

Advocacy Supports OSM Proposal to Clarify Mountaintop Mining Rules and Urges Continued Attention on Impacts to Small Businesses

On November 15, the Office of Advocacy submitted a 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*. Advocacy supports the intent behind OSM's proposed rule, which is to clarify its regulations regarding the circumstances in which mining activities may be allowed near and in waters of the United States. However, Advocacy does not believe that this rule can be certified under the Regulatory Flexibility Act (RFA) because it may have a significant economic impact on a substantial number of small entities. Advocacy's letter to OSM may be accessed at: <http://www.sba.gov/advo/laws/comments/>.

- OSM is clarifying its "mountaintop mining" rules under the Surface Mining Control and Reclamation Act (SMCRA). When mining occurs in steep slope areas such as in the Appalachian coalfields, this process creates excess spoil material that cannot be safely placed in the mined-out areas. This proposed rule lists the requirements for mining activities related to the disposal of this excess spoil; it creates different standards for activities that occur *within* 100 feet of the water or the stream buffer zone (SBZ), and those activities that occur *in* the water.
- Advocacy believes that OSM's certification of this rule under the RFA cannot be supported, because it may have a significant economic impact on a substantial number of small entities. Statistics from the Mine Safety and Health Administration (MSHA) and OSM show that over 95 percent of the coal mining companies and surface mining companies are considered small entities based on the SBA small business size standard. OSM has not provided information on the economic impact that this rule may have on these small entities.
- Small entities are worried about two additions from the 2004 proposed rule that may add significant costs, the adoption of the vague term "waters of the United States" from the Clean Water Act for the activities that occur in the SBZ and an expanded alternatives analysis for activities that occur in the water.
- 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, then the agency must prepare an Initial Regulatory Flexibility Analysis (IRFA) and publish it in the *Federal Register* with a period of notice and comment.

For more information, visit Advocacy's Web page at <http://www.sba.gov/advo>, or contact Assistant Chief Counsel Janis Reyes by email at janis.reyes@sba.gov or by phone at 202-619-0312.