Statement of Katharine A. Fredriksen, Senior Vice President, Environmental Strategy & Regulatory Affairs, CONSOL Energy

Before the House of Representatives Energy and Mineral Resources Subcommittee of the Natural Resources Committee

At the September 26, 2011 Subcommittee Hearing "Jobs at Risk: Community Impacts of the Obama Administration's Effort to Rewrite the Stream Buffer Zone Rule" Charleston, WV

Introduction

Good Morning Mr. Chairman and distinguished Subcommittee Members and guests. My name is Katharine Fredriksen and I am the Senior Vice President, Environmental Strategy & Regulatory Affairs for CONSOL Energy. Thank you for inviting me to participate in this very important Subcommittee oversight hearing. CONSOL Energy holds the largest proven reserves of minable bituminous coal of 4.4 billion tons. We are the nation's largest underground miner of coal, and will produce some 62 million tons of coal this year alone. My comments today are based on the draft Office of Surface Mining ("OSM") Stream Buffer Zone rule available in the public forum. Based on our analysis of that draft rule, CONSOL has serious concerns about the jobs at risk and the significant impacts on coal mining if this rule were to go forward as any of the proposed alternatives other than "no action".

Eighty-eight percent of our coal is produced using the longwall method of mining. As Members of this Subcommittee may know, longwall systems have their own hydraulic roof supports called shields for overlying rock that move with the

machine as mining progresses into the coal seam. Rock that is no longer supported by the coal that has been removed is allowed to fall behind the operation in a controlled manner, always keeping the miners under the shields. Longwall mines are the safest method of underground mining, and at CONSOL, safety is absolutely our number one core value.

Currently, we operate active mining complexes across five states. Eight of our mining complexes are longwall mines, as follows; (1) Buchanan in Southwest Virginia; (2) Shoemaker in Northern West Virginia near Wheeling; (3) McElroy in Northern West Virginia near Moundsville; (4) Blacksville in Northern West Virginia near the Pennsylvania border; (5) Loveridge in Northern West Virginia near Fairmont; (6) Robinson Run, also near Fairmont in Northern West Virginia; (7) Bailey Mine in Pennsylvania; and 8) Enlow Fork Mine, also in Pennsylvania. We also have surface and underground mine operations in central and southern West Virginia, namely our Fola and Miller Creek mines.

SMCRA Regulates the Surface Effects of Underground Coal Mines

As the Subcommittee knows, SMCRA not only regulates surface coal mines, but also, as specified in SMCRA § 516, the surface effects of underground coal mining operations. Importantly, however, SMCRA § 516 mandates that in adopting any rules and regulations for the surface effects of underground coal mines, OSM "shall consider the distinct difference between surface coal mining and underground

coal mining." Thus, all of CONSOL Energy's longwall mining operations operate pursuant to and in accordance with SMCRA permits issued by the state regulatory authorities in the states where we operate. The programs of these state regulatory authorities have been approved by OSM as being as stringent as federal SMCRA and they are subject to strict oversight by OSM. In addition, Congress in SMCRA specifically encouraged the use of planned subsidence such as that which occurs with longwall mining.

Consequently, CONSOL Energy will be directly affected by any changes OSM makes to its stream buffer zone rule. As I describe in more detail below, everything we have learned to date about these changes causes us to be gravely concerned about the economic viability of our longwall mines, and the adverse impacts on employment at the mines, as well as the effects on the local communities that depend on these operations.

What is the Stream Buffer Zone Rule?

Rules and policies on stream buffer zones have been in existence from almost the very beginning of the implementation of SMCRA by OSM and the regulatory authorities of the coal mining states. The current stream buffer zone rule was published in the *Federal Register* on December 12, 2008 in a document entitled "Excess Spoil, Coal Mine Waste, and Buffers for Perennial and Intermittent Streams." 73 Fed. Reg. 75,814. A copy of the first page of the preamble to the

stream buffer zone rule and the rule itself is attached as Exhibit A to my prepared statement. As you heard in earlier testimony, the existing rule is a is a very comprehensive and detailed rule.

This 2008 rule resulted from a careful and well-executed public process completed over more than a five-year period. It included public hearings and consideration of over 45,000 public comments. The 2008 rule was also supported by an October 2005 programmatic environmental impact statement ("EIS"), which was sponsored by four federal agencies: OSM; EPA; the Corps of Engineers; and the Fish and Wildlife Service. This EIS included 30 scientific and economic studies. OSM also completed another separate EIS to support the final rule. The 2008 rule clarified existing agency policy on stream buffer zones that had been consistently used and applied by both OSM and state regulatory authorities for over 25 years. However, it also added and strengthened significant new environmental requirements for the placement of excess spoil. These new requirements included provisions for:

- minimizing excess spoil, avoiding mining activities in or near perennial and intermittent streams, if reasonably possible;
- requiring an analysis of alternatives; and
- selection of the option for placement of spoil with the least environmental impact on fish, wildlife, and related environmental values, to the extent possible.

The 2008 rule was challenged in court, but instead of remanding or vacating the rule, the court instructed OSM that any changes the agency wanted to make would have to be done through notice and comment rulemaking, with full public participation. In the meantime, the 2008 stream buffer zone rule would remain in effect. A copy of the court's August 2009 decision in this case is attached to my prepared statement as Exhibit B.

Impacts Resulting from Revisions to the SBZ rule

OSM's revised SBZ rule appears to include, among other things:

- prohibition of mining in, near, or through intermittent and perennial streams and within 100 feet of such streams;
- very restrictive provisions for excess spoil fills; and
- new and expansive standards for what constitutes material damage to the hydrologic balance.

These standards could make longwall mines impossible to permit or operate. In the locations where we operate, it is impossible for longwall mining to avoid impacts to intermittent and perennial streams because such streams are ubiquitous atop our operations and we cannot avoid mining beneath them. The proposed definition of material damage could prohibit subsidence of streams, thus eliminating our ability to extract the coal via longwall mining.

Using a moderate interpretation of a protected stream, CONSOL conducted a preliminary engineering analysis of the impacts this rule, in its current draft form, could have if finalized. Our analysis indicates that the rule would result in a 40% loss of eastern longwall minable reserves to CONSOL—that is over 1 billion tons CONSOL would be prohibited from mining. At current market prices, this translates to a reduction in future revenues by over $66 billion. Additionally, the increased quantity and frequency of longwall moves due to avoidance of protected streams could further reduce the mine's annual production by 25 to 30 percent, and potentially increases production costs by 20 to 35 percent. For CONSOL alone, this would mean many of CONSOL's longwall mines would be unprofitable at today's coal prices.

