

# Office of Surface Mining Reclamation and Enforcement

## Excess Spoil Minimization/Stream Buffer Zone Rule: Significant Differences Between the Proposed Rule and the Final Rule

### 1. Scope of the stream buffer zone rule.

We retained the scope of the existing stream buffer zone rules (perennial and intermittent streams) rather than revising those rules to apply to waters of the United States, as in the proposed rule. Almost all commenters (state, industry, and environmental organizations) who opined on this issue opposed the proposed change. In general, commenters preferred the relatively well-understood meaning of the term “perennial and intermittent streams” in the existing rules as opposed to the uncertain meaning of the term “waters of the United States,” especially after the Supreme Court’s Rapanos decision and the issuance of Corps/EPA guidance interpreting that decision.

*Relevant final rule provisions:* Scattered throughout 30 CFR 780.25(d)(1); 780.28; 780.35(a)(3); 784.16(d)(1); 784.28; 784.19(a)(3); 816.57; and 817.57.

### 2. Avoidance of perennial and intermittent streams and their buffer zones.

In response to numerous comments expressing concern that the proposed rule did not adequately protect headwater streams, we revised our excess spoil and coal mine waste disposal rules by adding a requirement that the operation be designed to avoid placement of excess spoil or coal mine waste in or within 100 feet of perennial or intermittent streams to the extent possible.

We also revised the stream buffer zone rule to provide that, as a prerequisite for approval of activities in a perennial or intermittent stream, the permit applicant must demonstrate, and the regulatory authority must find, that it is not reasonably possible to avoid disturbance of the stream. We added similar provisions for activities in buffer zones for those streams; i.e., as a prerequisite for approval of activities on the surface of lands within 100 feet of a perennial or intermittent stream, the permit applicant must demonstrate, and the regulatory authority must find, that avoiding disturbance of the buffer zone either is not reasonably possible or is not necessary to meet the fish and wildlife and hydrologic balance protection requirements of the regulatory program.

*Relevant final rule provisions:* 30 CFR 780.25(d)(1); 780.28(b)(1), (c)(1), (d)(1), and (e)(1); 780.35(a)(3)(i); 784.16(d)(1); 784.28(b)(1), (c)(1), (d)(1), and (e)(1); 784.19(a)(3)(i).

### 3. Relationship between the SMCRA permit and Clean Water Act requirements.

In response to EPA concerns, we revised our permitting rules to provide that the SMCRA permit must include a condition requiring a demonstration of compliance with all applicable Clean Water Act authorization or certification requirements before the permittee may

conduct any activities in a perennial or intermittent stream for which authorization or certification is required under the Clean Water Act.

We also revised our stream buffer zone rule performance standards to reiterate that mining activities may be authorized in perennial or intermittent streams only where those activities would not cause or contribute to the violation of applicable State or Federal water quality standards developed pursuant to the Clean Water Act, as determined through certification under section 401 of the Clean Water Act or a permit under section 402 or 404 of the Clean Water Act.

*Relevant final rule provisions:* 30 CFR 780.28(d)(2), 784.28(d)(2), 816.57(a)(2), and 817.57(a)(2).

4. Activities in streambeds versus activities that occur only in stream buffer zones.

In response to industry comments, we revised the rule to clearly differentiate between permit application requirements and findings required for approval of activities that would take place in perennial or intermittent streams and the requirements and findings for those activities that would disturb only the buffer zone. The most significant difference is summarized in item 2 above.

*Relevant final rule provisions:* 30 CFR 780.28(b) through (e), 784.28(b) through (e).

5. Requirements for identification and analysis of alternatives.

Industry strongly opposed the proposed requirement for an analysis of alternatives for disposal of coal mine waste and placement of excess spoil. In response to those concerns, we revised the rules to require identification and analysis of alternatives only when the applicant proposes to place coal mine waste or excess spoil in a perennial or intermittent stream or within 100 feet of that stream. In addition, consistent with similar guidance published under the Clean Water Act, the revised rules provide that the permit applicant need identify only those reasonably possible alternatives that are likely to differ significantly in terms of impacts on fish, wildlife, and related environmental values. The proposed rule would have required identification of alternatives that are possible from a technological perspective, but may prove impracticable because of cost or other considerations.

