

OSM's Stream Protection Rule POTENTIAL IMPACTS TO COAL OPERATIONS



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OSM's Stream Protection Rule

Evolution of a Flawed Rule Making Process:

CASE STUDY OF A PROFESSIONAL and ETHICAL DILEMMA



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THE WAR ON COAL

- Many have termed it phony
- We know it is real
- We have seen the casualties
- **It didn't have to happen this way!**
- Just a few of the Battles:
 - Environmental groups
 - Mercury and Air Toxics Standards (MATS)
 - The Clean Power Plan (CPP)
 - The Stream Protection Rule (SPR)
 - etc., etc. etc.



The Clean Power Plan

- Final rule Aug. 3, 2015. Significantly different from proposed rule.
- Requires 39.4 % emissions rate reduction by 2030 for KY.
- Roughly 150 entities (including 28 states) sued. Supreme Court stay Feb. 9.
- U.S. Court of Appeals for D.C. Circuit oral arguments in June.
- With the stay, EPA cannot require any action from states.
- 20 states (including KY) have suspended planning ; 19 states continuing in planning efforts. 8 states “assessing” planning.
- U.S. Chamber, states opposing the rule required to come up with 81% of total emissions reductions.

EPA's McCarthy, "I can't find one single bit of evidence that we have destroyed an industry or significantly impacted jobs other than in a positive way," April 13, 2016



EPA & the Gold King Mine Debate Aug 5, 2015





Animas River, Colorado and New Mexico

OSM's Stream Protection Rule Brief History of a Flawed Regulation

The Surface Mining Control and Reclamation Act of 1977:

- PL 95-87 better known as SMCRA
- Established the Office of Surface Mining Reclamation and Enforcement, better known as OSM

Brief History of a Flawed Regulation

SMCRA Title 1, Section 101 (f):

- “...the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation **obligations subject to this Act should rest with the States.**”
- All active coal mining states except for Tennessee have primacy

Brief History of a Flawed Regulation

1983:

- SPR Predecessor is Stream Buffer Zone (SBZ) rule issued in 1983.
- SBZ rule required 100-foot buffer zone, essentially prohibited mining within 100 feet of perennial or intermittent streams
- Industry and other stakeholders opposed 1983 SBZ rule for fear rule could be interpreted as outright prohibition on fills.
- Historically, OSM and Appalachian states did not interpret the 1983 rule in this manner.
- **Did not address underground mining**

Brief History of a Flawed Regulation

1999:

- WV federal judge relied on the 1983 SBZ rule to prohibit fills as he interpreted SMCRA (Bragg v. Robertson).
- Effectively prohibited valley fills in WV
- Led to short-term disruption in permitting

2001

- Bragg opinion challenged on jurisdictional grounds.
- OSM subsequently concurred.
- OSM made clear – 100-foot buffer zone rule did not prohibit fills or “mine throughs”, rather is an erosion control measure.

Brief History of a Flawed Regulation

2004–2008:

- 2004 OSM clarified 1983 SBZ, mining activities/fills allowed
- In part to avoid future reinterpretations to prohibit fills, as Clinton administration previously attempted in last days,
- 2008 OSM EIS supporting proposed changes, a 3.5 year project.
- OSM proposed changes 1983 SBZ rule, so-called “Bush-era-2004” SBZ finalized December 2008.
- Culmination of nearly five-year process -- first version proposed SBZ in Jan 2004 and final version took effect on Jan. 12, 2009.

Brief History of a Flawed Regulation

2004–2008:

- Final EIS 2008 for the SBZ rule concluded net effect on mining positive since mining required to minimize impacts.

2009

- Opponents challenged 2008 SBZ rule claiming OSM failed to consult USFWS on effects on T&E species as required by the ESA

2010 Stream Protection Rulemaking

- As result of a Settlement Agreement OSM agreed to revise SBZ
- 2009 OSM handpicked a team of consultants to prepare new EIS and RIA
- Contract required completion in ~ 6 months (mandated by Settlement)
- Promises made to consultants that deadline would be extended
- OSM changed scope mid-contract included Underground Mining
- OSM began imbedding numerous personnel in EIS teams
- In spite of numerous scope changes, OSM refused to extend contract
- Again promises of additional time and budget if a DRAFT was submitted

Brief History of a Flawed Regulation

- Preliminary drafts submitted with several incomplete sections per OSM instructions
- Consultant team conservatively predicted over 7,000 job losses in RIA
- OSM attempted to coerce the consultants to change the analysis
- Feb. 2011, OSM Director Pizarchik's attorney:

“It's not the real world. This is rulemaking.”

- All consultant team members agreed that it would be unprofessional and unethical to change the results under the conditions!
- Consultants threatened with nonpayment and government blacklisting.