Please note that streams typical of the streams "to be protected" by this proposed rule have been undermined by longwall operations for 35 years. This mining has been conducted consistent with the Congressional intent that underground mining cause "subsidence to occur at a predictable time and in a relatively uniform and predictable manner" (Report of the House Committee on Interior and Insular Affairs to Accompany H.R.2; April 22, 1977). To date, over 172 square miles in PA and WV have been undermined by CONSOL's longwall operations with no material damage to the hydrologic balance. And in those infrequent circumstances where subsidence does impact streams, states require those impacts to be addressed. We suggest that it would be educational for the

committee members to take the time to drive through these areas that have been undermined to see for themselves that environmental normalcy exists in those areas.

Existing Environmental Regulations Already Address the SBZ Issues

CONSOL believes that coal production, safety of personnel and environmental stewardship are not mutually exclusive goals. Impacts to the environment as a result of longwall mining can be, and have been, addressed in a manner that complies with the existing laws and regulations of the states in which CONSOL operates these mines.

The following environmental permits must be obtained for our mining operations. These permits incorporate ALL the provisions of the federal Clean Water Act, Clean Air Act, NEPA and SMCRA.

United States Army Corps of Engineers (USACE) 404

Permit to impact jurisdictional waters and wetlands. The permit includes mitigation to offset the stream and wetland impacts from the project, a cumulative impact statement or environmental impact statement, a jurisdictional determination for the streams and wetlands, long term maintenance plan for mitigation sites, long term monitoring plan and a description of the project and direct impacts.

PA Department of Environmental Protection (PA DEP) 401/NPDES Coal Mining Activity permit application - The permit includes the design, purpose and details of the project, hydrological, stream baseline, ecological and geological evaluations, construction specifications, and bonding.

PA DEP Chapter 105 - Permit for water obstructions and encroachments. The permit includes mitigation to offset the stream and wetland impacts from the project, a long term maintenance plan for mitigation sites, long term monitoring plan and a description of the project and direct impacts. As part of the Chapter 105 approval an erosion and sedimentation/NPDES plan approval is obtained by either the Conservation District or DEP.

PA DEP Chapter 105 and Mine Safety and Health Administration (MSHA) - Permit for Dam construction and maintenance. The permit includes design, construction specifications, and bonding, Emergency Action Plan and Operation and Maintenance Plan.

VA Department of Mines, Minerals and Energy Surface Mine Control and Reclamation Act Permit (SMCRA)

The permit includes the design, purpose and details of the project, hydrological, stream baseline, ecological and geological evaluations, construction

specifications, and bonding. This permit is issued as a combined SMCRA/NPDES Permit.

WV DEP 401/NPDES Coal Mining Activity permit application.

The permit includes the design, purpose and details of the project, hydrological, stream baseline, ecological and geological evaluations, construction specifications, and bonding.

Jobs at Risk and Impacts on Our Communities

By way of example, we wish to provide the Subcommittee with our analysis (attached as Exhibit D to my statement) of the year-end 2010 economic impacts of our Bailey-Enlow Fork complex in Southwestern Pennsylvania. To briefly summarize this analysis, there are a total of 1,348 CONSOL employees at this complex, as well as an average of 412 contractor employees on-site every day. The total direct expenditures from the complex in the local economy is almost $763 million, not including almost $98 million in federal, state, and local taxes. This results in a total direct economic impact from the mining complex on the local economy of almost $861 million. In addition, the estimated local economy multiplier effect is about $1.7 billion, with the estimated "spin-off" effect of jobs resulting from the Bailey-Enlow Complex at 5 to 1 – creating 6,740 jobs. Thus, the total economic impact of the Bailey-Enlow Fork Complex on the local community is almost $2.6 billion for 2010.

Our other five longwall mining complexes in WV provide similar high-paying jobs and economic benefits to the communities in which they operate. We directly employ 3,035 employees at those mines, and approximately 264 contractors. At a 5 to 1 spin-off that equals about 15,175 jobs. The total direct expenditures from these five complexes in the local economies in WV is almost $871 million, not including almost $146 million in federal, state, and local taxes. This resulted in a total direct economic impact from the mining complex on the economy of almost $1,017 billion for 2010 to the communities of northern West Virginia.

Also please note that CONSOL provided approximately $2,363,000 in philanthropic donations to the communities in which we operated in PA, VA and WV in 2010. Should our longwall mines be forced to close or curtail business as a result of OSM's SBZ rule, then those donations would be substantially reduced.

We would be happy to provide the Subcommittee with analyses for each of these operations.

Conclusion

Mr. Chairman, and Members of the Subcommittee, please allow me to conclude by saying that at a time when our Nation's economy is still struggling to regain its former balance, and with unemployment remaining stubbornly high, one

of the few relatively robust sectors is the coal mining industry. In this regard, we are particularly pleased and proud of our longwall operations and all of the men and women who work so tirelessly toward the safe, environmentally protective, and economically successful operation of these mines. The coal we produce is "America's on Switch."™ The SBZ rule, if promulgated in its current form, would mean the loss of billions of dollars to the economy, and literally thousands of jobs. On behalf of CONSOL, I fervently hope that the Administration will proceed in a different direction.

Thank you.

EXHIBIT A

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 780, 784, 816, and 817

[Docket ID No.: OSM–2007–0007]

RIN 1029–AC04

Excess Spoil, Coal Mine Waste, and Buffers for Perennial and Intermittent Streams

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Final rule.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are amending our regulations concerning stream buffer zones, stream-channel diversions, siltation structures, impoundments, excess spoil, and coal mine waste. Among other things, this rule requires that surface coal mining operations be designed to minimize the creation of excess spoil and the adverse environmental impacts of fills constructed to dispose of excess spoil and coal mine waste. We have revised the stream buffer zone rule to more closely reflect the underlying provisions of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), to adopt related permit application requirements, to require that disturbance of perennial and intermittent streams and their buffer zones generally be avoided unless it is not reasonably possible to do so, to identify exceptions to the requirement to maintain an undisturbed buffer zone for perennial and intermittent streams, and to clarify the relationship between SMCRA and the Clean Water Act.