The final rule specifies that an alternative is reasonably possible if it—

(A) Conforms to the safety, engineering, design, and construction requirements of the regulatory program.

(B) Is capable of being done after consideration of cost, logistics, and available technology. The fact that one alternative may cost somewhat more than a different alternative does not necessarily warrant exclusion of the more costly alternative from consideration. [*The preceding sentence replaces the sentence in the proposed rule prohibiting selection of the least costly alternative at the expense of environmental*

*protection solely on the basis of cost. As commenters pointed out, cost can be the determinative factor in some situations, even under the Clean Water Act.] However, an alternative generally may be considered unreasonable if its cost is substantially greater than the costs normally associated with that type of project. [The preceding sentence corresponds to similar standards in guidance published under the Clean Water Act.]*

(C) Is consistent with the provisions of 30 CFR 816.59/817.59, which require maximization of coal recovery to minimize the likelihood that the land will be reaffected by mining operations in the future.

*Relevant final rule provisions:* 30 CFR 780.25(d)(1)(ii) and (iii); 780.35(a)(3)(ii) and (iii); 784.16(d)(1)(ii) and (iii); 784.19(a)(3)(ii) and (iii).

6. Selection of alternative.

The final rule requires a permit applicant proposing to place excess spoil or coal mine waste in perennial or intermittent streams or their buffer zones to select the alternative with the least overall adverse impact on fish, wildlife, and related environmental values. The proposed rule would have allowed an applicant to select a less protective alternative based upon a demonstration that the most protective alternative was not possible. However, under the final rule, the alternatives that an applicant identifies must be reasonably possible, which means that this provision of the proposed rule is no longer relevant.

*Relevant final rule provisions:* 30 CFR 780.25(d)(1)(iv); 780.35(a)(3)(iv); 784.16(d)(1)(iv); 784.19(a)(3)(iv).

7. Avoidance or minimization of adverse environmental impacts.

We did not adopt the provisions of the proposed rule that would have required the permit application to include a description of the steps to be taken to avoid the adverse environmental impacts that may result from the construction of excess spoil fills, refuse piles, or coal mine waste impoundments, or, if avoidance was not possible, the steps that would be taken to minimize those impacts.

Those provisions are not needed in view of our addition of the requirements in items 2 and 6 above (avoidance of perennial and intermittent streams to the extent possible and selection of the alternative with the least overall adverse impact on fish, wildlife, and related environmental values). In addition, they are redundant of our regulations in 30 CFR 780.16(b) and 784.21(b), which require that each permit application include a description of how, to the extent possible using the best technology currently available, the operator will minimize disturbances and adverse impacts on fish and wildlife and related environmental values.

*Relevant final rule provisions:* None. [See proposed 30 CFR 780.25(d)(2); 780.35(a)(4); 784.16(d)(2); 784.19(a)(4).]

8. No buffer zone for stream segments that have been diverted.

The final rule clarifies that the stream buffer zone requirement does not apply to any stream segment for which a stream-channel diversion is approved and constructed. The proposed rule would have applied the exception only to mining through streams, which has limited utility in the context of underground mines. Furthermore, it would be illogical to apply the buffer zone requirement to any stream segment that has been diverted, regardless of the reason for the diversion, because there is no longer a need for a buffer zone for a former stream channel from which the flow has been diverted.

*Relevant final rule provisions:* 30 CFR 816.57(b)(1) and 817.57(b)(1).

9. Stream-channel diversion requirements for ephemeral streams.

Our proposed rule would have removed specific standards for the construction of stream-channel diversions for ephemeral streams. In response to EPA concerns, we have retained that requirement in the final rule.

*Relevant final rule provisions:* 30 CFR 816.43(a)(4) and 817.43(a)(4).