a primary consideration under SMCRA. There are many methods of coal mining, and coal is mined in many parts of the country. Local conditions should dictate which method is used in a given situation. If a particular mining method is such that it cannot be conducted in a specific location without causing adverse environmental effects, then it should not be allowed in that location. This does not mean that mining in that location is prohibited, only that another method of extracting the coal should be used, one that will not damage the stream corridors and other environmental resources. Under the current rule, variances can be authorized, but only where the proposed work can be done within the buffer in a manner that "*will not adversely affect the water quantity and quality or other environmental resources of the stream*".

COMMENT 10. The existing 100-foot stream buffer rule should be uniformly applied and enforced in connection with underground coal mining as well as surface mining. Certain types of underground mining, longwall mining in particular, cause significant adverse impacts to streams, wetlands, and other surface water resources when the overburden subsides into the mine void. Subsidence is an intrinsic and predictable aspect of longwall mining. Consequently, underground mining activities should be made to comply with the stream buffer rule and should be allowed to occur within the buffer *only* in exceptional circumstances (*e.g.*, where room and pillar mining is proposed and no subsidence can be anticipated).

COMMENT 11. The rules should not be weakened to accommodate mining activities that cannot meet the standards. SMCRA became law 30 years ago largely in response to the environmental devastation being inflicted on the Appalachian coalfields by unregulated strip mining. A major element of the law and its implementing regulations was the inclusion of detailed environmental performance standards. The currently-proposed changes to the 100 foot buffer zone requirement will result in a return to the type of environmental impacts in Appalachia that SMCRA sought to correct. That should not be allowed to happen. As mentioned above, if a particular mining method is such that it cannot be conducted in certain locations without causing adverse environmental effects, then it should not be allowed in those locations. Instead of weakening the rules to accommodate certain coal mining methods, the method of mining must be changed to conform with local conditions and comply with the environmental standards.

COMMENT 12. OSM should not abandon its regulatory and oversight roles in favor of becoming an advocate for private industry. Environmental standards and regulations too often are viewed (at least by the regulated community) as unwarranted infringements on the right to operate a business and make a profit. The debate typically is framed as a strict choice between economics and the environment. The environmental protection rules are seen as imposing unreasonable costs on a business or industry. What is unreasonable, however, is the expectation that any business should be allowed to destroy mountains and streams, and when it happens, to avoid fixing or paying for the damages caused. In that sense, environmental regulations are a means to level the overall playing field, to ensure that all relevant costs and considerations are factored into the approval process. In their absence, the cost of environmental destruction is not reflected in the price of coal, rendering less destructive alternative sources of energy uncompetitive. So long as the regulations are fairly and consistently applied and enforced, it then becomes a free-market decision for the business owner to modify the proposed mining operation to comply with the requirements, or to use a different method of mining that complies. Good old American innovation and ingenuity is still alive and well in this country, and I know that coal can be mined without destroying streams. OSM should not presume otherwise.

In conclusion, I am asking OSM and the State regulatory authorities to retain and enforce the existing 100-foot stream buffer regulatory requirement whereby no mining activity is allowed within 100 feet of perennial or intermittent streams except in specific, extraordinary situations where it can be conclusively demonstrated that there will be no adverse environmental impact on the stream.

Thank you for the opportunity to provide these comments.

Yours truly,

Stephen P. Kunz
Senior Ecologist