



United States Department of the Interior

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

Appalachian Region
Three Parkway Center
Pittsburgh, Pennsylvania 15220

DEC 08 2009

Joseph M. Lovett
Executive Director
Appalachian Center for the
Economy and the Environment
P.O. Box 507
Lewisburg, WV 24901

Re: Response to petition requesting Federal enforcement of West Virginia's surface mining program pursuant to 30 C.F.R. Part 733.

Dear Mr. Lovett:

This letter responds to your August 10, 2009, petition requesting Federal enforcement, pursuant to 30 C.F.R. Part 733, of West Virginia's stream buffer zone (SBZ) regulation. In reviewing the allegations raised in your letter, we have found no indication that West Virginia does not apply its SBZ rules consistent with its historic application of the SBZ requirements, as approved by OSM. Therefore, and for the further reasons outlined below, I am denying your request for an evaluation of the State program at this time. Neither your allegations nor other available information supports the conclusion that the State is failing to administer its approved SBZ provisions.

However, it is a high priority of OSM to improve stream protection in Appalachia, and OSM is in the process of reviewing and revising our stream protection requirements through an expedited SBZ rulemaking. On November 30, 2009, OSM published for a thirty-day public comment period an advance notice of proposed rulemaking for its SBZ and related regulations. Further, to provide increased protection for streams pending the final outcome of the pending rulemaking, we are currently seeking comment on a series of state oversight measures, and we are implementing immediate stream protection measures under existing program requirements.

In your petition, you made the following allegations:

- "... WVDEP's decision to exempt valley fills and huge stream elimination projects from the scope of the rule's protections renders the regulation meaningless."

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- "...West Virginia does not apply the buffer zone rule to the footprints of fills, neither does it consider the buffer zone rule in regard to permanently eliminating intermittent and perennial stream segments."
- "...we believe that the State has never denied a request for a variance from the buffer zone rule."

Your petition also advances numerous legal arguments supporting your position that West Virginia must construe its rule in a manner consistent with your interpretation of the 1983 Federal regulation.

We have reviewed the relevant aspects of West Virginia's program and have found that the factual allegations in your petition are not supported by the record. However, I encourage you to submit your views as comments on the current rulemaking.

West Virginia does not interpret its SBZ rule in a manner that serves as an absolute prohibition of fills and all other coal mining activities (such as mining through, crossing, relocating or other activities) within 100 feet of an intermittent or perennial stream. West Virginia is applying its rule in a manner consistent with OSM's historical interpretation of the 1983 Federal SBZ rule upon which the State rule is based. The State program applies the SBZ rule in a manner that allows the placement of excess spoil fills, refuse piles, slurry impoundments, and sedimentation ponds in intermittent and perennial streams. However as explained below, the State uses procedures and processes to reduce, minimize and in some cases eliminate the placement of fill in streams in order to reduce the environmental impacts.

West Virginia has previously implemented measures to minimize the adverse environmental impact of the placement of excess spoil in streams. As a result of a consent decree in *Bragg v. Robertson*, Civil Action No. 2:98-0636 (S.D. W. Va. 1998), which was approved by U.S. District Court Judge Charles Haden, on February 17, 2000, the West Virginia Department of Environmental Protection (WVDEP) agreed to do the following, *inter alia*:

- Enforce its SBZ rule and make site-specific written findings before granting SBZ variances;
- Make site-specific written findings showing that ponds are to be placed as close as practicable to the toes of fills; and
- Develop a plan to meet approximate original contour (AOC) and to optimize spoil placement. The plan does not cover contour operations. Furthermore, the plan shall only be implemented pursuant to a memorandum of understanding (MOU) or agreement among the affected Federal and State agencies.

In response to the consent decree, WVDEP, in cooperation with OSM, developed procedures for optimizing spoil placement. The guidance documents were approved by three Federal agencies

(USEPA, USACE, OSMRE) and were implemented by WVDEP in June of 2000. This guidance, known as "AOC+", was developed to achieve the following stated objectives:

- Provide an objective process for achieving AOC while ensuring stability of backfill material and minimization of sedimentation to streams;
- Provide an objective process for determining the quantity of excess spoil that may be disposed of in excess spoil disposal sites such as valley fills; and
- Optimize the placement of spoil to reduce watershed impacts.

The AOC+ method is a reasonable procedure to ensure that an adequate amount of spoil will be returned to the mine excavation so that the AOC requirements of configuration, stability, and drainage will be achieved. This volumetric model (defined backfill template) expands the in-place overburden and then reduces the total expanded volume to ensure backfill stability, drainage, access and safety during the mining and reclamation process. The calculated backfill volume is placed in the mine excavation. All spoil material in excess of the backfill volume is placed in excess spoil fills, usually in adjacent valleys. Minor variations from the model are allowed for the final grading to blend with surrounding contours and drainage patterns.

