DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 780, 816, and 817

RIN 1029–AC04

Surface Coal Mining and Reclamation Operations; Excess Spoil; Stream Buffer Zones; Diversions

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

ACTION: Proposed rule.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are proposing to amend our regulations to accomplish two basic goals: Minimizing the adverse environmental effects stemming from the construction of excess spoil fills; and clarifying the circumstances in which mining activities, such as the construction of excess spoil fills, may be allowed within the stream buffer zone (SBZ), *i.e.*, within 100 feet of a perennial or intermittent stream. By these changes, we intend to clarify our program requirements and reduce the regulatory uncertainty concerning these matters. These changes will also reduce conflicts and improve consistency between regulation under the Surface Mining Control and Reclamation Act of 1977 (SMCRA) and regulation under the Clean Water Act (CWA).

More specifically, we intend to minimize the environmental effects from excess spoil fill construction by requiring that the coal operator demonstrate to the satisfaction of the regulatory authority that, to the extent possible, the volume of excess spoil is minimized; excess spoil fills associated with a mine are designed to be no larger than needed to accommodate the anticipated volume of excess spoil from that mine; alternative configurations for excess spoil disposal, including alternative sizes, numbers and locations of fill are considered; and the proposed excess spoil disposal plan minimizes, to the extent possible, adverse impacts to the prevailing hydrologic balance, fish, wildlife, and related environmental values.

We also propose to amend the regulation commonly referred to as the SBZ rule to more closely align with its basis in SMCRA and our experience in implementing the rule. These changes will require the applicant to demonstrate, to the satisfaction of the regulatory authority, that the mining operation has been designed, to the extent possible, to minimize impacts on hydrology, fish and wildlife, and related environmental values and to prevent additional contributions of sediment to streams prior to allowing mining within 100 feet of a perennial or intermittent stream. We intend to revise rule language that is evidently confusing, has given rise to divergent, conflicting interpretations, has led to litigation, and has raised concern over restrictions that are not required by SMCRA and that might conflict with regulations under the CWA.

Finally, we propose to amend our stream diversion regulation to comport with the proposed changes to the SBZ rule.

DATES: *Electronic or written comments:* We will accept written comments on the proposed rule until 5 p.m., Eastern Time, on March 8, 2004.

Public hearings: Anyone wishing to testify at a public hearing must submit a request on or before 5 p.m., Eastern Time, on January 28, 2004. Because we will hold a public hearing at a particular location only if there is sufficient interest, hearing arrangements, dates and times, if any, will be announced in a subsequent **Federal Register** notice. Any disabled individual who needs special accommodation to attend a public hearing should contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: If you wish to comment, you may submit your comments on this proposed rule by one of three methods. You may mail or hand carry comments to the Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 101, 1951 Constitution Avenue, NW., Washington, DC 20240, or you may send comments via electronic mail to *osmrules@osmre.gov*.

If you wish to comment on the information collection aspects of this proposed rule, you may submit your comments to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Interior Desk Officer, via e-mail to *oira_docket@omb.eop.gov,* or via facsimile to 202–365–6566.

You may submit a request for a public hearing orally or in writing to the person and address specified under **FOR FURTHER INFORMATION CONTACT.** The address, date and time for any public hearing held will be announced before the hearing. Any disabled individual who requires special accommodation to attend a public hearing should also contact the person listed under **FOR FURTHER INFORMATION CONTACT.**

FOR FURTHER INFORMATION CONTACT: David G. Hartos, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 3 Parkway Center, Pittsburgh, PA 15220; Telephone: 412–937–2909. E-mail address: *dhartos@osmre.gov*. Additional information concerning this rule and related documents may be found on our home page on the internet at *http://www.osmre.gov*.

SUPPLEMENTARY INFORMATION:

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I. Introduction

When coal is mined by surface mining methods, rock and soil that overlie the coal must be removed and stored temporarily outside of the immediate mining area. The rock is broken as it is removed, and the broken rock is referred to as ''spoil.'' Because the broken rock incorporates voids and air, spoil is less dense than undisturbed rock; so the volume of spoil removed during mining becomes greater than the volume of rock that was in place prior to mining. After coal removal, the mine operator returns the spoil to the mined-out area for reclamation.

The operator grades the spoil so that it closely resembles the pre-mining topography. We refer to this as returning

the reclaimed mine to the approximate original contour, or simply AOC. Under certain circumstances, by obtaining the necessary approvals, the mine operator may get a waiver from the AOC requirement that allows the operator to grade the backfilled spoil to a shape capable of supporting an alternative postmining land use.

Regardless of whether an operator reclaims the mine to AOC or shapes it to support an alternative postmining land use, there are situations, particularly in steep terrain, where the volume of spoil is more than sufficient and more than is technically feasible to return to the mined-out area when reclaiming the site. Surplus spoil material disposed of in locations other than the mined-out area, except for material used to blend spoil with surrounding terrain in achieving AOC in non-steep slope areas, is referred to as ''excess spoil''.

In Appalachia, on steep terrain, the mine operator may place the excess spoil either in adjacent valleys or on previously mined sites. Our rules at 30 CFR 816.71–74 provide flexibility in design and construction of several types of steep-slope fills: ''valley'', ''head-of-hollow'', and ''durable rock''. Valley and head-of-hollow fills are limited by definition in 30 CFR 701.5 to steep slope areas (valley side slopes of greater than 20 degrees or valley profile [stream] gradient of greater than 10 degrees). Durable rock fills are not limited to steep slopes, but in practice have been the most common fill construction technique in steep slope areas.

Surface coal mining activities other than excess spoil fills may also involve disturbance of stream channels. Coal deposits underlie many streams at shallow depths, and mining activities routinely divert and relocate a watercourse to remove the coal.

Underground mining development involves excavating rock and soil on the surface to expose the coal seam and to provide access for people, equipment, and ventilation for the underground mining operation. This process is referred to as ''facing up.'' In steep terrain, excavated material from these ''face-up'' areas may result in small fills if the excavation is limited to providing coal seam access, or larger fills if facilities such as miners' bathhouses, office buildings, coal storage or coal preparation areas are needed. Some face-up fills are constructed on valley hillsides, and other face-up fills must be placed in adjacent valleys. Underground mining may also involve excavating non-coal waste rock underground. Because underground mining typically brings this waste rock material to the surface, the mine operator typically constructs fills to accommodate the material.

The mine operator may have to place fill in small streams adjacent to the preparation facility or within embankments or impoundments, in order to dispose of coal waste from the cleaning and preparation of coal. Similarly, the operator of a preparation facility may need an impoundment in an adjacent stream valley for withdrawal of cleaning process water. In order to minimize sedimentation and comply with CWA or State effluent standards, an operator of a surface or underground coal mine may need to place sediment control structures or ponds in streams below the mine.

Because of such mining necessities, SMCRA and the implementing regulations on protecting the hydrologic balance and on other subjects, recognize that certain stream impacts may be necessary during coal mining. However, such impacts must be carefully and thoughtfully evaluated, planned for, and minimized to assure the environment is protected during and after mining. *See* SMCRA sections 102(d) and 507(b). The rule proposal described below is consistent with this approach. It would clarify and supplement existing requirements and require a permit applicant to provide relevant information and analysis concerning mine planning and design to minimize environmental impacts.

A. Why Is OSM Initiating Rulemaking To Minimize the Adverse Environmental Effects Stemming From the Construction of Excess Spoil Fills?

Section 201(c)(2) of SMCRA, 30 U.S.C. 1211(c)(2), directs the Secretary of the Interior (the Secretary), acting through OSM, to publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of SMCRA. Section 501(b) of SMCRA, 30 U.S.C. 1251(b), directs the Secretary to ''promulgate and publish in the **Federal Register** regulations covering a permanent regulatory procedure for surface coal mining and reclamation operations performance standards.'' The implementing OSM regulations are codified at 30 CFR Chapter VII.

Since the early 1970's, large-scale surface mining has become a more prevalent means of coal extraction in the central Appalachian coalfields. Most surface coal mining in the mountainous terrain of central Appalachian coalfields unavoidably generates excess spoil. This excess spoil is often placed in the upper reaches of valleys adjacent to the mine. In the Appalachian coalfields, even the upper reaches of valleys may contain stream channels or watercourses with continual (perennial) or intermittent flow. For example, the United States Geologic Survey studied a sample of streams in West Virginia and found that, on average, perennial streams may begin in watersheds of 40.8 acres and intermittent streams in watersheds of 14.5 acres. [Paybins, 2003, p.1 (citations in this preamble to the reference materials listed at I.C. of the preamble, are set out in brackets)].