DATES: This rule is effective January 12, 2009. The incorporation by reference of the publication listed in the rule is approved by the Director of the Federal Register as of January 12, 2009.

FOR FURTHER INFORMATION CONTACT: Dennis G. Rice, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240. Telephone: 202–208–2829.

You can find additional information concerning OSM, this rule, and related documents on OSM's home page on the Internet at *http://www.osmre.gov.*

SUPPLEMENTARY INFORMATION:

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I. What does SMCRA say about surface coal mining operations in or near streams?

SMCRA contains three references to streams, two references to watercourses, and several provisions that indirectly refer to activities in or near streams.

Section 507(b)(10) [1] requires that permit applications include "the name of the watershed and location of the surface stream or tributary into which surface and pit drainage will be discharged." However, this provision has no relevance to mining-related activities in or near streams or to the existing or proposed buffer zone rules.

Section 515(b)(18) requires that surface coal mining and reclamation operations "refrain from the construction of roads or other access ways up a stream bed or drainage channel or in such proximity to such channel so as to seriously alter the normal flow of water."

Section 516(c) requires the regulatory authority to suspend underground coal mining under permanent streams if an imminent danger to inhabitants exists. However, this provision is not relevant to a discussion of the stream buffer zone rules because, in response to litigation concerning the 1983 version of 30 CFR 817.57, we stipulated that "this regulation is directed only to disturbance of surface lands by surface activities associated with underground mining." *In re: Permanent Surface Mining Regulation Litigation II-Round II,* 21 ERC 1725, 1741, footnote 21 (D.D.C. 1984).

Section 515(b)(22)(D) provides that sites selected for the disposal of excess spoil must "not contain springs, natural water courses or wet weather seeps unless lateral drains are constructed from the wet areas to the main underdrains in such a manner that filtration of the water into the spoil pile will be prevented." In adopting this provision, Congress could have chosen to exclude perennial and intermittent streams (or other waters) from the scope of "natural water courses," but it did not do so. In addition, the fact that this provision of the Act authorizes disposal of excess spoil in areas containing natural watercourses, springs, and seeps further suggests that Congress did not intend to prohibit placement of excess spoil in perennial or intermittent

[1] 30 U.S.C. 1257(b)(10). SMCRA, Pub. L. 95–87, is codified at 30 U.S.C. 1201–1328. Thus, for example, SMCRA section 102 is codified at 30 U.S.C. 1202, SMCRA section 515 is codified at 30 U.S.C. 1265, and SMCRA section 516 is codified at 30 U.S.C. 1266.

Alternatives 1, 2, and 3 would revise the excess spoil regulations to enhance consideration of the environmental effects of fill construction by requiring that applicants minimize the volume of spoil placed outside the mined-out area, design and construct excess spoil fills to reduce the amount of land and water directly affected outside the mined-out area, and configure fills to minimize adverse impacts on fish, wildlife, and related environmental values. States in the central Appalachian coalfields (Kentucky, Virginia, Tennessee, and West Virginia) have taken various steps in accordance with their approved SMCRA regulatory programs to implement similar actions, so the impacts of the excess spoil elements of alternatives likely would be limited by the changes already made by those states.

We do not anticipate that the revisions that Alternatives 1, 2, and 4 would make to the stream buffer zone rule would have any major on-the-ground consequences because we do not expect that those revisions would alter the rate at which surface coal mining and reclamation operations are impacting perennial and intermittent streams. Between 1992 and 2002, we estimate that coal mining operations directly impacted 1,208 miles of stream in the central Appalachian coal fields, which constitutes 2.05 percent of the total stream miles in the central Appalachian coal fields. At this rate, 4.1% of the total stream miles in central Appalachia would be directly impacted within the subsequent 10 years. The miles of stream directly impacted by excess spoil fills for permits issued between 1985 and 2001 is 724 miles, which is approximately 1.2 percent of the streams in central Appalachia. If fill construction continued at this rate, an additional 724 miles of headwater streams would be buried in the next 17 years (by 2018). This trend likely would decline as surface-minable coal reserves in central Appalachia are depleted in the next few decades.

Alternative 1 is uniquely different from the other alternatives in that it incorporates changes to reduce the adverse impacts of coal mine waste disposal facilities (refuse piles and slurry impoundments) on fish, wildlife, and related environmental values. We anticipate that these changes would positively impact the environment.

We estimate that the combination of the excess spoil and coal mine waste provisions in Alternative 1 would result in slight positive effects on the human environment with respect to direct hydrologic impacts, water quality, and aquatic fauna when compared to the "no action" alternative. In the final rule, we are adopting this alternative, which is both the most environmentally protective alternative and the preferred alternative.

Mitigation, Monitoring and Enforcement

We have adopted all practicable means to avoid or minimize environmental harm from the alternative selected. SMCRA's permitting requirements and performance standards generally require avoidance or minimization of adverse impacts to important environmental resources, and our regulations do likewise. In particular, this final rule requires that surface coal mining operations be designed to minimize the amount of spoil placed outside the mined-out area, thus minimizing the amount of land disturbed. The final rule also requires that, to the extent possible, surface coal mining and reclamation operations be designed to avoid disturbance of perennial or intermittent streams and the surface of lands within 100 feet of those streams. If avoidance is not reasonably possible, the rule requires that the permit applicant develop and analyze a reasonable range of reasonably possible alternatives and select the alternative that would have the least overall adverse impact on fish, wildlife, and related environmental values.

Each SMCRA regulatory program includes five major elements: Permitting requirements and procedures, performance bonds to guarantee reclamation in the event that the permittee defaults on any reclamation obligations, performance standards to which the operator must adhere, inspection and enforcement to maintain compliance with performance standards and the terms and conditions of the permit, and a process for the designation of lands as unsuitable for surface coal mining operations. Under 30 CFR 730.5, 732.15, and 732.17, each state regulatory program must be no less effective than our regulations in achieving the requirements of the Act. We conduct oversight of each state's implementation of its approved regulatory program.

List of Subjects

30 CFR Part 780

Incorporation by reference, Reporting and recordkeeping requirements, Surface mining.

30 CFR Part 784

Incorporation by reference, Reporting and recordkeeping requirements, Underground mining.

30 CFR Part 816

Environmental protection, Reporting and recordkeeping requirements, Surface mining.

