



November 15, 2007

Via Electronic Mail

Brent Wahlquist, Director
Office of Surface Mining Reclamation and Enforcement
Administrative Record
Room 252 SIB
1951 Constitution Avenue, NW
Washington, DC 20240

Re: RIN 1029-AC04; Excess Spoil, Coal Mine Waste, and Buffers for Waters of the United States

Dear Director Wahlquist:

The Office of Advocacy (Advocacy) of the U.S. Small Business Administration (SBA) respectfully submits this comment letter on the Office of Surface Mining Reclamation and Enforcement's (OSM) proposed rule, *Excess Spoil, Coal Mine Waste, and Buffers for Waters of the United States*.¹ Advocacy supports the intent behind OSM's proposed rule, to clarify its regulations regarding the circumstances in which mining activities may be allowed within the stream buffer zone, or the area within 100 feet of waters of the United States; and in waters of the United States, such as excess spoil fills and coal mine waste disposal facilities. However, OSM needs to take additional steps in order for the proposal to satisfy the requirements of the Regulatory Flexibility Act (RFA).²

Based on conversations with small business representatives, Advocacy believes that this proposed rule cannot properly be certified under the Regulatory Flexibility Act (RFA) due to two significant additions from the 2004 proposed rule: the adoption of the "waters of the United States" standard and the expansion of the alternatives analysis for the activities of excess spoil fills and coal mine waste disposal facilities. Advocacy believes that these provisions may have a significant economic impact on a substantial number of small entities. Advocacy recommends that OSM do one of two things to come into compliance with the RFA: (1) modify the proposed rule as recommended by small entities to minimize these impacts and then certify the rule with a factual basis, or (2) if OSM cannot properly certify the rule, provide an Initial Regulatory Flexibility Analysis (IRFA) and publish it in the *Federal Register* with a period for notice and comment.

¹ *Excess Spoil, Coal Mine Waste, and Buffers for Waters of the United States*, 72 Fed. Reg. 48890 (Aug. 24, 2007).

² *Regulatory Flexibility Act of 1980*, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified as amended at 5 U.S.C. § 601 et seq.).

The Office of Advocacy

Congress established the Office of Advocacy in 1976 by Pub. L. 94-305 to represent the views and the interests of small business within the federal government. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),³ as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),⁴ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.⁵

Moreover, on August 13, 2002, President Bush signed Executive Order 13272, which requires federal agencies to notify Advocacy of any proposed rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy.⁶ Further, the agency must include, in any explanation or discussion accompanying publication in the *Federal Register* of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule.

Background

OSM is clarifying its rules under the Surface Mining Control and Reclamation Act of 1977 (SMCRA) because there has been considerable controversy over the interpretation of its rules governing mining activities that occur in the stream buffer zone (SBZ) and in waters of the United States. OSM and state regulatory authorities have applied the SBZ rule and other SMCRA provisions to allow mining activities in perennial or intermittent streams under certain circumstances.⁷

However, two district courts have interpreted the SBZ rule and SMCRA as restricting or not authorizing the disposal of excess spoil in perennial or intermittent streams.⁸ A 2000 OSM environmental impact study found that this interpretation would result in a 90 percent reduction in coal production in the Appalachia area.⁹ Both of these court decisions were reversed by the U.S. Court of Appeals for the Fourth Circuit. In one case,

³ 5 U.S.C. § 601 et seq.

⁴ *Small Business Regulatory Enforcement Fairness Act*, Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

⁵ 5 U.S.C. § 603.

⁶ Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking*, 67 *Fed. Reg.* 53461 (Aug. 16, 2002).

⁷ 72 *Fed. Reg.* at 48892. The proposed section 817.57 of SMCRA is the SBZ rule. This rule requires operators to obtain a permit if they are performing mining activities within stream buffer zone, or within 100 feet of waters of the United States.