Code of Ethics for Engineers

I. Fundamental Canons

Engineers, in the fulfillment of their professional duties, shall:

1. Hold paramount the safety, health, and welfare of the public.
2. Perform services only in areas of their competence.
3. Issue public statements only in an objective and truthful manner.
4. Act for each employer or client as faithful agents or trustees.
5. Avoid deceptive acts.
6. Conduct themselves honorably, responsibly, ethically, and lawfully so as to enhance the honor, reputation, and usefulness of the profession.

Brief History of a Flawed Regulation

- Consultant's contract with OSM was not renewed
- OSM tried to impose a Gag Order on consultants

Brief History of a Flawed Regulation

- Nov. 4, 2011, in Congressional Testimony OSM Director Joe Pizarchik stated among other things:
 - Job loss numbers
 - “placeholders”,
 - “fabricated”
 - and “no basis in fact”
 - Suggested plagiarism in DEIS
 - Claimed that OSM was at “arms length” in process



“When OSM did not like the result of the analysis, OSM asked that the team change the baseline conditions and use alternative assumptions to alter the coal production and job loss numbers.”

**Steve Gardner Testimony
House Subcommittee on Energy
and Mineral Resources
November 18, 2011**

Brief History of a Flawed Regulation

- Results of testimony:
 - USDOJ Office of Inspector General (OIG), Program Integrity Division initiated investigation of OSM and the SPR DEIS process
 - Recorded transcripts of meetings confirmed OSM pressure to change results
 - OSM Project Manager stated consultants had performed exactly as directed
 - This PM removed from project and pressured to resign
 - OIG report confirmed all consultant allegations, however there were no repercussions to OSM

Withdrawal of Cooperating Agencies

- 10 coal-producing states (LA, NM, UT, TX, KY, MT, WY, WV, IN, and VA) originally agreed to be “cooperating agencies” with OSM to develop EIS at the start of the rulemaking process years ago
 - Cooperating agencies to receive copies of draft documents
 - Be provided opportunity to comment on those drafts
 - OSM failed to provide drafts as agreed
 - All but one of these states formally withdrew

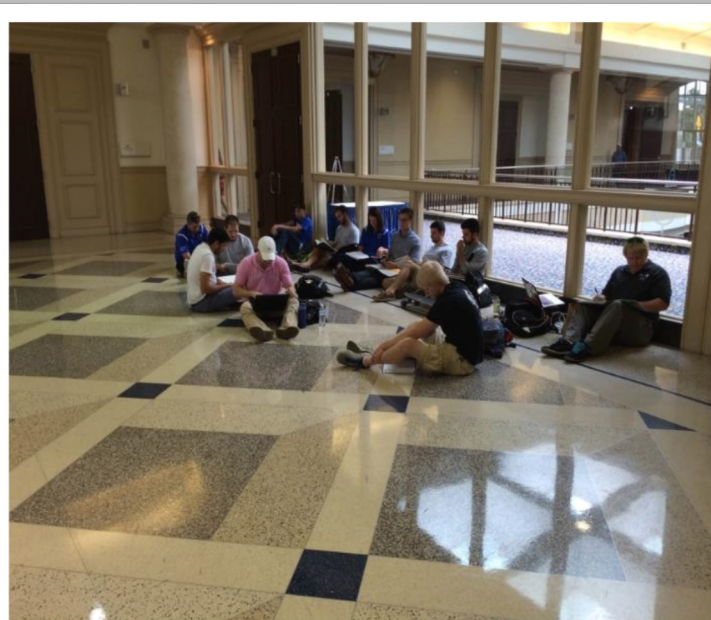
2015 Proposed Rule

- After previous consultants contract not renewed, OSM continued work engaging new contractors, including one of previous group
- New SPR, DEIS and RIA released July, 2015
- Essentially total rewrite of SMCRA
- Impacts were termed minimal to industry and states
- Interstate Mining Compact Commission asked ECSI to form new team to review SPR, DEIS and RIA

OSM public hearings at six locations

- Initially only 60 day public comment period for rule, EIS and RIA consisting of over 3,000 pages and 6 years in the making
- One 30 day extension granted due to overwhelming number of extension requests
- Extensive opposition to rule at public hearings nationwide
- Over 94,000 comments submitted
- OSM withheld Key documents— “Deficient Public Process”

OSM public hearings at six locations



WV Governor Tomblin



**MST & SIU Student Sections
at St. Louis Hearing**



CSM SME Student Section



**Pittsburgh Hearing
WVU SME Student Section**

**VT SME Student Section
at Big Stone Gap**



- Interstate Mining Compact Commission, multiple state governments and Industry teams, as well as many companies and associations
- To date serious flaws discovered made by OSM and new consultant team, their assumptions and science used to justify need for the rule

Some Issues identified to date include:

- Inadequate Review of Supporting Technical Literature
- Science OSM claims justifies rule change incomplete at best and unproven in many cases.
- Narrow definition in application of “Materials Damage to the Hydrologic Balance”
- Shortcomings of the “Model Mine” Approach used to predict impacts
- Indefensible Application of Overburden Depth Threshold Limit without consideration of local geology and mining type across country
- The rule significantly impacts the ability of companies to longwall mine coal.
- Overlooked implications related to fracture zones
- Inappropriate and unsupported conclusions