An OSM inventory of fills in the central Appalachian coalfields (eastern Kentucky, Tennessee, southwestern Virginia and southern West Virginia) identified about 5700 excess spoil fills constructed between 1985 and 2001. [U.S. Environmental Protection Agency (USEPA), 2003, p. III. K–15] Spoil from these fills covered approximately 1.2 percent of the small streams (724 of the estimated 59,000 miles of streams) in the inventory region. [*Ibid,* p. III. K–47] OSM has estimated that, without changes in production or mining technology, excess spoil fills may potentially impact an additional 724 stream miles in the next seventeen years. [*Ibid*, p. IV. B–2].

As the population and the cumulative surface extent of surface mines and excess spoil fills have increased, so have the concerns regarding the adverse environmental effects from the construction of excess spoil fills. In the summer of 1998, the West Virginia Highlands Conservancy—an environmental organization—and several citizens filed suit in Federal court against the West Virginia Division of Environmental Protection (WVDEP) alleging that the State was not administering its SMCRA-based coal regulatory program in compliance with State requirements. *Bragg* v. *Robertson* (Bragg), Civ. No. 2:98–0636 (S.D.W. Va.).

In addition to suing the WVDEP, the plaintiffs in *Bragg* sued the U.S. Army Corps of Engineers (USCOE) concerning its implementation of CWA Section 404 in the permitting of excess spoil fills. Among other issues, plaintiffs argued that the USCOE should have been individually permitting excess spoil fills rather than issuing authorizations under its nationwide permits (NWP) process. Coal mining activities affecting ''waters of the United States'' are subject to applicable requirements of CWA Section 404. The USCOE is the primary Federal authority responsible for issuing Section 404 permits, which may be either NWP or individual permits (IP). The USCOE uses the NWP process for coal mining activities that have less than a minimal impact on aquatic

resources—both individually and cumulatively.

In December 1998, the parties reached an agreement, which addressed all outstanding counts directed at the USCOE in *Bragg*. Pursuant to the settlement agreement, in February 1999 OSM, the U.S. Fish and Wildlife Service (USFWS), USEPA, USCOE, and WVDEP initiated preparation of a draft programmatic environmental impact statement (EIS) under the National Environmental Policy Act (NEPA).

The agencies designed the EIS to consider developing agency policies, guidance, and coordinated agency decision-making processes to minimize the adverse effects stemming from mountaintop mining/valley fills in the Appalachian coalfields. The agencies released the draft EIS for public comment on May 29, 2003.

While work towards finalizing that EIS continues, we recognized the need to revise and clarify our national rules to address environmental effects from the construction of excess spoil fills.[1] We are moving forward with this rule to expeditiously address concerns regarding the construction of excess spoil fills and regulatory uncertainty regarding our stream buffer zone regulations.

As part of our oversight activities and separate from the EIS, we conducted studies in Kentucky, Virginia and West Virginia to determine how the regulatory authorities were administering SMCRA programs regarding AOC and postmining land use requirements. [USDOI–OSM, May 1999; USDOI–OSM, September 1999; USDOI–OSM, May 2000] When we examined permit files and reclaimed mines, we found it difficult to distinguish between the reclamation configuration of mines that were not to be reclaimed to AOC and the reclamation configuration of mines that were to be reclaimed to AOC. There were no clear differences in the number and size of the excess spoil fills, although we anticipated that non-AOC mines would typically have larger or more numerous fills. We determined that typically, coal mine operators could have retained more spoil on mined-out areas under applicable AOC requirements than they were actually retaining.

We also found that, in many instances, coal mine operators were overestimating the anticipated volume of excess spoil. As a result, we concluded that coal companies were designing fills larger than necessary to accommodate the anticipated excess spoil. Where fills are larger than needed, more land outside the coal extraction area is disturbed than is necessary. We attributed these problems, in part, to inadequate regulatory guidance. Therefore, we recommended that each regulatory authority work with us to develop enhanced guidance on material balance determinations, spoil management, and AOC. Kentucky, Virginia and West Virginia have developed such guidance; we also developed such guidance for the Tennessee Federal program. We continue to review the implementation and effectiveness of this guidance.

Most excess spoil is attributed to surface mining in the steep terrain of the central Appalachian coalfields, and we commend Kentucky, Virginia and West Virginia for their improvements in addressing AOC and the volume of excess spoil. However, we believe there is also a need to revise the national regulations concerning excess spoil placement, because surface mining throughout the country may generate excess spoil. Our existing regulations pertaining to excess spoil fill construction are primarily focused on ensuring that fills are safe and stable. However, these regulations, with minor exceptions, do not explicitly address how the applicants must demonstrate consideration and minimization of the environmental effects of fill construction.

Existing regulatory requirements primarily address the need to ensure that excess spoil fills are not subject to erosion, are stable, and do not cause landslides or washouts. However, SMCRA section 515(b)(22)(I) requires that operators place all excess spoil material so that all other provisions of SMCRA are met. Under this requirement, hydrologic balance, water quality, revegetation, and other performance standards must be addressed in excess spoil design and construction plans.

Accounting for the volume of excess spoil material is standard engineering practice in mine design, and is clearly envisioned by section 515(b)(3) of SMCRA. Concerning thick overburden, this section requires the operator to demonstrate that, due to volumetric expansion of the overburden and other spoil and waste material, more than sufficient material is available to reclaim the site to AOC. In response to a comment on the proposed rule adopted in 1983 on thick overburden performance standards, at 30 CFR 816.105, we stated:

> In a thick-overburden situation the operator must meet all of the performance standards of the rules except that the operator, after achieving AOC, may exceed the AOC requirement. The amount of excess overburden is a site-specific condition and easily documented. Therefore, each permit application requesting consideration under this section should be evaluated by the regulatory authority.

48 FR 23365, (May 24, 1983.)

For all of the above reasons, we believe that national rulemaking is needed to make explicit the requirements that the volume of excess spoil be minimized by returning as much mine spoil to the mined out area as possible, and that excess spoil fills be designed and constructed to minimize the adverse effects to the hydrologic balance, fish, wildlife, and other environmental resources.

B. Why Is OSM Proposing To Revise Its Stream Buffer Zone Regulation?

There is no provision in SMCRA requiring establishment or protection of stream buffer zones. We adopted the concept of a ''buffer zone'' around intermittent and perennial streams as a means ''to protect stream channels from abnormal erosion'' from nearby upslope mining activities. 42 FR 62652 (December 13,1977).

1. Evolving Stream Buffer Zone Rule Controversy

The current Federal SBZ rule has been in effect since June 30, 1983. State regulatory programs include similar requirements. These SBZ requirements were implemented for nearly twenty years before the *Bragg* lawsuit was filed in July 1998. The issues and allegations raised in *Bragg* indicate that there remains considerable misunderstanding regarding the meaning of the SBZ regulation at 30 CFR 816.57, particularly as it applies to the placement of excess spoil fills within and near intermittent and perennial streams.

In addition to the concerns expressed in *Bragg* about USCOE administration of CWA section 404, the plaintiffs alleged that WVDEP violated the West Virginia stream buffer zone rule (38 C.S.R. 2–5.2(a)) by approving applications for surface mining permits that disturb stream buffer zones, even though the permitted activities could not satisfy the applicable criteria for a variance. Plaintiffs argued that the Director of WVDEP may grant a variance for surface mining activities closer than 100 feet to, or through, an intermittent or perennial stream only if he finds that such activities ''will not adversely affect the

[1] The December 23, 1998, settlement agreement between the plaintiffs and the defendants in *Bragg* led to the initiation of the EIS. Paragraph 21 of that agreement states: ''* * * Nothing in this Settlement Agreement shall be construed to limit or modify the Federal Agencies' discretion to alter, amend, or revise from time to time any actions taken by them pursuant to this Settlement Agreement or to promulgate superseding regulations.''

normal flow or gradient of the stream, adversely affect fish migration or related environmental values, materially damage the water quantity or quality of the stream and will not cause or contribute to violations of applicable State or Federal water quality standards,'' under 38 C.S.R. 2–5.2(a). Plaintiffs argued that the State's SBZ rule allows surface mining activities ''closer to, or through'' land within 100 feet of an intermittent or perennial stream only if the activities are minor incursions, but not if the activities would bury substantial portions of the stream. Plaintiff's December 30, 1998, Amended Complaint for Declaratory and Injunctive Relief at 21, filed in *Bragg supra*.