30 CFR Part 817

Environmental protection, Reporting and recordkeeping requirements, Underground mining.

Dated: December 1, 2008,

C. Stephen Allred,

Assistant Secretary, Land and Minerals Management.

■ For the reasons set forth in the preamble, the Department revises 30 CFR parts 780, 784, 816, and 817 as set forth below.

PART 780—SURFACE MINING PERMIT APPLICATIONS—MINIMUM REQUIREMENTS FOR RECLAMATION AND OPERATION PLAN

■ 1. The authority citation for part 780 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.* and 16 U.S.C. 470 *et seq.*

■ 2. The part heading is revised to read as set forth above.

■ 3. Section 780.10 is revised to read as follows:

§ 780.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.*, the Office of Management and Budget (OMB) has approved the information collection requirements of this part and assigned clearance number 1029–0036. Sections 507 and 508 of SMCRA contain permit application requirements for surface coal mining activities, including a requirement that the application include an operation and reclamation plan. The regulatory authority uses this information to determine whether the proposed surface coal mining operation will achieve the environmental protection requirements of the Act and regulatory program. Without this information OSM and state regulatory authorities could not approve permit applications for surface coal mines and related facilities. Persons intending to conduct such operations must respond to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

■ 4. Amend § 780.14 by revising paragraphs (b)(11) and (c) to read as follows:

§ 780.14 Operation plan: Maps and plans.

* * * * *

(b) * * *

(11) Locations of each siltation structure, permanent water impoundment, refuse pile, and coal mine waste impoundment for which plans are required by § 780.25 of this part, and the location of each fill for the disposal of excess spoil for which plans are required under § 780.35 of this part.

(c) Except as provided in §§ 780.25(a)(2), 780.25(a)(3), 780.35, 816.73(c), 816.74(c), and 816.81(c) of this chapter, cross-sections, maps, and plans required under paragraphs (b)(4), (5), (6), (10), and (11) of this section must be prepared by, or under the direction of, and certified by a qualified registered professional engineer, a professional geologist, or, in any state that authorizes land surveyors to prepare and certify cross-sections, maps, and plans, a qualified, registered, professional land surveyor, with assistance from experts in related fields such as landscape architecture.

■ 5. Amend § 780.25 as follows:

■ A. Revise the section heading, paragraph (a) introductory text, paragraph (a)(1) introductory text, and paragraph (a)(2);

■ B. Revise paragraph (c)(2) and add paragraph (c)(4);

■ C. Revise paragraph (d); and

■ D. Remove paragraphs (e) and (f).

The revisions and addition read as follows:

§ 780.25 Reclamation plan: Siltation structures, impoundments, and refuse piles.

(a) *General.* Each application must include a general plan and a detailed design plan for each proposed siltation structure, impoundment, and refuse pile within the proposed permit area.

(1) Each general plan must—

* * * * *

(2)(i) Impoundments meeting the criteria for Significant Hazard Class or High Hazard Class (formerly Class B or C) dams in "Earth Dams and Reservoirs," Technical Release No. 60 (210–VI–TR60, July 2005), published by the U.S. Department of Agriculture, Natural Resources Conservation Service, must comply with the requirements of this section for structures that meet the criteria in § 77.216(a) of this title. Technical Release No. 60 (TR–60) is hereby incorporated by reference. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may review and download the incorporated document from the Natural Resources Conservation Service's Web site at *http://www.info.usda.gov/scripts/lpsiis.dll/TR/TR_210_60.htm.* You may inspect and obtain a copy of this document which is on file at the Administrative Record Room, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, NW., Washington, DC 20240. For information on the availability of this document at OSM, call 202–208–2823. You also may inspect a copy of this document at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030 or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(ii) Each detailed design plan for a structure that meets the criteria in § 77.216(a) of this title must—

(A) Be prepared by, or under the direction of, and certified by a qualified registered professional engineer with assistance from experts in related fields such as geology, land surveying, and landscape architecture;

(B) Include any geotechnical investigation, design, and construction requirements for the structure;

(C) Describe the operation and maintenance requirements for each structure; and

(D) Describe the timetable and plans to remove each structure, if appropriate.

* * * * *

(c) * * *

(2) Each plan for an impoundment meeting the criteria in § 77.216(a) of this title must comply with the requirements of § 77.216–2 of this title. The plan required to be submitted to the District Manager of MSHA under § 77.216 of this title must be submitted to the regulatory authority as part of the permit application.

* * * * *

(4) If the structure meets the Significant Hazard Class or High Hazard Class criteria for dams in TR–60 or meets the criteria of § 77.216(a) of this chapter, each plan must include a stability analysis of the structure. The stability analysis must include, but not be limited to, strength parameters, pore pressures, and long-term seepage conditions. The plan also must contain a description of each engineering design assumption and calculation with a discussion of each alternative considered in selecting the specific design parameters and construction methods.

(d) *Coal mine waste impoundments and refuse piles.* If you, the permit applicant, propose to place coal mine waste in a refuse pile or impoundment, or if you plan to use coal mine waste to construct an impounding structure, you must comply with the applicable requirements in paragraphs (d)(1) through (d)(3) of this section.

(1) *Addressing impacts to perennial and intermittent streams and related environmental values.* You must design the operation to avoid placement of coal mine waste in or within 100 feet of a perennial or intermittent stream to the extent possible. If avoidance is not possible, you must—

(i) Explain, to the satisfaction of the regulatory authority, why an alternative coal mine waste disposal method or an alternative location or configuration that does not involve placement of coal mine waste in or within 100 feet of a perennial or intermittent stream is not reasonably possible.

(ii) Identify a reasonable range of alternative locations or configurations for any proposed refuse piles or coal mine waste impoundments. This provision does not require identification of all potential alternatives. You need identify only those reasonably possible alternatives that are likely to differ significantly in terms of impacts on fish, wildlife, and related environmental values. An alternative is reasonably possible if it meets all the following criteria:

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

(B) The alternative 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. However, an alternative generally may be considered unreasonable if its cost is substantially greater than the costs normally associated with this type of project.

(C) The alternative is consistent with the coal recovery provisions of § 816.59 of this chapter.

(iii) Analyze the impacts of the alternatives identified in paragraph (d)(1)(ii) of this section on fish, wildlife, and related environmental values. The analysis must consider impacts on both aquatic and terrestrial ecosystems.