⁸ See *Bragg v. Robertson*, 72 F.Supp.2d 642, 660-663(S.D.W.Va.,1999); and *Kentuckians for the Commonwealth v. Riverburgh*, 204 F. Supp. 2d 927,942 (S.D.W.Va.,2002).

⁹ OSM, *Draft Environmental Impact Statement: Excess Spoil Minimization Stream Buffer Zones; Proposed Revisions II-20* (Apr. 2007).

the Court of Appeals reversed the district court due to lack of jurisdiction.¹⁰ In the other, the Court of Appeals rejected the district court's interpretation of the SBZ rule and SMCRA, stating that "SMCRA does not prohibit the discharge of surface coal mining excess spoil in waters of the United States."¹¹

On January 7, 2004, OSM published a proposed rule to amend its SMCRA regulations in regards to the stream buffer zone and other mining activities.¹² OSM received over 32,000 written comments on that rule, and some of these comments requested that OSM prepare an environmental impact statement (EIS) on that rule. The 2004 rule was never finalized. In 2007, OSM released the environmental impact statement and a new proposed rule.¹³ In the RFA section, OSM certified that the proposed rule would not have a significant economic impact on a substantial number of small entities.

Proposed Rule Requirements

This new proposed rule addresses the surface mining activities that occur in steep slope areas such as in the Appalachian coalfields (often referred to as "mountaintop mining"), where the process of mining creates significant amounts of excess spoil material that cannot safely be placed in the mined-out areas. Surface coal mining operations conduct many types of mining activities related to the disposal of this excess spoil, and this rule changes the regulatory requirements for mining activities that occur *within* the SBZ, or within 100 feet from the water, and those mining activities that occur *in* the water.

One activity that occurs in the SBZ and is subject to the SBZ rule is the permanent placement of excess spoil in engineered valley fills. The valleys in this area contain "waters" such as perennial and intermittent streams; operators seeking to conduct mining activities within 100 feet from these waters would be required to get a SMCRA permit.¹⁴ Mining activities occurring in the water, such as excess spoil and coal mine waste, are not subject to the SBZ rule. However, they are subject to stricter requirements, such as more thorough alternatives analysis discussed in this rule and in other provisions in the SMCRA. These activities are also subject to requirements under the Clean Water Act.¹⁵

¹⁰ *Bragg v. West Virginia Coal Association*, 248 F.3d 275, 296 (4th Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002).

¹¹ *Kentuckians for the Commonwealth, Inc. v. Riverburgh*, 317 F.3d 425, 442 (4th Cir. 2003).

¹² *Surface Mining And Reclamation Operations; Excess Spoil; Stream Buffer Zones; Diversions*; 69 Fed. Reg. 1036. (Jan. 7, 2004).

¹³ 72 *Fed. Reg.* at 48891.

¹⁴ 72 *Fed. Reg.* at 48919 and 48925. The proposed section 817.57 of SMCRA is the SBZ rule and the proposed section 780.28 contains the requirements for a SBZ permit/variance.

¹⁵ 72 *Fed. Reg.* at 48925. The proposed section 817.57(b) of SMCRA contains the exceptions to the SBZ rule, which include surface mining activities that occur in the water such as mining through waters, placement of bridge abutments, construction of sedimentation pond embankments and construction of excess spoil fills and coal mine waste disposal facilities. Each of these exemptions is subject to the listed SMCRA rules and the listed Clean Water Act requirements.