The plaintiffs also argued that valley fills (excess spoil fills) violate the SBZ requirements because such fills bury and destroy substantial portions of intermittent or perennial streams. Plaintiffs contended that, by their very nature, such fills adversely affect the normal flow or gradient of the stream, adversely affect fish migration and related environmental values, materially damage the water quantity and quality of the stream, and cause or contribute to violations of applicable State water quality standards in the segment of the stream actually filled. *Id*. at 21–22.

In reply to plaintiffs' allegations in *Bragg*, WVDEP agreed that streams should be protected, but stated that the language of the West Virginia SBZ rule refers not just to the ''footprint'' of the fill, but to the entire stream segment. WVDEP stated that the plaintiffs are ''myopic'' to think that OSM, in promulgating the SBZ rules, was speaking of particular stream segments. WVDEP asserted that the SBZ protections apply to a stream's entirety, so that one part of a stream, usually the headwaters and upper reaches, may be filled as long as stream quantity and quality are not adversely affected downstream. We were aware that this had been the State's interpretation for a number of years, and we had not taken issue with it.

In August 1999, USEPA, USCOE, OSM, and WVDEP signed a memorandum of understanding (MOU) to clarify the application of the SBZ regulations to the placement of excess spoil fills in waters of the United States. The agencies agreed that the CWA section 404(b)(1) Guidelines (40 CFR Part 230), promulgated by USEPA and used by USCOE in administering the CWA section 404 program, contain requirements comparable to the SBZ regulations. For example, the Guidelines require, among other things, that a discharge shall not be authorized if it will cause or contribute to a violation of State water quality standards or result in significant degradation of waters of the U.S. (40 CFR 230.10(b) and (c)). The MOU states that OSM and WVDEP believe that, if a proposed fill is consistent with the requirements of the CWA section 404(b)(1) Guidelines and applicable requirements for State certification under CWA section 401, the proposed mining operation has satisfied the requirements for a buffer zone waiver under SMCRA and WVDEP regulations.

On October 20, 1999, Judge Haden issued a decision in *Bragg* concerning WVDEP implementation of the State SBZ rule (38 C.S.R. 2–5.2(a)). Judge Haden rejected WVDEP's interpretation that the State SBZ rule applies to the stream as a whole, as opposed to a particular stream segment. He said that such an interpretation leads to an absurd result that miles of stream could be filled and deeply covered with rock and dirt, but, if some stretch of water downstream of the fill remains undiminished and unsullied, the stream has been protected. He went on to say that State and Federal SBZ regulations clearly contemplate protecting stream segments.

The October 20, 1999, decision in *Bragg* also commented on the August 1999 MOU addressing compliance with SBZ waiver requirements. Judge Haden concluded that compliance with the CWA 404(b)(1) Guidelines is not sufficient to satisfy the SBZ waiver requirements, because the Guidelines are more lenient and less protective than the SBZ rule. He explained that the Guidelines require that there be no ''significant degradation'' of waters of the United States; whereas, the SBZ rule requires that the fill ''will not adversely affect'' certain environmental values. Judge Haden concluded that the August 1999 MOU must be rejected as inconsistent with the statutes it interpreted. Accordingly, he held that the MOU is without force or effect on SBZ requirements.

The district court granted summary judgment for the plaintiffs on the SBZ issues, and held that the Director of WVDEP has a non-discretionary duty under the buffer zone rule to deny variances for valley fills in intermittent and perennial streams because they necessarily adversely affect stream flow, stream gradient, fish migration, related environmental values, water quality and quantity, and because they violate State and Federal water quality standards. He also granted the plaintiffs' motion to permanently enjoin the Director of WVDEP from further violations of the non-discretionary duties discussed above and from approving any further surface mining permits under current law that would authorize placement of excess spoil in intermittent and perennial streams for the purpose of waste disposal.

On October 21, 1999, the Director of WVDEP issued an order that no new fill permits would be issued, and no existing fills or permitted fills could be advanced. The coal industry and labor officials expressed considerable concern about the *Bragg* decision and the WVDEP Director's order, because coal mining necessitates stream disturbance.

WVDEP and USCOE appealed Judge Haden's October 1999 decision and order, and were granted a temporary stay of the order pending a decision by the Court of Appeals for the Fourth Circuit. October 29, 1999, Memorandum Opinion and Order Granting Stay at 5, *Bragg supra*.

The U.S. Department of Justice (DOJ) filed a brief on behalf of Federal Appellants in the *Bragg* appeal, which asserted:

> The district court also correctly granted summary judgment on Count 3, holding that the burial of substantial portions of intermittent or perennial streams in valley fills causes adverse environmental impact in the filled stream segments and therefore cannot be authorized consistent with the stream buffer zone rule. The uncontested evidence demonstrates that the burial of substantial portions of intermittent or perennial streams causes adverse environmental effects to the filled stream segments, as such fill eliminates all aquatic life that inhabited those segments.

April 17, 2000, Brief for the Federal Appellants at 25, filed in *Bragg* v. *Robertson*, C.A. No. 99–2683.

However, DOJ qualified the Government's endorsement of the district court's remedy:

> By prohibiting the placement of any excess spoil in intermittent or perennial streams, the district court stripped WVDEP of authority to approve much more modest spoil disposal activities than those challenged by Bragg. The district court's injunction prohibits even minor spoil disposal activities that do not involve the filling of stream segments. Indeed, the district court's injunction would prohibit the placement of even *de minimis* amounts of excess spoil, such as a single rock or handful of dirt, in any intermittent or perennial stream. Neither the law nor the evidence presented to the district court mandates the conclusion that such spoil disposal inevitably causes adverse environmental effects.

Id. at 45.

OSM was not a party to the *Bragg* litigation, and the narrow interpretation of the SBZ rule set out in the DOJ brief is not consistent with our historic interpretation of SMCRA rules. We are

aware of no instance in which OSM has interpreted the SBZ rule to prohibit mining activities, including excess fill construction, within 100 feet of intermittent and perennial streams. In fact, in the preamble of the 1983 SBZ rule, we recognized that mining would directly impact many small streams, especially in Appalachia, but that the SBZ rule, along with other requirements, provides the basis for minimizing those impacts. 48 FR 30313 (June 30, 1983).

Nonetheless, because of the DOJ brief, on April 17, 2000, the Solicitor of the Department of the Interior and the acting Director of OSM sent a letter to the Director of WVDEP informing WVDEP that the August 1999 MOU does not represent the Federal government's current interpretation of the SBZ rule. The letter stated that the Department had reconsidered its position and no longer felt compliance with CWA 404(b)(1) guidelines and CWA 401 certification equated to compliance with the SBZ requirements.

On May 22, 2000, the acting Director of OSM sent letters to the regulatory authorities in Kentucky, Virginia and West Virginia. The letters stated that OSM would develop guidance to explain that findings made in applying the CWA section 404(b)(1) Guidelines cannot be used as a substitute for the finding required to grant a SBZ waiver for the disposal of excess spoil in intermittent or perennial streams. The letter further advised that the guidance would state that the SBZ waiver finding must be applied to each segment of an intermittent or perennial stream in which fill will be placed.

The acting Director of OSM went on to say in the May 22, 2000, letter:

> Pending completion and issuance of that guidance, we believe that permitting decisions regarding whether an activity is entitled to a waiver of the buffer zone requirement must be made on a case-by-case basis, as a part of the stream buffer zone analysis for activities impacting either an intermittent or a perennial stream. This analysis must consider all factors identified in the approved SMCRA program for granting the waiver, including the SBZ regulation found at 30 CFR 816.57.

Neither the brief filed on April 17, 2000, nor the May 22, 2000, letter from the acting Director of OSM to certain regulatory authorities precludes us from reconsidering those interpretations based on the entire record before us, including subsequent developments in *Bragg* and related litigation, and other relevant information and analysis.[2]

On April 24, 2001, the Court of Appeals for the Fourth Circuit overturned the district court's October 20, 1999, decision in *Bragg.* The court of appeals said that, under the 11th Amendment to the U.S. Constitution, the district court did not have jurisdiction to hear the case concerning the State's SBZ rule, because of the State's sovereign immunity. The appellate decision did not address the merits of the plaintiffs' or Federal government's arguments regarding interpretation of the SBZ rule. (*Bragg* v. *Robertson*, 248 F.3d 275 (4th Cir. 2001).