How the SPR will affect coal operations:

- Additional production cuts nationwide, but especially in Appalachia;
- Overlap of the SPR with CWA jurisdiction will create regulatory uncertainty and permitting difficulty;
- Additional baseline data gathering requirements;
- Additional inspection and reporting requirements for structures such as ponds, culverts and ditches;
- Difficulty in siting and/or expanding facilities due to “material damage to the hydrologic balance” constraints;
- Gives USFWS permit “veto” authority if TandE species are suspected or present with no definitive timeline for a decision

In summary:

Economic impacts of this rule are far reaching;

- The mining industry, state governments, insurance and financial institutions and the public!
- Unfunded mandates to state governments.

Dr. Michael Hendryx - *Mountaintop Mining and Public Health*

Thursday, January 21, 2016 –

11:00am to 12:00pm



- Dr. Hendryx, a psychologist stated about the Appalachian Research Initiative for Environmental Science (ARIES), “Studies that I have seen come out of the ARIES group are **LAUGHABLY BAD.**”

ARIES research consortium includes WVU, Marshall, UK, Ohio State, Penn State, Pittsburgh, Edward Via College of Osteopathic Medicine, UVA Wise, St. Francis University (PA) and consultants in Epidemiology and Occupational Health (which includes faculty from Georgetown University, Johns Hopkins University, and George Washington University).

It also includes researchers from Virginia Tech which manages the program.



NEWS RELEASE



WASHINGTON, D.C.
WWW.OSMRE.GOV

OSMRE Funds National Academy of Sciences Study of Potential Health Risks Related to Surface Coal Mining in Central Appalachia

- *\$1 million study responds to state of WV request*
- “West Virginia asked us in the Federal government for help. We wanted to do the best we could for the people, so we brought the National Academy of Sciences on board because they are one of the world’s most reputable scientific organizations. Good things happen when we work together.” said OSMRE Director Joe Pizarchik.
- The panel won’t include any active members of the coal industry or anyone from a government agency that regulates coal mining, OSM said.
- Read more here:
<http://www.kentucky.com/news/state/article93600657.html#storylink=cpy>

July 27, 2016 memo to Asst. Director Program Support, Regional and Field Office Directors and Title V Division Chiefs from Joseph G. Pizarchik, Director, OSMRE

Subject: A More Complete Enforcement of SMCRA and its Implementing Regulations




United States Department of the Interior

OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT
Washington, D.C. 20240

July 27, 2016

Memorandum

To: Assistant Director Program Support, Regional and Field Office Directors and
Title V Division Chiefs

From: 
Joseph G. Pizarchik, Director
Office of Surface Mining Reclamation and Enforcement

Subject: A More Complete Enforcement of SMCRA and Its Implementing Regulations

Purpose of Memorandum:
The Office of Surface Mining Reclamation and Enforcement (OSMRE) is responsible to ensure SMCRA and the associated regulations are directly implemented in Federal program states and through oversight, ensure that State Regulatory Authorities enforce the state counterparts in accordance with their approved state programs. While it is OSMRE's responsibility to assist the States and Tribes and to conduct oversight to help ensure approved programs are properly implemented, it is also important for OSMRE to prevent long-term water pollution and the fiscal obligations treating such pollution can impose on state bond pools and mine operators. Prevention of such long-term discharges and associated treatment will help ensure a stronger mining industry to meet the country's energy needs, ensure more viable state bond programs, and assure that surface coal mining operations are conducted so as to protect the environment long after mining has been completed. This memorandum is provided to help accomplish these purposes and to help resolve questions relative to the interrelationship between the Clean Water Act (CWA) and SMCRA.

Background on SMCRA:
The Surface Mining Control and Reclamation Act (SMCRA) established a nationwide regulatory program to, among other things, prevent pollution from coal mining through a permitting process which requires measures in mining and reclamation plans that minimize on-site hydrologic impacts and prevent off-site "material damage to the hydrologic balance." 30 C.F.R. § 773.15. The Act specifies that mining permit applications must include baseline hydrologic data in order to predict the probable hydrologic consequences of mining based upon the quantity and quality of water in surface water and ground water systems, including the dissolved and suspended solids under seasonal flow conditions. Sections 515(b) and 516(b) of SMCRA require that surface coal mining and reclamation operations be restored to a condition that does not present any actual or probable threat of water diminution or pollution by avoiding the creation of acid or other toxic drainage, treating drainage to reduce toxic content which might affect downstream

AN END AROUND?



Concerned about self-bonding, top federal mining regulator wonders about collusion

- On May 19, 2016 Joe Pizarchik said. "Was there any kind of collusion, malfeasance out there? I think the public needs to know the answers to those questions."
- August 16, 2016 OSM announces rulemaking on Self-Bonding to strengthen regulations.



WHAT'S NEXT?



OSM's Stream Protection Rule QUESTIONS?

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