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# Proposed Rule from U.S. Department of the Interior Increases Pressure on Coal Mining Industry

*By Paul N. Singarella, Claudia M. O'Brien, Marc T. Campopiano, Daniel P. Brunton, and Joshua T. Bledsoe\**

*In this article, the authors discuss a recent proposal by the U.S. Department of the Interior to revise regulations adopted under the Surface Mining Control and Reclamation Act of 1977 that govern surface coal mining and reclamation operations near surface streams.*

The U.S. Department of the Interior, through its Office of Surface Mining Reclamation and Enforcement (“OSMRE”), recently proposed to revise regulations adopted under the Surface Mining Control and Reclamation Act of 1977 (“SMCRA”) that govern surface coal mining and reclamation operations near surface streams (the “Proposed Rule”). According to the OSMRE, “[t]he primary purpose of this proposed rule is to reinforce the need to minimize the adverse impacts of surface coal mining operations on surface water, groundwater, fish, wildlife, and related environmental values, with particular emphasis on protecting or restoring streams and aquatic ecosystems.” OSMRE asserts widespread impacts including loss of headwater streams, long-term degradation of surface water quality downstream from mines, displacement of native species, compaction of postmining soils and watershed hydrology impacts. SMCRA requires OSMRE regulations to respect coal’s important place in the country’s energy portfolio. Whether this draft rule strikes a reasonable balance under SMCRA will be the subject of intense debate as this rulemaking proceeds.

The Proposed Rule<sup>1</sup> would significantly alter OSMRE’s decades-old “Stream Buffer Zone” regulations, which nominally require a 100-foot buffer for mining operations along streams,<sup>2</sup> and would expand regulatory oversight in the coal industry. Along with the Proposed Rule, OSMRE has published a draft Environ-

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<sup>1</sup> <http://www.gpo.gov/fdsys/pkg/FR-2015-07-27/pdf/2015-17308.pdf>.

<sup>2</sup> OSMRE issued and revised three versions of the Buffer Zone rule from 1977 to 1983. OSMRE implemented revisions in 2008 to permit excess mining spoil to be placed in streams and impose additional requirements to reduce environmental impacts. However, the U.S. District Court for the District of Columbia vacated the 2008 rule when environmental groups successfully alleged that OSMRE failed to consult FWS concerning impacts of the 2008 rule to endangered species. The district court reinstated the 1983 version of the Buffer Zone Rule, which triggered OSMRE to begin the process to develop and implement the Proposed Rule.

mental Impact Statement<sup>3</sup> (“EIS”) and a Regulatory Impact Analysis<sup>4</sup> (“RIA”).

**THE RULE REACHES BROADLY**

The Proposed Rule would impose a suite of new requirements on the operators of coal mines. OSMRE has highlighted seven key components of the Proposed Rule as follows:

1. Establish in each permit the point at which adverse mining-related off-site impacts on groundwater and surface water reach an unacceptable level (*i.e.*, the point at which adverse impacts from mining would cause “material damage to the hydrologic balance outside the permit area”);
2. Require collection of adequate pre-mining data about the site of a proposed mining operation and adjacent areas and establish a comprehensive baseline against which the impacts of mining can be compared;
3. Require effective, comprehensive monitoring of groundwater, surface water, and the biological condition of streams during and after mining and reclamation activities;
4. Protect or restore perennial and intermittent streams and related resources (including fish and wildlife);
5. Ensure the use of advances in information, technology, science, and methodologies related to surface and groundwater hydrology, surface-runoff management, stream restoration, soils and revegetation;
6. Ensure that land disturbed by surface coal mining operations is restored to a condition capable of supporting the uses supported before mining; and
7. Protect threatened and endangered species and designated critical habitat under the Endangered Species Act of 1973 (“ESA”), and implement SMCRA to protect fish and wildlife.

**PROPOSED RULE MAY REQUIRE ADDITIONAL WATERSHED ANALYSIS**

Surface coal mining operations require either a federal surface coal mining and reclamation permit or a state permit issued pursuant to an approved state program under SMCRA. Among other conditions, Section 510(b)(3) of SMCRA provides that the regulatory authority may not approve a permit unless the application affirmatively demonstrates and the regulatory authority finds in writing that the proposed operation “has been designed to prevent material damage to the hydrologic balance outside the permit area.” The Proposed Rule would define “material damage to the hydrologic balance outside the permit area” (“Off-site Hydrologic Damage”) for the first time.

Under the proposal, Off-site Hydrologic Damage would include any adverse

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<sup>3</sup> <http://www.osmre.gov/programs/RCM/docs/sprDEIS.pdf>.

<sup>4</sup> <http://www.osmre.gov/programs/RCM/docs/sprRIA.pdf>.

impact from mining operations “on the quantity or quality of surface water or groundwater, or on the biological condition of a perennial or intermittent stream, that would preclude any designated surface water use under sections 101(a) and 303(c) of the [CWA] or any existing or reasonably foreseeable use of surface water or groundwater outside the permit area.” This sweeping and arguably stringent definition presents the potential specter of open-ended regulatory inquiry on complex scientific “material damage” and “hydrologic balance” issues, and debate on criteria to determine harm.