In two later opinions, Judge Haden again addressed the relationship between the SBZ regulation and the CWA in *Kentuckians for the Commonwealth, Inc.* v. *Rivenburgh*, reported at 204 F.Supp. 2d 927 and 206 F. Supp. 2d 782 (S.D. W. Va. 2002). Although neither the SBZ regulations nor SMCRA were at issue in the case, Judge Haden concluded that:

> In SMCRA, when Congress dealt specifically with surface coal mining overburden, it reinforced its plan that fills were appropriate where, and only where, they were justified by some constructive end use and purpose served by the fill itself. Otherwise, such overburden is just waste, to be returned to the mine site to recreate the AOC of the landscape mined. SMCRA contains no provisions authorizing disposal of overburden waste in streams, a conclusion further supported by the stream buffer zone rule.

204 F. Supp. 942.

These opinions were appealed. The Court of Appeals for the Fourth Circuit rejected the district court's comments on the SBZ rule, noting that:

> [R]egardless of whether the fill has a beneficial purpose, SMCRA does not prohibit the discharge of surface coal mining excess spoil in waters of the United States.

Kentuckians for the Commonwealth, Inc v. *Rivenburgh*, 317 F. 3d 425, 442 (4th Cir. 2003).

The appeals court further stated:

> Indeed, it is beyond dispute that SMCRA recognized the possibility of placing excess spoil material in waters of the United States even though those materials do not have a beneficial purpose. Section 515(b)(22)(D) of SMCRA authorizes mine operators to place excess spoil material in ''springs, natural water courses or wet weather seeps'' so long as ''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.'' 30 U.S.C. 1265(b)(22)(D). In addition, section 515(b)(24) requires surface mine operators to ''minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable,'' implying the placement of fill in the waters of the United States. 30 U.S.C. 1265(b)(24). It is clear that SMCRA anticipates the possibility that excess spoil material could and would be placed in waters of the United States, and the fact cannot be juxtaposed with section 404 of the Clean Water Act to provide a clear intent to limit the term ''fill material'' to material deposited for a beneficial primary purpose.

Id. at 443.

In light of all the questions and concerns that have been raised concerning SBZ requirements, we are proposing amendments to the SBZ rule to clarify the circumstances in which mining activities such as the construction of excess spoil fills may be allowed within the SBZ.

2. SBZ Regulatory Background

As previously explained, there are no provisions in SMCRA requiring establishment or protection of a stream buffer zone. We adopted the concept of a ''buffer zone'' around intermittent and perennial streams[3] as a means ''to protect stream channels from abnormal erosion'' from nearby upslope mining activities. 42 FR 62652 (December 13, 1977) The initial program regulations establishing the SBZ requirements provide:

> No land within 100 feet of an intermittent or perennial stream shall be disturbed by surface coal mining and reclamation operations unless the regulatory authority specifically authorizes surface coal mining and reclamation operations through such a stream. The area not to be disturbed shall be designated a buffer zone and marked as specified in § 715.12.

30 CFR 715.17(d)(3).

The 1977 regulation, which is still in effect, does not specify the conditions under which the regulatory authority could waive the SBZ requirement. We confirmed in the preamble to the 1977 rule that, ''if operations can be conducted within 100 feet of a stream in

[2] Positions taken by agencies in briefs submitted in litigation are ''entitled to respect * * * to the extent that [they] * * * have the 'power to persuade,' '' but are not normally entitled to the judicial deference given to validly promulgated agency regulations. *Chevron USA Inc.* v. *Natural Resources Defense Council, Inc.*, 46 U.S. 837 (1984). *See Ball* v. *Memphis Bar-B-Q Co.*, 228 F.3d 360, 365 (4th Cir. 2000) (quoting *Christensen* v. *Harris Co.*, 529 U.S. 576, 587 (2000)). Similarly, documents such as opinion letters and policy statements from federal officials are not entitled to the degree of deference accorded to adopted rules. Id. Agency positions in such documents have at most, limited effect as statements of agency policy or interpretation. This is particularly so if the agency subsequently re-evaluates a matter. *See also Appalachian Power Co.* v. *Train*, 620 F.2d 1040, 1045–6 (4th Cir. 1980).

[3] The initial regulations defined ''Intermittent or perennial streams'' to mean ''a stream or part of a stream that flows continuously during all (perennial) or for at least one month (intermittent) of a calendar year as a result of ground-water discharge or surface runoff.'' 42 FR 62678 (December 13, 1977)

an environmentally acceptable manner, they may be approved.'' 42 FR 62652 (December 13, 1977).

We published our permanent program regulations in the **Federal Register** on March 13, 1979. Those regulations retained a revised SBZ concept as a means to implement various SMCRA provisions, in particular, sections 515(b)(10) and 515(b)(24). 44 FR 15176 (March 13, 1979). Section 515(b)(10) requires that mining operations ''minimize the disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas' by, among other things, preventing, to the extent possible, additional contributions of suspended solids to stream flow or runoff outside of the permit area. Section 515(b)(24) requires operations to ''minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values.''

We explained in the preamble to the 1979 final rule: ''Buffer zones are required to protect streams from adverse effects of sedimentation and from gross disturbance of stream channels.'' 44 FR 15176 (March 13, 1979) The bulk of the discussion in that preamble focused on protecting streams from sedimentation. *Id.* We stated that the SBZ rule ''protects stream channels, but contemplates that the regulatory authority may allow surface mining activities to be conducted within'' the SBZ. ''Thus, if operations can be conducted within 100 feet of a stream in an environmentally acceptable manner, they may be approved.'' *Id.*

The 1979 SBZ rule specified conditions under which the regulatory authority could grant an exemption to the SBZ restriction. The permanent program rule also replaced the term ''intermittent stream'' with ''stream with a biological community.'' The 1979 permanent program rule provided that, in order to grant an exemption from the SBZ restriction, the regulatory authority had to find:

(1) That the original stream channel will be restored; and

(2) During and after the mining, the water quantity and quality from the stream section within 100 feet of the surface mining activities shall not be adversely affected.

30 CFR 816.57(a).

It is important to note that the second finding required for granting an SBZ waiver requires the regulatory authority to evaluate effects on water quantity and quality, not at the location of the mining activity, but within 100 feet of the activity. This concept was not expressly retained in the 1983 version of the SBZ rule. However, the 1983 rule language does not preclude OSM's practice since 1979 of not requiring evaluation of effects on the segment of stream directly affected by surface mining activities. Instead, when acting on waivers for the buffer zone, OSM has required an evaluation of the effects anticipated within the stream section within 100 feet downstream of the surface mining activities, and outside the area affected by surface mining activities.

On March 30, 1982, our current SBZ regulations were published in the **Federal Register** as proposed rules. 47 FR 13466. We published the final regulations over a year later on June 30, 1983. (48 FR 30327). In the preamble to the proposed rule in March 1982, we stated that the 1979 regulations had to be changed because they had proved excessive and too confusing to implement. 47 FR 13467. This characterization primarily stemmed from the 1979 rule's reference to protecting ''streams with a biological community,'' but was also based on the agency's recognition that the condition for granting an exemption to the SBZ restriction—to restore the original stream channel—was too impractical. *Id.*

The 1983 amendments reinstated use of the term ''intermittent stream'' in place of ''streams with a biological community.'' The amended regulation also changed the conditions for authorizing an exemption to the SBZ restriction, to require that:

(1) Surface mining activities will not cause or contribute to the violation of applicable State or Federal water quality standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream; and

(2) If there will be a temporary or permanent stream channel diversion, it will comply with § 816.43.

We reaffirmed the basic purpose of the SBZ rule in the preamble to the June 30, 1983, amendments: to protect streams from sedimentation and from gross disturbances of the stream channel. We said that SBZs are effective means, in conjunction with sediment ponds and other measures, to prevent excessive sedimentation of streams by runoff from disturbed surface areas. We also said that the new rules recognize that intermittent and perennial streams have environmental resource values worthy of protection under section 515(b)(24) of SMCRA. 48 FR 30312 (June 30, 1983).

Several commenters recommended that a new phrase in the March 1982 proposed rule ''as determined by State or Federal water quality standards'' be deleted or clarified. To address the commenters' concerns and to eliminate regulatory uncertainty, we adopted the phrase ''will not cause or contribute to violation of applicable State or Federal water quality standards.'' We explained that operators would be required to comply with all ''non-Act requirements for water'' protection under proposed hydrologic balance protection regulations at § 816.41 (§ 816.41 was proposed in the **Federal Register** on June 25, 1982 (47 FR 27712) and finalized on September 26, 1983 (48 FR 43956)). While the language of § 816.41 does not specifically state that ''operators will be required to comply with all non-Act requirements for water,'' it does provide that mining and reclamation activities must be conducted to minimize pollution and changes in flow, disturbance to the hydrologic balance on site, and to prevent material damage off site. Even without this advisory language, an operator must comply with all applicable local, State, and Federal permits and other requirements for water quality.