(A) For every alternative that proposes placement of coal mine waste in a perennial or intermittent stream, the analysis required under paragraph (d)(1)(iii) of this section must include an evaluation of impacts on the physical, chemical, and biological characteristics of the stream downstream of the proposed refuse pile or coal mine waste impoundment, including seasonal variations in temperature and volume, changes in stream turbidity or sedimentation, the degree to which the

coal mine waste may introduce or increase contaminants, and the effects on aquatic organisms and the wildlife that is dependent upon the stream.

(B) If you have prepared an analysis of alternatives for the proposed impoundment or refuse pile under 40 CFR 230.10 to meet Clean Water Act requirements, you may initially submit a copy of that analysis in lieu of the analysis required under paragraph (d)(1)(iii)(A) of this section. The regulatory authority will determine the extent to which that analysis satisfies the requirements of paragraph (d)(1)(iii)(A) of this section.

(iv) Select the alternative with the least overall adverse impact on fish, wildlife, and related environmental values, including adverse impacts on water quality and aquatic and terrestrial ecosystems.

(2) *Design requirements for refuse piles.* Refuse piles must be designed to comply with the requirements of §§ 816.81 and 816.83 of this chapter.

(3) *Design requirements for impoundments and impounding structures.* Impounding structures constructed of or intended to impound coal mine waste must be designed to comply with the requirements of §§ 816.81 and 816.84 of this chapter, which incorporate the requirements of paragraphs (a) and (c) of § 816.49 of this chapter. In addition,—

(i) The plan for each structure that meets the criteria of § 77.216(a) of this title must comply with the requirements of § 77.216–2 of this title; and

(ii) Each plan for a coal mine waste impoundment must contain the results of a geotechnical investigation to determine the structural competence of the foundation that will support the proposed impounding structure and the impounded material. An engineer or engineering geologist must plan and supervise the geotechnical investigation. In planning the investigation, the engineer or geologist must—

(A) Determine the number, location, and depth of borings and test pits using current prudent engineering practice for the size of the impoundment and the impounding structure, the quantity of material to be impounded, and subsurface conditions.

(B) Consider the character of the overburden and bedrock, the proposed abutment sites for the impounding structure, and any adverse geotechnical conditions that may affect the particular impoundment.

(C) Identify all springs, seepage, and groundwater flow observed or anticipated during wet periods in the area of the proposed impoundment.

(D) Consider the possibility of mudflows, rock-debris falls, or other landslides into the impoundment or impounded material.

■ 6. Add § 780.28 to read as follows:

§ 780.28 Activities in or adjacent to perennial or intermittent streams.

(a) *Applicability.* (1) *In general.* Except as otherwise provided in paragraph (a)(2) of this section, this section applies to applications to conduct surface mining activities in perennial or intermittent streams or on the surface of lands within 100 feet, measured horizontally, of perennial or intermittent streams.

(2) *Exceptions.* (i) *Coal preparation plants not located within the permit area of a mine.* This section does not apply to applications under § 785.21 of this chapter for coal preparation plants that are not located within the permit area of a mine.

(ii) *Stream-channel diversions.* Paragraphs (b) through (e) of this section do not apply to diversions of perennial or intermittent streams, which are governed by § 780.29 of this part and § 816.43 of this chapter.

(b) *Application requirements for surface mining activities in a perennial or intermittent stream.* If you propose to conduct one or more of the activities listed in paragraphs (b)(2) through (b)(4) of § 816.57 of this chapter in a perennial or intermittent stream, your application must demonstrate that—

(1) Avoiding disturbance of the stream is not reasonably possible; and

(2) The proposed activities will comply with all applicable requirements in paragraphs (b) and (c) of § 816.57 of this chapter.

(c) *Application requirements for surface mining activities within 100 feet of a perennial or intermittent stream.* If you propose to conduct surface mining activities within 100 feet of a perennial or intermittent stream, but not in the stream itself, and those activities would occur on land subject to the buffer requirement of § 816.57(a)(1) of this chapter, your application must—

(1) Demonstrate that avoiding disturbance of land within 100 feet of the stream either is not reasonably possible or is not necessary to meet the fish and wildlife and hydrologic balance protection requirements of the regulatory program;

(2) Identify any lesser buffer that you propose to implement instead of maintaining a 100-foot undisturbed buffer between surface mining activities and the perennial or intermittent stream; and

(3) Explain how the lesser buffer, together with any other protective measures that you propose to implement, constitute the best technology currently available to—

(i) Prevent the contribution of additional suspended solids to streamflow or runoff outside the permit area to the extent possible, as required by §§ 780.21(h) and 816.41(d)(1) of this chapter; and

(ii) Minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible, as required by §§ 780.16(b) and 816.97(a) of this chapter.

(d) *Approval requirements for activities in a perennial or intermittent stream.* Before approving any surface mining activities in a perennial or intermittent stream, the regulatory authority must—

(1) Find in writing that—

(i) Avoiding disturbance of the stream is not reasonably possible; and

(ii) The plans submitted with the application meet all applicable requirements in paragraphs (b) and (c) of § 816.57 of this chapter.

(2) Include a permit condition requiring a demonstration of compliance with the Clean Water Act in the manner specified in § 816.57(a)(2) of this chapter before the permittee may conduct any activities in a perennial or intermittent stream that require authorization or certification under the Clean Water Act.

(e) *Approval requirements for activities within 100 feet of a perennial or intermittent stream.* Before approving any surface mining activities that would disturb the surface of land subject to the buffer requirement of § 816.57(a)(1) of this chapter, the regulatory authority must find in writing that—

(1) Avoiding disturbance of the surface of land within 100 feet of the stream either is not reasonably possible or is not necessary to meet the fish and wildlife and hydrologic balance protection requirements of the regulatory program; and

(2) The measures proposed under paragraphs (c)(2) and (c)(3) of this section constitute the best technology currently available to—

(i) Prevent the contribution of additional suspended solids to streamflow or runoff outside the permit area to the extent possible, as required by §§ 780.21(h) and 816.41(d)(1) of this chapter; and

(ii) Minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible, as required by §§ 780.16(b) and 816.97(a) of this chapter.

(f) *Relationship to the Clean Water Act.* (1) In all cases, your application must identify the authorizations and certifications that you anticipate will be needed under sections 401, 402, and 404 of the Clean Water Act, 33 U.S.C. 1341, 1342, and 1344, and describe the steps that you have taken or will take to procure those authorizations and certifications.