### **THE PROPOSED RULE REINFORCES RESTORATION REQUIREMENTS**

To obtain a permit, an applicant must submit a reclamation plan to the regulatory authority showing how the applicant would comply with applicable reclamation requirements, as well as post a performance bond to secure post-mining restoration.<sup>5</sup> Under the Proposed Rule, bond release would not occur until all monitoring data show no adverse trends in stream flow, surface-water and groundwater water-quality data and hydrologic balance. The Proposed Rule would require the reclamation plan to provide significant additional information including a detailed reclamation timetable projecting such “major step[s] in the reclamation plan” as perennial and intermittent stream restoration, soil redistribution, revegetation, and restoration of the ecological function of all reconstructed perennial and intermittent stream segments.

SMCRA Section 515(b)(2) requires successful permit applicants to restore land affected by surface coal mining and reclamation operations “to a condition capable of supporting the uses which it was capable of supporting prior to mining,” or to a condition supporting “higher and better use[s].” The Proposed Rule notes, however, that “[e]xisting rules and permitting practices have focused primarily on the land’s suitability for a single approved postmining land use” that have “not always been applied in a manner that results in the construction of postmining soils that provide a growth medium suitable for restoration of premining site productivity.” The Proposed Rule would bring renewed focus on SMCRA’s restoration requirement.

### **THE PROPOSED RULE IMPOSES NEW ESA-RELATED REQUIREMENTS**

The Proposed Rule could potentially affect even mining operations that are not near streams, as it imposes new requirements to implement the Endangered Species Act. For example, the Proposed Rule would define Material Damage to include impacts to protected species or habitat outside the permit area, and Off-site Hydrologic Damage to include impacts from coal mining activities on streams “that would impact threatened or endangered species, or have an adverse effect on designated critical habitat, outside the permit area in violation of [ESA].” OSMRE also is considering alternative language to the Off-site Hydrologic Damage definition that would cover coal mining activities “that would jeopardize the continued existence of threatened or endangered species, or result in the destruction or adverse

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<sup>5</sup> SMCRA §§ 506(d), 507–08.

modification of designated critical habitat, outside the permit area in violation of [ESA].”

Section 515 of SMCRA requires surface coal mining operations to “minimize disturbances and adverse impacts” on fish, wildlife, and related environmental values “to the extent possible using the best technology currently available.”<sup>6</sup> Surface mining permit applicants must include information regarding fish and wildlife resources for a proposed permit and adjacent areas in a Protection and Enhancement Plan (“PEP”).<sup>7</sup> The Proposed Rule would add a provision expressly requiring the PEP to include any species-specific protection and enhancement plans developed in accordance with the ESA and any biological opinions implementing that law.

### **PROPOSED RULE WOULD IMPOSE MATERIAL NEW COSTS ON THE COAL INDUSTRY DESPITE ACKNOWLEDGING DEMAND**

The Proposed Rule would impose sweeping new regulatory requirements on the coal mining industry. SMCRA’s Statement of Purpose outlined in Section 102 balances environmental protection with economic demand for coal as an essential source of energy, assuring the coal supply essential to the nation’s energy requirements, and supporting the nation’s economic and social well-being. While the Proposed Rule purports to strike this balance, costs to comply will be material, and are expected to reduce coal-mining activity, rendering some portion of it uneconomic. Also, the proposal represents yet another hurdle for a domestic coal industry that faces significant challenges.

The economic analysis developed in connection with the Proposed Rule asserts that compliance would be economically achievable, costing \$52 million industry-wide on an annualized basis, or about 0.1 percent of current industry-wide revenues. According to the RIA of the Stream Protection Rule, the proposed rule is anticipated to decrease coal production and consumption patterns across the U.S. by increasing the cost of coal production. Those economic impacts are not spread uniformly across the nation; rather, they are likely to be felt disproportionately by certain coal-producing regions, such as Appalachia, which are predicted to experience both job losses and the loss of state tax revenues. Further, OSMRE admits that the rule would likely have an annual negative effect on the economy of \$100 million or more.

Even if the above estimates prove to be reasonable (an assumption we do not make), the Proposed Rule is only the latest in a series of rulemakings targeting the coal industry. Since 2009, the EPA and other agencies have proposed a number of major rules that will significantly impact coal-fired power, including the Cross-State Air Pollution Rule (which the D.C. Circuit remanded in part to EPA on July 28, 2015), the Coal Combustion Residuals Rule, the Cooling Water Intake Structures Rule, and the Mercury and Air Toxics Standards (which the U.S. Supreme Court overturned on June 29, 2015). In addition, EPA was expected to release the final Clean Power Plan during the first week of August. Each of these rules individually

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<sup>6</sup> 30 U.S.C. § 1265(b)(24).

<sup>7</sup> 30 CFR 780.16(a), (b).

was predicted to cost \$100 million or more, and taken together, the costs imposed on coal mining and coal-fired power generation exceed many billions of dollars. Not surprisingly, then, the coal mining industry has experienced significant challenges in recent years—challenges which the Proposed Rule will exacerbate.

**COMMENTS ON THE PROPOSED RULE WERE DUE BY SEPTEMBER 25, 2015**

The Draft EIS for the Proposed Rule was published in the Federal Register on July 17, 2015, for a 60-day comment period,<sup>8</sup> which ended on September 25, 2015. Both the Proposed Rule and the RIA also were subject to a 60-day comment period, which ended September 25, 2015, though an extension could be granted. Likely the OSMRE would attempt to produce a final rule by the end of 2016. Given the magnitude of the Proposed Rule, OSMRE may face difficulty in responding to all comments to produce a carefully crafted final rule that would not raise future vulnerabilities for OSMRE.

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<sup>8</sup> <http://www.regulations.gov/#!documentDetail;D=OSM-2010-0018-0001>.