In the preamble to the 1983 final rule, our response to a comment indirectly elaborated on the requirement that SMCRA mining operations ''will not adversely affect the water quantity and quality or other environmental resources of the stream.'' We implicitly recognized that this condition does not require that ''no adverse'' effects occur, but rather requires that these effects be minimized, when we stated:

Alteration of streams may have adverse aquatic and ecological impacts on both diverted stream reaches and other downstream areas. However, final § 816.57(a) will minimize these impacts* * *

48 FR 30315 (June 30, 1983).

Finally, in response to a comment on the 1983 SBZ rule, we explained that the clause ''will not adversely affect * * * related environmental resources'' was added to the conditions for a SBZ exemption to more accurately reflect the objectives of sections 515(b)(10) and (24) of SMCRA. 48 FR 30316 (June 30, 1983).

The January 1983 final environmental statement ''OSM–EIS–1: Supplement'' provided the NEPA support for the 1983 SBZ rule. The following excerpt illustrates our recognition that some small streams would be impacted by mining under the revised SBZ rule:

The draft final regulations on the stream buffer zone (section 816.57) would provide essentially the same protection to water quality of streams as the current regulations. The draft final regulations, however, would provide protection to perennial and intermittent streams, whereas, the current regulations protect perennial streams and streams with a biological community. The

current definition of ''intermittent stream'' (section 701.5) does not include streams draining less than 1 square mile. Those streams would not be protected by the buffer zone where they would have been protected before. Many such streams are found in the Appalachian coal region and support biological communities or serve as fish spawning areas. In most cases, impact of mining on those streams would be temporary because of the requirement to design and construct permanent diversions or stream channels to restore or approximate the premining characteristics of the original stream channel and natural riparian vegetation (draft final section 816.41(f)). In some cases, such as small headwater drainages, the original stream channel might not be restored. Where this happens, the disruption of the stream channel could potentially alter the hydrologic balance downstream, with subsequent impacts on fish. Requirements to protect the hydrologic balance would tend to limit this, and such impacts are not considered significant.

(OSM, 1983, p. IV–37).

In the 1983 EIS, we went on to discuss the impacts of more environmentally protective alternatives to the 1983 SBZ rule:

OSM could eliminate the exemption from the general stream buffer zone requirements (section 816.57), and all mining would be prohibited within 100 feet of any perennial or intermittent stream. Although this would provide maximum protection to streams, the potential impacts on coal recovery could be significant in those areas with large coal reserves and extensive water resources.

OSM could redefine ''intermittent stream'' in current section 701.5.

This definition is not being revised under the preferred alternative. A broader definition of intermittent stream consistent with that of the Army Corps of Engineers' definition would allow regulatory authorities to protect smaller streams (those draining less than 1 square mile) with buffer zones where necessary. This would mitigate the potential impacts identified for the draft final regulations on stream buffer zones.

(Ibid, p. IV–83).

These paragraphs further illustrate that we did not intend the SBZ rule as an absolute prohibition of mining in the buffer zone. It also shows that we did not anticipate regulatory authorities to apply the SBZ to watercourses in small watersheds (less than 1 square mile).

The 1983 SBZ rule was challenged in U.S. District Court, District of Columbia, by both the coal industry and the National Wildlife Federation and successfully defended by OSM. *In re: Permanent Surface Mining Regulation Litigation II*, No. 79–1144 [21 ERC 1741–1742] (October 1, 1984).

C. Reference Materials

Paybins, Katherine S., *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.

Office of Surface Mining Reclamation and Enforcement, *Permanent Regulatory Program Implementing Section 501(b) of the Surface Mining Control and Reclamation Act of 1977*, Final Environmental Statement OSM–EIS–1, January 1979.

Office of Surface Mining Reclamation and Enforcement, *Proposed Revisions to the Permanent Program Regulations Implementing Section 501(b) of the Surface Mining Control and Reclamation Act of 1977*, Volume 1: Analysis—Revised text and responses to comments, Final Environmental Statement OSM—EIS–1: Supplement, January 1983.

U.S. Department of the Interior, Office of Surface Mining, ''An Evaluation of Approximate Original Contour and Post-mining Landuse in Kentucky'' USOSM Oversight Report, September 1999.

U.S. Department of the Interior, Office of Surface Mining, ''An Evaluation of Approximate Original Contour Variances and Postmining Land Uses in Virginia'' USOSM Oversight Report, September 1999.

U.S. Department of the Interior, Office of Surface Mining, ''Final Report: An Evaluation of Approximate Original Contour and Postmining Land Use in West Virginia.'' USOSM Oversight Report, May 1999.

U.S. Environmental Protection Agency, *Mountaintop Mining/Valley Fills in Appalachia Draft Programmatic Environmental Impact Statement*, EPA 9–03–R–00013, EPA Region 3, June 2003.

II. Discussion of the Proposed Rules

For convenience, where the discussion concerns the SBZ regulation at 30 CFR 816.57 (surface mining) and 30 CFR 817.57 (underground mining), or the regulation pertaining to diversions at 30 CFR 816.43 (surface mining) and 30 CFR 817.43 (underground mining), these sections are cited together in the heading as §§ 816.[ ]/817.[ ], but in most cases only part 816 is referenced in the text. The changes to permitting requirements in part 780 and the performance standards in § 816.71 would apply only to surface mines, and corresponding changes to the regulations for underground mines are not being proposed. We decided not to propose changes to the excess spoil regulations applicable to underground mining because the current regulations in this regard are satisfactorily working, and the size and number of excess spoil fills associated with underground mining are small.

A. Reclamation Plan (§ 780.18(b)(3))

Section 780.18(b)(3) requires a permit application to contain a plan for backfilling, soil stabilization, compacting and grading, with contour or cross-section maps that show the anticipated final surface configuration of the proposed permit area, in accordance with the applicable performance standards. Authority for this section stems from SMCRA sections 507(b)(14), 508(a)(5) and (10), 515(b)(3) through (6), (8), (10), (11), (13), (17), and (22).

In essence, § 780.18(b)(3) requires that the application show how all spoil and soil from the mine site will be managed. While excess spoil is not specifically discussed, it would certainly be integral to, and encompassed by, this plan. Because of the growing concerns regarding the volume of excess spoil and the size of excess spoil fills, we propose to amend this regulation to require the applicant to include sufficient supporting information in the plan to demonstrate, to the satisfaction of the regulatory authority, that the applicant has taken necessary steps to avoid the generation of excess spoil and has minimized the volume of excess spoil to the maximum extent possible. Minimizing the volume of excess spoil is fundamentally important to ensure that adverse environmental effects stemming from the construction of excess spoil fills are minimized.

B. Disposal of Excess Spoil (§§ 780.35 and 816.71)

Section 780.35 requires the operator provide necessary plans describing the sites and structures to be used in the disposal of excess spoil. Section 780.35(a) states:

Each application shall contain descriptions, including appropriate maps and cross section drawings, of the proposed disposal site and design of the spoil disposal structures according to 30 CFR 816.71–816.74. * * *

The authority for § 780.35 is sections 102, 210, 501, 503, 507, 508, 510, and 515 of SMCRA. Principally, this section establishes the overall requirements for a plan for handling excess spoil in compliance with the performance standards at section 515(b)(22) of SMCRA. Section 816.71 establishes the general performance standards to implement section 515(b)(22).

We propose to further strengthen regulations at § 780.35 and § 816.71 to more explicitly address the direct impacts associated with excess spoil fill construction. In § 780.35, we propose requiring that each permit application (for which excess spoil is anticipated) contain alternative analyses of the environmental impacts of constructing fills in different locations and under different configurations, with different sizes and numbers of fills to accommodate the excess spoil. OSM anticipates that this analysis will

address the baseline information collected as part of the permitting process, such as fish, wildlife, stream quality, vegetative cover, and other information, in order to make an informed, science-based decision as to where excess spoil material should be placed to result in the least environmental impact. For example, a permit applicant might evaluate available alternatives such as placing a fill in either a relatively pristine stream or a degraded stream. If all other factors were equal, we would expect that the stream with higher water quality would be protected. Similarly, we would expect to see an analysis of the environmental impacts of each alternative, based on the available baseline information typically collected as part of the SMCRA and/or CWA section 404 application process. The analysis would discuss how the impacts of the alternatives would vary; for example, the impacts of constructing fewer large excess spoil fills, compared to the impacts of constructing many small fills.