(2) The regulatory authority will process your application and may issue the permit before you obtain all necessary authorizations and certifications under the Clean Water Act, 33 U.S.C. 1251 et seq., provided your application meets all applicable requirements of subchapter G of this chapter. However, issuance of a permit does not authorize you to initiate any activities for which Clean Water Act authorization or certification is required. Information submitted and analyses conducted under subchapter G of this chapter may inform the agency responsible for authorizations and certifications under sections 401, 402, and 404 of the Clean Water Act, 33 U.S.C. 1341, 1342, and 1344, but they are not a substitute for the reviews, authorizations, and certifications required under those sections of the Clean Water Act.

■ 7. Revise § 780.35 to read as follows:

§ 780.35 Disposal of excess spoil.

(a) If you, the permit applicant, propose to generate excess spoil as part of your operation, you must include the following items in your application—

(1) *Demonstration of minimization of excess spoil.* A demonstration, prepared to the satisfaction of the regulatory authority, that the operation has been designed to minimize, to the extent possible, the volume of excess spoil that the operation will generate, thus ensuring that spoil is returned to the mined-out area to the extent possible, taking into consideration applicable regulations concerning restoration of the approximate original contour, safety, stability, and environmental protection and the needs of the proposed postmining land use.

(2) *Capacity demonstration.* A demonstration, prepared to the satisfaction of the regulatory authority, that the designed maximum cumulative volume of all proposed excess spoil fills within the permit area is no larger than the capacity needed to accommodate the anticipated cumulative volume of excess spoil that the operation will generate, as approved by the regulatory authority under paragraph (a)(1) of this section.

(3) *Discussion of how you will address impacts to perennial and intermittent streams and related environmental values.* You must design the operation to avoid placement of excess spoil in or within 100 feet of a perennial or intermittent stream to the extent possible. If avoidance is not possible, you must—

(i) Explain, to the satisfaction of the regulatory authority, why an alternative that does not involve placement of excess spoil in or within 100 feet of a perennial or intermittent stream is not reasonably possible.

(ii) Identify a reasonable range of alternatives that vary with respect to the number, size, location, and configuration of proposed fills. This provision does not require identification of all potential alternatives. You need identify only those reasonably possible alternatives that are likely to differ significantly in terms of impacts on fish, wildlife, and related environmental values. An alternative is reasonably possible if it meets all the following criteria:

(A) The alternative conforms to the safety, engineering, design, and construction requirements of the regulatory program;

(B) The alternative 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. However, an alternative generally may be considered unreasonable if its cost is substantially greater than the costs normally associated with this type of project.

(C) The alternative is consistent with the coal recovery provisions of § 816.59 of this chapter.

(iii) Analyze the impacts of the alternatives identified in paragraph (a)(3)(ii) of this section on fish, wildlife, and related environmental values. The analysis must consider impacts on both terrestrial and aquatic ecosystems.

(A) For every alternative that proposes placement of excess spoil in a perennial or intermittent stream, the analysis must include an evaluation of impacts on the physical, chemical, and biological characteristics of the stream downstream of the proposed fill, including seasonal variations in temperature and volume, changes in stream turbidity or sedimentation, the degree to which the excess spoil may introduce or increase contaminants, and the effects on aquatic organisms and the wildlife that is dependent upon the stream.

(B) If you have prepared an analysis of alternatives for the proposed fill under 40 CFR 230.10 to meet Clean Water Act requirements, you may initially submit a copy of that analysis with your application in lieu of the analysis required by paragraph (a)(3)(iii)(A) of this section. The regulatory authority will determine the extent to which that analysis satisfies the analytical requirements of paragraph (a)(3)(iii)(A) of this section.

(iv) Select the alternative with the least overall adverse impact on fish, wildlife, and related environmental values, including adverse impacts on water quality and aquatic and terrestrial ecosystems.

(4) *Location.* Maps and cross-section drawings showing the location of all proposed disposal sites and structures. You must locate fills on the most moderately sloping and naturally stable areas available, unless the regulatory authority approves a different location based upon the alternatives analysis under paragraph (a)(3) of this section or on other requirements of the Act and this chapter. Whenever possible, you must place fills upon or above a natural terrace, bench, or berm if that location would provide additional stability and prevent mass movement.

(5) *Design plans.* Detailed design plans for each structure, prepared in accordance with the requirements of this section and §§ 816.71 through 816.74 of this chapter. You must design the fill and appurtenant structures using current prudent engineering practices and any additional design criteria established by the regulatory authority.

(6) *Geotechnical investigation.* The results of a geotechnical investigation of each proposed disposal site, with the exception of those sites at which spoil will be placed only on a pre-existing bench under § 816.74 of this chapter. You must conduct sufficient foundation investigations, as well as any necessary laboratory testing of foundation material, to determine the design requirements for foundation stability for each site. The analyses of foundation conditions must take into consideration the effect of underground mine workings, if any, upon the stability of the fill and appurtenant structures. The information submitted must include—

(i) The character of the bedrock and any adverse geologic conditions in the proposed disposal area.

(ii) A survey identifying all springs, seepage, and groundwater flow observed or anticipated during wet periods in the area of the proposed disposal site.

(iii) A survey of the potential effects of subsidence of subsurface strata as a result of past and future mining operations.

(iv) A technical description of the rock materials to be utilized in the

construction of disposal structures containing rock chimney cores or underlain by a rock drainage blanket.

(v) A stability analysis including, but not limited to, strength parameters, pore pressures, and long-term seepage conditions. This analysis must be accompanied by a description of all engineering design assumptions and calculations and the alternatives considered in selecting the design specifications and methods.

(7) *Operation and reclamation plans.* Plans for the construction, operation, maintenance, and reclamation of all excess spoil disposal structures in accordance with the requirements of §§ 816.71 through 816.74 of this chapter.

(8) *Additional requirements for keyway cuts or rock-toe buttresses.* If keyway cuts or rock-toe buttresses are required under § 816.71(d) of this chapter, the number, location, and depth of borings or test pits, which must be determined according to the size of the spoil disposal structure and subsurface conditions. You also must provide the engineering specifications used to design the keyway cuts or rock-toe buttresses. Those specifications must be based upon the stability analysis required under paragraph (a)(7)(v) of this section.