West Virginia also incorporates a site-specific "Buffer Zone Analysis" (BZA) into its permitting process whenever an applicant proposes to conduct mining activities (including fills and mining through) within 100 feet of an intermittent or perennial stream. This analysis, which is conducted by WVDEP prior to the issuance of a permit, addresses the following issues:

1. Disposal Site Selection
 - Does the site selection of the proposed fills and its associated drainage structures represent the least environmentally damaging practicable alternative?
 - Can the activity operate without fills in an intermittent or perennial stream?
 - Has the least adverse impact alternative on special aquatic sites been identified?
 - Has the activity's fill volume been minimized?
 - Has the fill been located and confined to impaired streams to minimize smothering of organisms?
 - Are previously used disposal sites available?
2. Fill Material Evaluation
 - An evaluation of the proposed fill for any indication of possible contaminants, considering the following physical characteristics:
 - Results from previous testing of the material or similar material in the vicinity of the project.
 - Protection practices for petroleum products or designated hazardous substances.

- Known existence of substantial material deposits of substances, which could be released in harmful quantities to the aquatic environment by manmade discharge activities.

3. Environmental Analysis

- Are the physical and chemical characteristics of the aquatic ecosystem significantly affected in the following areas:
 - Substrate impacts, changes in physical, chemical and biological characteristics?
 - Suspended particulate/turbidity impacts?
 - Changes in chemistry and physical characteristics of the receiving stream?
 - Alteration of normal water flow which will result in changes in habitat, food supplies, and spawning areas?
- Do the proposed fills and associated drainage structures significantly affect the following:
 - Violate applicable State Water Quality Standards?
 - Violate applicable toxic effluent standard?
 - Jeopardize the continued existence of endangered or threatened species or their habitat?
 - Aquatic ecosystem diversity, productivity, and stability?
 - Other wildlife ecosystem diversity, productivity, and stability?
 - Wetlands?
 - Riffle and pool complexes?
 - Human health, municipal and private water supplies?
 - Recreational, aesthetic and economic values?
 - Parks, historical sites and wilderness areas?

The BZA also includes a table summarizing temporary and permanent impacts to intermittent and perennial streams within the proposed permit area. Finally, the BZA makes a specific recommendation, signed by the reviewing engineer, biologist, geologist and NPDES permit writer, to the WVDEP Director regarding approval.

In response to your allegations, we have verified that WVDEP is still using AOC+ and the BZA in its permitting process and conducts a BZA and corresponding authorization for all mining activities within 100 feet of an intermittent or perennial stream, including mining through and relocating streams. We have reviewed recently issued permits and selected four which our staff believe were large enough to require valley fills. Three of these permits proposed impacts within stream buffer zones: Alex Energy, Inc., S-3011-07, Raven Crest Contracting, LLC, S-5006-08, and Alex Energy, Inc., S-3009-07. WVDEP did prepare BZA's for the permits, and the permit files include AOC+ documentation. Two of the BZA's conducted concerned durable rock fills while one was for mining through and permanently relocating a stream.

With respect to your last allegation that the WVDEP has never denied a stream buffer zone variance, neither OSM nor the State collects or tracks such statistics, and we were unable to verify or refute that allegation. However, State officials advised us that requests for the placement of spoil or the conduct of other activities in streams or stream buffer zones are often modified to reflect the least environmentally damaging practicable alternative through the normal permitting process. In addition, during the review process the applicant may revise the mining plan to avoid certain streams, and that may avoid the occasion for a denial. WVDEP provided a list of recently issued permits where proposed stream impacts had been eliminated or reduced through the permit review process. OSM conducted independent verification of two instances where proposed fills were in fact eliminated. The first is S5034-08 (Sandy Gap Surface Mine) in which an excess spoil fill was proposed, but was subsequently eliminated, with the excess spoil being placed on an adjacent permit backfill area. The second is U5013-03 (Jarrell Branch Mine, Portal A) in which authorization was requested for an existing haul road and a temporary excess spoil fill in a stream buffer zone. The temporary excess spoil fill was subsequently eliminated, with the material to be placed in two locations on existing pre-law benches, and ultimately to be used in reclaiming the pre-law benches and highwalls.

Previously, for the Environmental Impact Statement conducted for the Federal 2008 stream buffer zone rule, OSM had reviewed 110 separate versions of WVDEPs' BZAs. In response to your petition, we reviewed a sample of those analyses and noted that one BZA resulted in moving the toe of a durable rock fill upstream approximately 2,800 feet, which eliminated the need to permanently fill several hundred feet of stream (SMA # S-5007-01, Apogee Coal Company).

In summary, we found no evidence that West Virginia is implementing its SBZ rule in any way that substantively deviates from the approved State program. Therefore, we have no reason to conduct the program evaluation under 30 CFR 733.12(a)(2) that your petition requests.