The 2007 proposed rule has two significant additions from the 2004 proposed rule. First, the proposed rule changes the definition of “water” for purposes of the SBZ requirements, from “perennial” and “intermittent” streams to a Clean Water Act term, “waters of the United States.”¹⁶ The adoption of the unsettled term “waters of the United States” may require a jurisdictional determination by the U.S. Army Corps of Engineers. The proposed rule also requires operators to perform an expanded alternatives analysis for the placement of excess spoil in the SBZ and in the waters of the United States.¹⁷

Regulatory Flexibility Act Certification

When a federal agency is developing a regulation and determines that the RFA applies, the agency must determine whether a certification of the rule is appropriate or whether an initial regulatory flexibility analysis (IRFA) is required. When an agency certifies under the RFA, the agency must state that the proposed rule will not have a significant economic impact on a substantial number of small entities. Under section 605(b) of the RFA an agency must also provide a “factual basis” in support of the certification.¹⁸

OSM certified this proposed rule, but did not provide a factual basis for doing so. Statistics from the Mine Safety and Health Administration (MSHA) and OSM show that a substantial number of small entities may be affected by this rulemaking. According to MSHA, 95.75% of the companies in the coal mining industry in 2006 are considered small based upon the Small Business Administration’s small business size standard of 500 or fewer employees.¹⁹ Based on 2004 statistics from OSM, 99.7% of companies performing surface mining activities are considered small based upon the same SBA small business size standard.²⁰ Advocacy recommends that OSM provide data on the number of small entities that perform “mountaintop mining” activities in this area.

While OSM does not believe that this rule will have a significant economic impact on these small entities, the agency did not provide data to substantiate this claim. OSM has stated that it plans to conduct a more comprehensive analysis to assess the effect of this rule for the final rule stage.²¹ However, the RFA requires that the agency’s economic analysis be available to the public for notice and comment prior to the final of the final rule. In addition, Advocacy has spoken to the National Mining Association and the

¹⁶ 30 C.F.R. § 701.5. This section defines a perennial stream as a stream or part of a stream that flows continuously during all the calendar year as a result of ground-water discharge or surface runoff. An intermittent stream is defined as (a) a stream or reach of a stream that drains a watershed of at least one square mile, or (b) a stream that is below the local water table for at least some part of the year, and obtains its flow from both surface runoff and ground water discharge.

¹⁷ 72 *Fed. Reg.* at 48919. The proposed section 780.35 of SMCRA lists the requirements for the disposal of excess spoil in the SBZ and in waters of the United States.

¹⁸ At a minimum the factual basis must include: (1) identification of the regulated small entities based on the North American Classification System (NAICS); (2) the estimated number of regulated small entities; (3) a description of the economic impact of the rule on small entities; and (4) an explanation of why either the number of small entities is not substantial and/or the economic impact is not significant under the RFA.

¹⁹ Telephone interview with Kenneth Bullock, Chief Office of Program Policy Evaluation, Mine Safety and Health Administration, in Arlington, Va. (Nov. 15, 2007).

²⁰ Telephone interview with Andy Devito, from OSM, Washington, DC (Nov. 8, 2007).

²¹ 72 *Fed. Reg.* at 48915.

Kentucky Coal Association, and while these two groups strongly support this rulemaking, they note that two provisions in this proposed rule may cause significant economic impact on small entities. Consequently, Advocacy does not believe this proposed rule can be certified under the RFA without further analysis.

Small Entity Concerns

Waters of the United States

Small entity representatives are concerned that OSM is changing the well-understood SMCRA definitions of “perennial stream” and “intermittent stream,” and is replacing these terms with the unsettled term, “waters of the United States.” In *Rapanos v. the United States*, the Supreme Court addressed the issue of when the Federal Government can apply this Clean Water Act term, specifically by determining whether a wetland or a tributary is a “water of the United States.”²² The justices issued five separate opinions in *Rapanos*, with no single opinion commanding a majority of the court.²³ The Kentucky Coal Association stated in an OSM hearing that “using an unsettled and subjective term such as ‘waters of the United States’ would spawn even greater uncertainty—exactly the opposite objective for a rule that is meant to clarify the existing regulatory framework.”²⁴

According to OSM, this “waters of the United States” definition may require entities to obtain a jurisdictional determination from the U.S. Army Corps of Engineers before submitting a SMCRA permit application for any mining activities.²⁵ Obtaining this determination may add delays and costs to the permitting process, which OSM has not quantified in its proposed rule. Small business representatives are also concerned that the expanded definition to all “waters of the United States” may increase the number of mining operations that may be impacted by this rule. Entities such as the National Mining Association²⁶ and the Kentucky Coal Association²⁷ have recommended that OSM abandon the “waters of the United States” definition, and continue to utilize the familiar SMCRA terms of “perennial stream” and “intermittent stream.”