(b) *Design certification.* A qualified registered professional engineer experienced in the design of earth and rock fills must certify that the design of all fills and appurtenant structures meets the requirements of this section.

PART 784—UNDERGROUND MINING PERMIT APPLICATIONS—MINIMUM REQUIREMENTS FOR RECLAMATION AND OPERATION PLAN

■ 8. The authority citation for part 784 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.* and 16 U.S.C. 470 *et seq.*

■ 9. Section 784.10 is revised to read as follows:

§ 784.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.*, the Office of Management and Budget (OMB) has approved the information collection requirements of this part and assigned clearance number 1029–0039. Collection of this information is required under section 516(d) of SMCRA, which in effect requires applicants for permits for underground coal mines to prepare and submit an operation and reclamation plan for coal mining activities as part of the application. The regulatory authority uses this information to determine whether the plan will achieve the reclamation and environmental protection requirements of the Act and regulatory program. Without this information, OSM and state regulatory authorities could not approve permit applications for underground coal mines and related facilities. Persons intending to conduct such operations must respond to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

■ 10. Amend § 784.16 as follows:

■ A. Revise the section heading, paragraph (a) introductory text, paragraph (a)(1) introductory text, and paragraph (a)(2);

■ B. Revise paragraph (c)(2) and add paragraph (c)(4);

■ C. Revise paragraph (d); and

■ D. Remove paragraphs (e) and (f).

The revisions and addition read as follows:

§ 784.16 Reclamation plan: Siltation structures, impoundments, and refuse piles.

(a) *General.* Each application must include a general plan and a detailed design plan for each proposed siltation structure, impoundment, and refuse pile within the proposed permit area.

(1) Each general plan must—

* * * * *

(2)(i) Impoundments meeting the criteria for Significant Hazard Class or High Hazard Class (formerly Class B or C) dams in "Earth Dams and Reservoirs," Technical Release No. 60 (210–VI–TR60, July 2005), published by the U.S. Department of Agriculture, Natural Resources Conservation Service, must comply with the requirements of this section for structures that meet the criteria in § 77.216(a) of this title. Technical Release No.60 (TR–60) is hereby incorporated by reference. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may review and download the incorporated document from the Natural Resources Conservation Service's Web site at *http://www.info.usda.gov/scripts/lpsiis.dll/TR/TR_210_60.htm.* You may inspect and obtain a copy of this document which is on file at the Administrative Record Room, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, NW., Washington, DC 20240. For information on the availability of this document at OSM, call 202–208–2823. You also may inspect a copy of this document at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030 or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(ii) Each detailed design plan for a structure that meets the criteria in § 77.216(a) of this title must—

(A) Be prepared by, or under the direction of, and certified by a qualified registered professional engineer with assistance from experts in related fields such as geology, land surveying, and landscape architecture;

(B) Include any geotechnical investigation, design, and construction requirements for the structure;

(C) Describe the operation and maintenance requirements for each structure; and

(D) Describe the timetable and plans to remove each structure, if appropriate.

* * * * *

(c) * * *

(2) Each plan for an impoundment meeting the criteria in § 77.216(a) of this title must comply with the requirements of § 77.216–2 of this title. The plan required to be submitted to the District Manager of MSHA under § 77.216 of this title must be submitted to the regulatory authority as part of the permit application.

* * * * *

(4) If the structure meets the Significant Hazard Class or High Hazard Class criteria for dams in TR–60 or meets the criteria of § 77.216(a) of this chapter, each plan must include a stability analysis of the structure. The stability analysis must include, but not be limited to, strength parameters, pore pressures, and long-term seepage conditions. The plan also must contain a description of each engineering design assumption and calculation with a discussion of each alternative considered in selecting the specific design parameters and construction methods.

(d) *Coal mine waste impoundments and refuse piles.* If you, the permit applicant, propose to place coal mine waste in a refuse pile or impoundment, or if you plan to use coal mine waste to construct an impounding structure, you must comply with the applicable requirements in paragraphs (d)(1) through (d)(3) of this section.

(1) *Addressing impacts to perennial and intermittent streams and related environmental values.* You must design the operation to avoid placement of coal mine waste in or within 100 feet of a perennial or intermittent stream to the extent possible. If avoidance is not possible, you must—

(i) Explain, to the satisfaction of the regulatory authority, why an alternative coal mine waste disposal method or an alternative location or configuration that does not involve placement of coal mine waste in or within 100 feet of a perennial or intermittent stream is not reasonably possible.

(ii) Identify a reasonable range of alternative locations or configurations for any proposed refuse piles or coal mine waste impoundments. This provision does not require identification of all potential alternatives. You need identify only those reasonably possible alternatives that are likely to differ significantly in terms of impacts on fish, wildlife, and related environmental values. An alternative is reasonably possible if it meets all the following criteria:

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

(B) The alternative 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. However, an alternative generally may be considered unreasonable if its cost is substantially greater than the costs normally associated with this type of project.

(C) The alternative is consistent with the coal recovery provisions of § 817.59 of this chapter.

(iii) Analyze the impacts of the alternatives identified in paragraph (d)(1)(ii) of this section on fish, wildlife, and related environmental values. The analysis must consider impacts on both aquatic and terrestrial ecosystems.

(A) For every alternative that proposes placement of coal mine waste in a perennial or intermittent stream, the analysis must include an evaluation of impacts on the physical, chemical, and biological characteristics of the stream downstream of the proposed refuse pile or coal mine waste impoundment, including seasonal variations in temperature and volume, changes in stream turbidity or sedimentation, the degree to which the coal mine waste may introduce or increase contaminants, and the effects on aquatic organisms and the wildlife that is dependent upon the stream.

(B) If you have prepared an analysis of alternatives for the proposed impoundment or refuse pile under 40 CFR 230.10 to meet Clean Water Act requirements, you may initially submit a copy of that analysis in lieu of the analysis required under paragraph (d)(1)(iii)(A) of this section. The regulatory authority will determine the extent to which that analysis satisfies the requirements of paragraph (d)(1)(iii)(A) of this section.

(iv) Select the alternative with the least overall adverse impact on fish, wildlife, and related environmental values, including adverse impacts on water quality and aquatic and terrestrial ecosystems.

(2) *Design requirements for refuse piles.* Refuse piles must be designed to comply with the requirements of §§ 817.81 and 817.83 of this chapter.