In § 816.71, we propose to add a requirement in subsection (c)(2) to ensure that fills are located so as to minimize, to the extent possible, adverse impacts to the prevailing hydrologic balance, fish, wildlife, and related environmental values (after considering alternative fill locations, sizes, and numbers). In addition, § 816.71 would be revised to add a required demonstration that cumulative volume of fill for an operation is no larger than necessary to accommodate the cumulative volume of excess spoil from the operation. The purpose of this latter change is to make it clear that operators should not design excess spoil fills to be inordinately oversized, and to require operators to minimize the area disturbed by spoil fill, in relation to the volume of excess spoil disposed. As the operator decreases the size of the fill footprint, the operator will reduce the extent to which fills cover stream reaches. Decreasing the fill footprint will also reduce the area of forest and riparian vegetation disturbed.

C. Stream Buffer Zones (§§ 816.57/817.57)

In order to reduce the regulatory uncertainty regarding the interpretation of our SBZ requirements, we propose to revise the language that has led to varying interpretations. The proposed language aligns more closely with the statutory basis for the SBZ rule. The existing SBZ rule for surface mining activities is found at 30 CFR 816.57. The SBZ rule for underground mining is found at 30 CFR 817.57. We are proposing essentially the same changes for both regulations. The SBZ rule for surface mining activities provides:

> 30 CFR 816.57 Hydrologic balance: Stream buffer zones.
>
> (a) No land within 100 feet of a perennial stream or an intermittent stream shall be disturbed by surface mining activities, unless the regulatory authority specifically authorizes surface mining activities closer to, or through, such a stream. The regulatory authority may authorize such activities only upon finding that—
>
> (1) Surface mining activities will not cause or contribute to the violation of applicable State or Federal water quality standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream; and
>
> (2) If there will be a temporary or permanent stream-channel diversion, it will comply with § 816.43.
>
> (b) The area not to be disturbed shall be designated as a buffer zone, and the operator shall mark it as specified in § 816.11.

We propose to revise the language of paragraph (a)(1) above by requiring two findings by the regulatory authority that would be conditions for granting an SBZ waiver. The first finding would be that the surface mining activities will ''prevent, to the extent possible using best technology currently available (BTCA), additional contributions of suspended solids to the stream section within 100 feet downstream of the surface mining activity, and outside of the area of the surface mining activity.''

We believe that the first condition comports with a principal goal of the SBZ rule that has been stated throughout the history of the rule: to protect streams outside of the mining permit area from sedimentation. The change would align with the requirement of SMCRA section 515(b)(10)(B)(i) that the operation: ''prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to stream flow, or runoff outside the permit area.'' This change would also make the SBZ rule more consistent with other SMCRA regulations, as well as with the CWA. For example, the proposed language would be more consistent with 30 CFR 816.41(a), which states:

> All surface mining and reclamation activities shall be conducted to minimize disturbance to the hydrologic balance within the permit and adjacent areas, to prevent material damage to the hydrologic balance outside of the permit area * * *
>
> Discharges of water from areas disturbed by surface mining activities shall be made in compliance with applicable State and Federal water quality laws and regulations and with effluent limitations for coal mining promulgated by the U.S. Environmental Protection Agency set forth in 40 CFR 434.

The change would have no effect on a mining operator's obligation to comply with other statutes, such as the CWA. The proposed change is intended to avoid the possibility that the SBZ rule could be misinterpreted to supersede the CWA by prohibiting an activity because of water quality standards that would otherwise be authorized under the CWA. Thus, the proposed rule would also be consistent with section 702 of SMCRA (30 U.S.C. 1292), which requires that nothing in SMCRA ''shall be construed as superseding, amending, modifying, or repealing'' the CWA or ''any rule or regulation promulgated thereunder.''

The second condition would require a regulatory authority finding that the surface mining activities will ''minimize, to the extent possible using BTCA, disturbances and adverse impacts on fish, wildlife, and other related environmental values.'' This change more closely aligns with SMCRA section 515(b)(24), which provides:

> [T]o the extent possible using the best technology currently available, minimize disturbances and adverse impacts of the operation on fish, wildlife and related environmental values * * *

It is virtually impossible to conduct mining activities within 100 feet of an intermittent or perennial stream without causing some adverse impacts, even if those impacts are very small. We believe SMCRA recognizes that an absolute standard of ''no adverse impacts'' is unattainable. This is reflected in the fact that SMCRA in most cases requires the mining operation to minimize, rather than completely prevent, adverse environmental impacts. We invite comment on this position.

The history of the rule shows that we recognized some adverse impacts would occur at the site of the mining activity in the stream buffer zone. For example, in the analyses of the projected impacts associated with the 1983 rule, we assumed that streams occurring in small watersheds (less than 1 square mile) might be adversely impacted by mining, even though we knew that many of these streams would be likely to come within the definition of ''intermittent'' or ''perennial'' streams. Therefore, in this proposed rule, rather than prohibiting any adverse impacts, we would require that these impacts be minimized to the extent possible using the best technology currently available,

and that operators prevent additional contributions of suspended solids to the stream section within 100 feet downstream of the mining activity, and outside the area affected by surface mining activities. We believe that making these two requirements for findings explicit in the rule would provide necessary safeguards for streams consistent with the original intent of SMCRA.

The Federal regulations at 30 CFR 701.5 define ''best technology currently available'' to mean:

> * * * equipment, devices, systems, methods, or techniques which will (a) prevent, to the extent possible, additional contributions of suspended solids to stream flow or runoff outside the permit area, but in no event result in contributions of suspended solids in excess of requirements set by applicable State or Federal laws; and (b) minimize, to the extent possible, disturbances and adverse impacts on fish, wildlife and related environmental values, and achieve enhancement of those resources where practicable. The term includes equipment, devices, systems, methods, or techniques, which are currently available anywhere as determined by the Director, even if they are not in routine use. The term includes, but is not limited to, construction practices, siting requirements, vegetative selection and planting requirements, animal stocking requirements, scheduling of activities and design of sedimentation ponds in accordance with 30 CFR parts 816 and 817. Within the constraints of the permanent program, the regulatory authority shall have the discretion to determine the best technology currently available on a case-by-case basis, as authorized by the Act and this chapter.

We would expect that the regulatory authority would authorize a waiver of the SBZ requirements only if information and analysis in the permit application record demonstrates to the satisfaction of the regulatory authority that (1) the proposed volume of excess spoil would be minimized, (2) proposed excess spoil fills associated with a mine would be no larger than needed to accommodate the volume of spoil from the mine, and (3) alternative fill locations, sizes, and numbers have been analyzed and the proposed excess spoil disposal plan incorporates the alternatives that cause the least environmental harm. Further, we would expect that the regulatory authority, in performing these reviews and making findings, would consider all applications of BTCA that would minimize adverse impacts, consistent with the definition of BTCA at 30 CFR 701.5. This type of analysis complements the ''no practical alternative'' requirements for CWA section 404 applicants.

Although it was vacated on procedural grounds, the opinion rendered by the district court in *Bragg* clearly viewed the SBZ requirements as applying restrictions more stringent than those of the CWA section 404 program. However, in part because of the references to CWA in section 702 of SMCRA mentioned above, we believe it is appropriate to limit SBZ restrictions on placement of fills in streams when those fills are also expressly regulated and authorized under section 404 of the CWA. The proposed rule also takes into consideration the 1980 decision of the District of Columbia Circuit Court of Appeals which held that any variances and exemptions under the Federal Water Pollution Control Act (now referred to as the CWA) that are applicable to surface coal mining operations are substantive elements rather than ''gaps'' in CWA authority. Therefore, the 1980 decision held that OSM may not alter those requirements by adopting more stringent provisions for surface coal mining operations. We invite comment on whether the proposed amendments to 30 CFR 816.57 and 817.57 are consistent with the requirement in section 702 concerning the interpretation of SMCRA relative to CWA.

D. Diversion of Perennial and Intermittent Streams. (§§ 816.43(b) / 817.43(b))

The current version of the regulation concerning the diversion of perennial and intermittent streams at § 816.43(b)(1) refers to the findings that the regulatory authority is required to make under the SBZ regulations:

> Diversion of perennial and intermittent streams within the permit area may be approved by the regulatory authority after making the finding relating to the stream buffer zones that the diversion will not adversely affect the water quantity and quality and related environmental resources of the stream.

To comport with the proposed SBZ regulation and to eliminate redundancy, we propose to revise the above language by striking the words ''that the diversion will not adversely affect the water quantity and quality and related environmental resources of the stream.'' As noted above, other provisions of SMCRA and the implementing regulations address impacts of the mining operation on water quality and quantity.

