

The Stream Buffer Zone Rule, 2008-2009

One of OSM's biggest (and ultimately, one of the most controversial) accomplishments in Fiscal Year 2009 was the finalization of a new Stream Buffer Zone rule, which was published in the Federal Register on December 12, 2008, and became effective on January 12, 2009.

The product of nearly five years of intense work, the new rule attempted to remedy a conflict between two Federal court decisions and the apparent intent of SMCRA. The 2008 version of the rule aimed to clarify how, in certain cases, coal mine operators could place the excess rock and soil from mountaintop mining near and in valley stream beds.

The controversy first arose when a Federal district court in West Virginia issued a 1999 ruling that prohibited any valley fill material in streams, which was subsequently reversed in a higher court on procedural grounds. In 2002, the same district court issued a similar ruling, saying SMCRA did not authorize placing any overburden in streams, but the higher court again reversed the decision, that time on statutory grounds.

In response to the litigation, OSM offered a new version of the Stream Buffer Zone rule in January 2004, and a revision of that

proposed draft in August 2007. By November 2008, the agency had solicited and received more than 43,000 public comments on the proposal, held four public hearings, and developed a detailed Environment Impact Statement (EIS) that offered a range of alternatives for the rule.

Agency officials said that, after careful consideration, they chose the most environmentally protective alternative for the final rule. The 2008 rule required operators to return as much of the overburden as possible to the mine excavation, avoid using any fill material in and around streams, identify a range of reasonable alternatives to placing overburden in a stream, and only then, with all other options exhausted, could they place any fill material in a stream bed.

In December 2008 and January 2009, environmental and citizens groups filed suit against OSM in the District court, claiming the agency violated several Federal statutes while writing the new Stream Buffer Zone rule. Specifically, the lawsuit claimed OSM violated SMCRA, the National Environmental Policy Act, the Clean Water Act, the Administrative Procedure Act, and the Endangered Species Act.

Secretary of the Interior Ken Salazar subsequently determined OSM had violated

the Endangered Species Act by failing to consult with the U.S. Fish and Wildlife Service to evaluate the rule's possible effects, and asked the court to vacate the 2008 version of the Stream Buffer Zone rule, which would allow the agency to revert to the 1983 version.

The court denied the Secretary's request, saying OSM must follow the rulemaking structure in the Administrative Procedure Act, meaning OSM would have to once again go through the entire rulemaking process to repeal or amend the 2008 rule.

In June 2009, the Department of the Interior signed an historic Memorandum of Understanding with the Army Corps of Engineers and the Environmental Protection Agency. The MOU provided for better cooperation and coordination among the agencies to protect the people and the environment in Appalachia. It included provisions for increased oversight of permitting and enforcement for all coal mining operations, including mountaintop mining. OSM also formally committed to consider rewriting the Stream Buffer Zone rule and the Approximate Original Contour requirements.

In mid-November (now FY 2010), the Secretary of the Interior and OSM's Director announced their decision to publish an Ad-

vance Notice of Proposed Rulemaking on stream protection, in order to begin gathering comprehensive public input on the future rule. Simultaneously, the agency solicited public comments on the agency's intent to increase oversight of coal mine permitting and surface coal mining and reclamation and operations.

When the comment period closed in January 2010, OSM had collected more than 34,000 comments on the advance notice of proposed rulemaking and the increased oversight measures.

By October 2010, OSM had increased the pace and frequency of both its announced and unannounced mine inspections in Appalachian coalfields. Significantly, OSM's Director committed to developing and writing a proposed stream protection rule under an ambitious schedule that included developing a new EIS, and adopting an innovative approach to ensure transparency and public involvement, as well as industry and citizen input prior to drafting and publishing the proposed rule.

The concept of gathering advance comments and analysis is designed to develop a reasonable and scientifically sound rulemaking.