In recent litigation, *Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 195 (4th Cir. 2009), the United States Court of Appeals for the Fourth Circuit discussed requirements of SMCRA concerning coal mining impacts on streams. In that decision, the court stated:

Congress clearly contemplated that the regulation of the disposal of excess spoil and the creation of valley fills fall under the SMCRA rubric. See 30 U.S.C. § 1265(b)(22)(D) (2000) (requiring that lateral drains be constructed where a spoil disposal area contains "springs, natural water courses or wet weather seeps"); *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 443 (4th Cir. 2003) ("[I]t is beyond dispute that SMCRA recognizes the possibility of placing excess spoil material in waters of the United States . . .").

Thus, *Aracoma* and *Rivenburgh* recognize that under SMCRA it may be appropriate to allow placement of excess spoil in streams. In addition, the *Aracoma* court stated:

As part of its federally approved SMCRA regulatory program, the WVDEP surface mine permitting process examines “[e]very detail of the manner in which a coal mining operation is to be conducted . . . includ[ing] the plan for disposal of excess spoil for surface . . . mining operations . . .” *** As the Corps explains in its permits, “the social and environmental impacts associated with surface coal mining and reclamation operations are appropriately analyzed by WVDEP in this context before that agency decides whether to permit the mining operation under SMCRA.” *** A SMCRA permit applicant must provide detailed information about possible environmental consequences of the proposed operations, as well as assurances that damage to the site will be prevented or minimized during mining and substantially repaired after mining has come to an end. The WVDEP must ensure compliance with SMCRA’s environmental protection performance standards. *See* 30 U.S.C. §§ 1257, 1260, 1265 (2000).

Aracoma. 556 at 195-196. The *Aracoma* court’s opinion recognizes that the State provides a detailed review of stream and environmental impacts for mine permit applications, and requires the operator to meet SMCRA requirements to prevent or minimize damage and to reclaim.

I conclude that there is no requirement for OSM or the State to change the interpretation of the existing State SBZ rule. Further, as discussed above, I have reviewed the allegations you have made and I find that they are not verified by the information we have reviewed. I have no basis to conclude that the State is failing to effectively implement its approved stream buffer zone provisions, or that the State has changed its historic interpretation of those provisions. Therefore, I find that pursuant to 30 CFR Part 733, I have no basis to evaluate the State’s implementation of its stream buffer zone provision at this time.

Although I have decided not to evaluate West Virginia’s implementation of its provision, OSM believes it is important to improve protection of streams under SMCRA. Therefore, as mentioned above, we have started an expedited rulemaking to revise the Federal 2008 SBZ rule to provide better environmental protections from the impacts of Appalachian surface coal mining. Further, OSM is taking immediate protective measures for streams pending final action on the rulemaking.

Mr. Joseph Lovett

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

In *NPCA*, on April 27, 2009, the Government filed a motion for voluntary remand and vacatur of the 2008 rule. Granting of the Government's motion likely would have had the effect of reinstating the 1983 version of the SBZ rule. In *Coal River*, on April 28, 2009, the Government filed a motion to dismiss the complaint as moot, which the Government argued should be granted if the court granted the motion in *NPCA*.

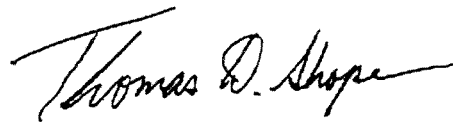
On June 11, 2009, the Secretary of the Department of the Interior, the Administrator of the U.S. Environmental Protection Agency, and the Acting Assistant Secretary of the Army (Civil Works) entered into a Memorandum of Understanding (MOU) implementing an interagency action plan to significantly reduce the harmful environmental consequences of surface coal mining operations in six states in central and northern Appalachia. Among other things, the MOU required that we develop guidance clarifying how the 1983 SBZ rule would be applied to reduce adverse impacts on streams if the court granted the Government's motion in *NPCA* for remand and vacatur of the 2008 SBZ rule.

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

On November 30, 2009, OSM published an Advance Notice of Proposed Rulemaking in the *Federal Register* seeking comments on our intention to revise our regulations concerning the conduct of mining activities in or near streams (74 FR 62664-62668). Those revisions would implement, in part, the MOU. Accomplishing that goal will involve revision or repeal of certain elements of the Federal 2008 rule. The rulemaking process will comply with the requirements of the Administrative Procedure Act, including any applicable notice and comment requirements, consistent with the court's decision in *NPCA*. While the Federal 2008 rule remains in effect, OSM is implementing immediate steps to improve stream protection pending the final outcome of the SBZ rulemaking. A copy of those immediate protective measures is enclosed.

It is possible that concerns you have raised may be resolved through our new SBZ rulemaking initiative, which we plan to complete as expeditiously as possible. If you have any questions or need further information, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Thomas D. Shope". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Thomas D. Shope
Regional Director, Appalachian Region

Enclosure