III. How Do I Submit Comments on the Proposed Rule?

Electronic or Written Comments: If you submit written comments, they should be specific, confined to issues pertinent to the proposed rule, and explain the reason for any recommended change(s). We appreciate any and all comments, but those most useful and likely to influence decisions on a final rule will be those that either involve personal experience or include citations to and analyses of SMCRA, its legislative history, its implementing regulations, case law, other pertinent State or Federal laws or regulations, technical literature, or other relevant publications.

Except for comments provided in an electronic format, you should submit three copies of your comments if practicable. We will not consider anonymous comments. Comments received after the close of the comment period (see **DATES**) or at locations other than those listed above (see **ADDRESSES**) will not be considered or included in the Administrative Record.

Availability of Comments: Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours at the OSM Administrative Record Room (see **ADDRESSES**). Individual respondents may request that we withhold their home address from the rulemaking record. We will honor this request to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, to the extent allowed by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment.

We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

Public hearings: We will hold a public hearing on the proposed rule upon request only. The time, date, and address for any hearing will be announced in the **Federal Register** at least 7 days prior to the hearing.

Any person interested in participating in a hearing should inform Mr. David G. Hartos (see **FOR FURTHER INFORMATION CONTACT**), either orally or in writing by 5 p.m., Eastern time, on January 28, 2004. If no one has contacted Mr. Hartos to express an interest in participating in a hearing by that date, a hearing will not be held. If only one person expresses an interest, a public meeting rather than a hearing may be held, with the results included in the Administrative Record.

The public hearing will continue on the specified date until all persons scheduled to speak have been heard. If you are in the audience and have not

been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after all persons scheduled to speak and persons present in the audience who wish to speak have been heard. To assist the transcriber and ensure an accurate record, we request, if possible, that each person who testifies at a public hearing provide us with a written copy of his or her testimony.

Public meeting: If there is only limited interest in a hearing at a particular location, a public meeting, rather than a public hearing, may be held. Persons wishing to meet with us to discuss the proposed rule may request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All meetings will be open to the public and, if possible, notice of the meetings will be posted at the appropriate locations listed under **ADDRESSES**. A written summary of each public meeting will be made a part of the administrative record of this rulemaking.

IV. Procedural Matters and Required Determinations

A. Executive Order 12866—Regulatory Planning and Review

This proposed rule is not a ''significant regulatory action'' under Executive Order 12866 for the following reasons:

a. This rule would not have an annual effect of $100 million or more on the economy. It would not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities. As previously stated, the revisions contained in the rule are intended to clarify existing requirements to: (1) Minimize the adverse environmental effects stemming from the construction of excess spoil fills; and (2) reduce regulatory uncertainty concerning the circumstances in which mining activities, such as the construction of excess spoil fills, may be allowed within 100 feet of a perennial or intermittent stream. The revisions are not expected to have an adverse economic impact on States and Indian Tribes or the regulated industry.

Some of the regulatory changes will result in an increase in the costs and burdens placed on coal operators and on some primacy States. It is estimated that the total annual increase for operators would be approximately $240,500, and for the primacy States the total annual increase is estimated at approximately $24,200. These increases are due to the requirement to document the analyses and findings required by these regulatory changes. The estimated increase in costs will likely only affect those coal operators and States (Kentucky, Virginia, and West Virginia) located in the steep slope terrain of the central Appalachian coalfields, where the bulk of excess spoil is generated. Because all of the regulatory agencies in the Appalachian coalfields have implemented policies to minimize the volume of excess spoil, no significant additional costs of implementing these regulatory changes are anticipated other than those required to document the strengthened requirements to consider all alternative excess spoil construction and disposal sites. This rule would not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

b. This rule would not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

c. This rule would not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients.

d. This rule would clarify existing regulatory requirements and does not raise novel legal or policy issues arising from legal mandates, Presidential priorities, or the principles set forth in the Executive Order.

B. Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This rule is not considered a significant energy action under Executive Order 13211. The revisions contained in this rule would not have a significant effect on the supply, distribution, or use of energy.

C. Regulatory Flexibility Act

The Department of the Interior certifies that this rule would not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). For the reasons previously stated, the revisions are not expected to have an adverse economic impact on the regulated industry including small entities. Further, the rule would produce no adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States enterprises to compete with foreign-based enterprises in domestic or export markets.

D. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule, for the reasons stated above:

a. Would not have an annual effect on the economy of $100 million or more.

b. Would not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. Would not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

E. Unfunded Mandates

This rule would not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than $100 million per year. The rule would not have a significant or unique effect on State, Tribal, or local governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1534) is not required.

F. Executive Order 12630—Takings

In accordance with Executive Order 12630, the rule would not have significant takings implications.

G. Executive Order 13132—Federalism

In accordance with Executive Order 13132, the rule would not have significant Federalism implications to warrant the preparation of a Federalism Assessment for the reasons discussed above.

H. Executive Order 12988—Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule would not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

I. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally recognized Indian Tribes and have determined that the proposed revisions pertaining to excess spoil and the stream buffer zone would not have substantial direct effects on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and

responsibilities between the Federal Government and Indian Tribes.

J. Paperwork Reduction Act

In accordance with 44 U.S.C. 3507(d), OSM has submitted the information collection and record keeping requirements of 30 CFR parts 780, 816 and 817 to the Office of Management and Budget (OMB) for review and approval.

30 CFR Part 780

Title: Surface Mining Permit Applications—Minimum Requirements for Reclamation and Operation Plan.

OMB Control Number: 1029–xxx1.

Summary: Permit application requirements in sections 507(b), 508(a), 510(b), 515(b) and (d), and 522 of Public Law 95–87 require the applicant to submit the operations and reclamation plan for coal mining activities. Information collection is needed to determine whether the mining and reclamation plan will achieve the reclamation and environmental protections pursuant to the Surface Mining Control and Reclamation Act. Without this information, Federal and State regulatory authorities cannot review and approve permit application requests.

Bureau Form Number: None.

Frequency of Collection: Once.

Description of Respondents: Applicants for surface coal mine permits.

Total Annual Responses: 477.

Total Annual Burden Hours: 231,671.

Non-labor Cost Burden: $2,125,220.

30 CFR Parts 816 and 817

Title: Permanent Program Performance Standards—Surface and Underground Mining Activities.

OMB Control Number: 1029–xxx2.

Summary: Sections 515 and 516 of the Surface Mining Control and Reclamation Act of 1977 provide that permittees conducting surface coal mining operations shall meet all applicable performance standards of the Act. The information collected is used by the regulatory authority in monitoring and inspecting coal mining activities to ensure that they are conducted in compliance with the requirements of the Act.

Bureau Form Number: None.

Frequency of Collection: Once, on occasion, quarterly and annually.

Description of Respondents: Surface coal mining operators.

Total Annual Responses: 186,341.

Total Annual Burden Hours: 871,140.

Non-labor Cost Burden: $315,000.

Comments are invited on:

(a) Whether the proposed collection of information is necessary for the proper performance of OSM and State regulatory authorities, including whether the information will have practical utility;

(b) The accuracy of OSM's estimate of the burden of the proposed collection of information;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(d) Ways to minimize the burden of collection on the respondents.

Under the Paperwork Reduction Act, OSM must obtain OMB approval of all information and recordkeeping requirements. No person is required to respond to an information collection request unless the form or regulation requesting the information has a currently valid OMB control (clearance) number. These numbers appear in sections 780.10, 816.10, and 817.10 of 30 CFR parts 780, 816, and 817, respectively. To obtain a copy of OSM's information collection clearance requests, explanatory information, and related forms, contact John A. Trelease at (202) 208–2783 or by e-mail at *jtreleas@osmre.gov.*

By law, OMB must respond to OSM within 60 days of publication of this proposed rule, but may respond as soon as 30 days after publication. Therefore, to ensure consideration by OMB, you must send comments regarding these burden estimates or any other aspect of these information collection and recordkeeping requirements by February 6, 2004, to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Interior Desk Officer, via e-mail to *oira_docket@omb.eop.gov*, or via facsimile to (202) 395–6566. Also, please send a copy of your comments to John A. Trelease, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave., NW., Room 210–SIB, Washington, DC 20240, or electronically to *jtreleas@osmre.gov.*

K. National Environmental Policy Act

We have prepared a draft environmental assessment (EA) of the proposed rule in accordance with the National Environmental Policy Act of 1969 and have made a tentative determination that this rule will not significantly affect the quality of the human environment. It is anticipated that a finding of no significant impact (FONSI) will be made for the final rule in accordance with Departmental procedures under NEPA. The EA is on file in our administrative record at the address specified previously *(see* **ADDRESSES**). The EA will be completed and a finding made on the significance of any resulting impacts before we publish the final rule.