²² *Rapanos v. the United States*, 126 S. Ct. 2208 (2006).

²³ *Id.*

²⁴ David Moss, Director of Governmental Affairs for Kentucky Coal Association, Remarks at an OSM Hearing in Hazard, Kentucky (Oct. 24, 2007) (*Kentucky Hearing*).

²⁵ 72 *Fed. Reg.* at 48900.

²⁶ Interview with Bradford V. Frisby, Associate General Counsel, National Mining Association, in Washington, D.C. (Oct. 25, 2007).

²⁷ *Kentucky Hearing*, at 2.

Alternatives Analysis

Small entity representatives are concerned that the proposed rule requires an expanded alternatives analysis under SMCRA for the disposal of excess spoil and coal mine waste in the SBZ and in the waters of the United States, which is duplicative and may add extra costs to this rulemaking.²⁸ Any mining activity that occurs in the water is already subject to other requirements under SMCRA and a thorough alternatives analysis under the Clean Water Act. The Kentucky Coal Association commented in a hearing that “as written, the rules contain a myriad of requirements for a seemingly never-ending ‘alternatives analysis,’ and the proposed rule cannot be reconciled with the statutory standards for excess spoil disposal related to stability, design, or configuration.”²⁹ OSM has not quantified the costs of this alternatives analysis but has stated that it will do so in the final rulemaking. Based on these small entity comments, Advocacy recommends that OSM revise this expanded alternatives analysis for these activities under SMCRA.

Recommendations

OSM can do one of two things to come into compliance with the RFA. OSM can modify the rule so that the proposed rule does not have a significant economic impact on a substantial number of small entities and then certify the rule with a factual basis. Alternatively, if OSM cannot properly certify the proposed rule, the agency must prepare an IRFA and publish it in the *Federal Register* with a period for notice and comment.

An IRFA must contain: (1) a description of the reasons why the regulatory action is being taken; (2) the objectives and legal basis for the proposed regulation; (3) a description and estimated number of regulated small entities; (4) a description and estimate of compliance requirements including any differential if any for different categories of small entities; (5) identification of duplication, overlap and conflict with other rules and regulations; and (6) a description of significant alternatives to the rule.

Additionally, E.O. 13272 requires agencies to provide a copy of their draft IRFA to Advocacy at the same time it is provided to the Office of Management and Budget (OMB) under Executive Order 12866.³⁰ However, if submission to OMB is not required, then the IRFA should be provided to Advocacy at a reasonable time prior to publication in the *Federal Register*.

²⁸ 72 *Fed. Reg.* at 48919. The proposed section 780.35 has the excess spoil disposal requirements.

²⁹ *Kentucky Hearing*, at 3.

³⁰ Executive Order 12866, 58 *Fed. Reg.* 51,735 (Oct. 4, 1993).

Conclusion

Advocacy recommends that OSM review the comments of the affected small entities, and recommends that OSM either publish data supporting their certification under the RFA prior to moving forward with a final rule, or publish an IRFA for comment. Advocacy stands ready to assist OSM in its compliance efforts. If you have any questions or require additional information please contact Assistant Chief Counsel Janis Reyes at (202) 619-0312 or by email at Janis.Reyes@sba.gov. Thank you for this opportunity to contribute to the record.

Sincerely,

//signed//

Thomas M. Sullivan
Chief Counsel of Advocacy

//signed//

Janis C. Reyes
Assistant Chief Counsel

cc:

The Honorable Susan E. Dudley, Administrator, Office of Information and Regulatory Affairs