L. Clarity of This Regulation

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this proposed rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the proposed rule clearly stated? (2) Does the proposed rule contain technical language or jargon that interferes with its clarity? (3) Does the format of the proposed rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Would the rule be easier to understand if it were divided into more (but shorter) sections (A ''section'' appears in bold type and is preceded by the symbol ''§ ''and a numbered heading; for example, § 780.18 Reclamation Plan: General Requirements. (5) Is the description of the proposed rule in the **SUPPLEMENTARY INFORMATION** section of this preamble helpful in understanding the proposed rule? (6) What else could we do to make the proposed rule easier to understand? Send a copy of any comments that concern how we could make this proposed rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street NW., Washington, DC 20240. You may also e-mail the comments to this address: *Exsec@ios.doi.gov.*

List of Subjects

30 CFR Part 780

Reporting and record keeping requirements, Mines, Surface mining, Reclamation, Excess Spoil.

30 CFR Part 816

Environmental protection, Reporting and record keeping requirements, Mines, Surface mining, Reclamation, Excess spoil, Diversions, Stream buffer zone.

30 CFR Part 817

Environmental protection, Reporting and record keeping requirements, Mines, Underground mining, Reclamation, Excess spoil, Diversions, Stream buffer zone.

Dated: December 19, 2003.

Patricia E. Morrison,

Acting Assistant Secretary, Land and Minerals Management.

Accordingly, we propose revising 30 CFR parts 780, 816, and 817 as set forth below.

PART 780—SURFACE MINING PERMIT APPLICATIONS—MINIMUM REQUIREMENTS FOR RECLAMATION AND OPERATION PLAN

1. The authority citation for Part 780 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.* and 16 U.S.C. 470 *et seq.*

2. Section 780.10 is revised to read as follows:

§ 780.10 Information collection.

(a) The collections of information contained in Part 780 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1029–xxx1. Permit application requirements in sections 507(b), 508(a), 510(b), 515(b) and (d), and 522 of the Surface Mining Control and Reclamation Act (Pub. L. 95–87) require the applicant to submit the operations and reclamation plan for coal mining activities. Information collection is needed to determine whether the mining and reclamation plan will achieve required reclamation and environmental protection. Without this information, Federal and State regulatory authorities cannot review and approve permit application requests.

(b) Public Reporting Burden for this information is estimated to average 29 hours per response and non-labor costs of $8,855.00, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Information Collection Clearance Officer, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave., NW., SIB 210, Washington, DC 20240. Please refer to OMB Control Number 1029–xxx1 in any correspondence.

3. In § 780.18 revise paragraph (b)(3) to read as follows:

§ 780.18 Reclamation plan: General requirements.

* * * * *

(b) * * *

(3) A plan for backfilling, soil stabilization, compacting, and grading, with contour maps or cross sections that show the anticipated final surface configuration of the proposed permit area, in accordance with 30 CFR 816.102 through 816.107. If excess spoil is anticipated, the plan must demonstrate to the satisfaction of the regulatory authority that the volume of excess spoil will be minimized to the maximum extent possible;

* * * * *

4. In § 780.35, redesignate paragraphs (b) and (c) as paragraphs (c) and (d) and add new paragraph (b) to read as follows:

§ 780.35 Disposal of excess spoil.

* * * * *

(b) Each application shall also describe the steps to be taken to minimize the adverse environmental effects stemming from the construction of excess spoil fills, and provide analyses of the environmental impacts of alternative disposal plans to accommodate the volume of excess spoil in which the configurations of fills, including fill location, number and size, vary.

* * * * *

PART 816—PERMANENT PROGRAM PERFORMANCE STANDARDS—SURFACE MINING ACTIVITIES

5. The authority citation for Part 816 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*; and sec 115 of Pub. L. 98–146.

6. Section 816.10 is revised to read as follows:

§ 816.10 Information collection.

(a) The collections of information contained in Part 816 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1029–xxx2. The information will be used by the regulatory authority to monitor and inspect surface coal mining activities to ensure that they are in compliance with the Surface Mining Control and Reclamation Act. Response is required to obtain a benefit.

(b) Public Reporting Burden for this information is estimated to average 10 hours per response and non-labor costs of $70.00, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Information Collection Clearance Officer, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave., NW., SIB 210, Washington, DC 20240. Please refer to OMB Control Number 1029–xxx2 in any correspondence.

7. In § 816.43, revise paragraph (b)(1) to read as follows:

§ 816.43 Diversions

* * * * *

(b) * * *

(1) The regulatory authority may approve the diversion of perennial and intermittent streams within the permit area after making the finding required by § 816.57 of this chapter.

* * * * *

8. In § 816.57, redesignate paragraphs (a)(2) and (b) as (b) and (c), respectively and revise paragraph (a) to read as follows:

§ 816.57 Hydrologic balance: Stream buffer zones.

(a) No land within 100 feet of a perennial stream or an intermittent stream shall be disturbed by surface mining activities, unless the regulatory authority specifically authorizes such activities closer to or through the stream. The regulatory authority may authorize such activities only upon finding that the activities will, to the extent possible, using the best technology currently available—

(1) Prevent additional contributions of suspended solids to the stream section within 100 feet downstream of the surface mining activities, and outside of the area affected by surface mining activities; and

(2) Minimize disturbances and adverse impacts on fish, wildlife, and other related environmental values of the stream.

* * * * *

9. In § 816.71 revise paragraphs (a)(2), (a)(3) and (c) and add paragraph (a)(4) to read as follows:

§ 816.71 Disposal of excess spoil; General requirements.

* * * * *

(a) * * *

(2) Ensure mass stability and prevent mass movement during and after construction;

(3) Ensure that the final fill is suitable for reclamation and revegetation compatible with the natural surroundings and the approved postmining land use; and

(4) Ensure that the cumulative volume of excess spoil fills is no larger than necessary to accommodate the cumulative excess spoil volume generated.

* * * * *

(c) Location. (1) The disposal area shall be located on the most moderately sloping and naturally stable areas available, as approved by the regulatory authority, and shall be placed, where possible, upon or above a natural terrace, bench, or berm, if such placement provides additional stability and prevents mass movement; and

(2) After considering alternative fill locations and size fills, fills must also be located so as to minimize, to the extent possible, adverse impacts on the prevailing hydrologic balance, fish, wildlife, and related environmental values.

* * * * *

PART 817—PERMANENT PROGRAM PERFORMANCE STANDARDS—UNDERGROUND MINING ACTIVITIES

10. The authority citation for Part 817 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

11. Section 817.10 is revised to read as follows:

§ 817.10 Information collection.

(a) The collections of information contained in part 817 have been approved by Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1029–xxx2. The information will be used to meet the requirements of 30 U.S.C. 1211, 1251, 1266, and 1309a, which provide, among other things, that permittees conducting underground coal mining operations will meet the applicable performance standards of the Act. The regulatory authority will use this information in monitoring and inspecting underground mining activities. The obligation to respond is required to obtain a benefit.

(b) Public reporting burden for this information is estimated to average 10 hours per response and non-labor costs of $70.00, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Information Collection Clearance Officer, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave., NW., SIB 210, Washington, DC 20240. Please refer to OMB Control Number 1029–xxx2 in any correspondence.

12. In § 817.43, revise paragraph (b)(1) to read as follows:

§ 817.43 Diversions.

* * * * *

(b) * * *

(1) The regulatory authority may approve the diversion of perennial and intermittent streams within the permit area after making the finding required by § 817.57 of this chapter.

* * * * *

13. In § 817.57 redesignate paragraphs (a)(2) and (b) as (b) and (c), respectively, and revise paragraph (a) to read as follows:

§ 817.57 Hydrologic balance: Stream buffer zones.

(a) No land within 100 feet of a perennial stream or an intermittent stream shall be disturbed by underground mining activities, unless the regulatory authority specifically authorizes such activities closer to or through, such a stream. The regulatory authority may authorize such activities only upon finding that the activities will, to the extent possible, using the best technology currently available—

(1) Prevent additional contributions of suspended solids to the stream section within 100 feet downstream of the underground mining activities, and outside the area affected by the underground mining activities; and

(2) Minimize disturbances and adverse impacts on fish, wildlife, and other related environmental values of the stream.

* * * * *

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