(3) *Design requirements for impoundments and impounding structures.* Impounding structures constructed of or intended to impound coal mine waste must be designed to comply with the requirements of §§ 817.81 and 817.84 of this chapter, which incorporate the requirements of paragraphs (a) and (c) of § 817.49 of this chapter. In addition,—

(i) The plan for each structure that meets the criteria of § 77.216(a) of this title must comply with the requirements of § 77.216–2 of this title; and

(ii) Each plan for a coal mine waste impoundment must contain the results of a geotechnical investigation to determine the structural competence of the foundation that will support the proposed impounding structure and the impounded material. An engineer or engineering geologist must plan and supervise the geotechnical investigation. In planning the investigation, the engineer or geologist must—

(A) Determine the number, location, and depth of borings and test pits using current prudent engineering practice for the size of the impoundment and the impounding structure, the quantity of material to be impounded, and subsurface conditions.

(B) Consider the character of the overburden and bedrock, the proposed abutment sites for the impounding structure, and any adverse geotechnical conditions that may affect the particular impoundment.

(C) Identify all springs, seepage, and groundwater flow observed or anticipated during wet periods in the area of the proposed impoundment.

(D) Consider the possibility of mudflows, rock-debris falls, or other landslides into the impoundment or impounded material.

■ 11. Revise § 784.19 to read as follows:

§ 784.19 Disposal of excess spoil.

(a) If you, the permit applicant, propose to generate excess spoil as part of your operation, you must include the following items in your application—

(1) *Demonstration of minimization of excess spoil.* A demonstration, prepared to the satisfaction of the regulatory authority, that the operation has been designed to minimize, to the extent possible, the volume of excess spoil that the operation will generate, thus ensuring that spoil is returned to the mined-out area to the extent possible, taking into consideration applicable regulations concerning restoration of the approximate original contour, safety, stability, and environmental protection and the needs of the proposed postmining land use.

(2) *Capacity demonstration.* A demonstration, prepared to the satisfaction of the regulatory authority, that the designed maximum cumulative volume of all proposed excess spoil fills within the permit area is no larger than the capacity needed to accommodate the anticipated cumulative volume of excess spoil that the operation will generate, as approved by the regulatory authority under paragraph (a)(1) of this section.

(3) *Discussion of how you will address impacts to perennial and intermittent streams and related environmental values.* You must design the operation to avoid placement of excess spoil in or within 100 feet of a perennial or intermittent stream to the extent possible. If avoidance is not possible, you must—

(i) Explain, to the satisfaction of the regulatory authority, why an alternative that does not involve placement of excess spoil in or within 100 feet of a perennial or intermittent stream is not reasonably possible.

(ii) Identify a reasonable range of alternatives that vary with respect to the number, size, location, and configuration of proposed fills. This provision does not require identification of all potential alternatives. You need identify only those reasonably possible alternatives that are likely to differ significantly in terms of impacts on fish, wildlife, and related environmental values. An alternative is reasonably possible if it meets all the following criteria:

(A) The alternative conforms to the safety, engineering, design, and construction requirements of the regulatory program;

(B) The alternative 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. However, an alternative generally may be considered unreasonable if its cost is substantially

greater than the costs normally associated with this type of project.

(C) The alternative is consistent with the coal recovery provisions of § 817.59 of this chapter.

(iii) Analyze the impacts of the alternatives identified in paragraph (a)(3)(ii) of this section on fish, wildlife, and related environmental values. The analysis must consider impacts on both terrestrial and aquatic ecosystems.

(A) For every alternative that proposes placement of excess spoil in a perennial or intermittent stream, the analysis must include an evaluation of impacts on the physical, chemical, and biological characteristics of the stream downstream of the proposed fill, including seasonal variations in temperature and volume, changes in stream turbidity or sedimentation, the degree to which the excess spoil may introduce or increase contaminants, and the effects on aquatic organisms and the wildlife that is dependent upon the stream.

(B) If you have prepared an analysis of alternatives for the proposed fill under 40 CFR 230.10 to meet Clean Water Act requirements, you may initially submit a copy of that analysis with your application in lieu of the analysis required by paragraph (a)(3)(iii)(A) of this section. The regulatory authority will determine the extent to which that analysis satisfies the analytical requirements of paragraph (a)(3)(iii)(A) of this section.

(iv) Select the alternative with the least overall adverse impact on fish, wildlife, and related environmental values, including adverse impacts on water quality and aquatic and terrestrial ecosystems.

(4) *Location.* Maps and cross-section drawings showing the location of all proposed disposal sites and structures. You must locate fills on the most moderately sloping and naturally stable areas available, unless the regulatory authority approves a different location based upon the alternatives analysis under paragraph (a)(3) of this section or on other requirements of the Act and this chapter. Whenever possible, you must place fills upon or above a natural terrace, bench, or berm if that location would provide additional stability and prevent mass movement.

(5) *Design plans.* Detailed design plans for each structure, prepared in accordance with the requirements of this section and §§ 817.71 through 817.74 of this chapter. You must design the fill and appurtenant structures using current prudent engineering practices and any additional design criteria established by the regulatory authority.

(6) *Geotechnical investigation.* The results of a geotechnical investigation of each proposed disposal site, with the exception of those sites at which spoil will be placed only on a pre-existing bench under § 817.74 of this chapter. You must conduct sufficient foundation investigations, as well as any necessary laboratory testing of foundation material, to determine the design requirements for foundation stability for each site. The analyses of foundation conditions must take into consideration the effect of underground mine workings, if any, upon the stability of the fill and appurtenant structures. The information submitted must include—

(i) The character of the bedrock and any adverse geologic conditions in the proposed disposal area.

(ii) A survey identifying all springs, seepage, and groundwater flow observed or anticipated during wet periods in the area of the proposed disposal site.

(iii) A survey of the potential effects of subsidence of subsurface strata as a result of past and future mining operations.

(iv) A technical description of the rock materials to be utilized in the construction of disposal structures containing rock chimney cores or underlain by a rock drainage blanket.

(v) A stability analysis including, but not limited to, strength parameters, pore pressures, and long-term seepage conditions. This analysis must be accompanied by a description of all engineering design assumptions and calculations and the alternatives considered in selecting the design specifications and methods.

(7) *Operation and reclamation plans.* Plans for the construction, operation, maintenance, and reclamation of all excess spoil disposal structures in accordance with the requirements of §§ 817.71 through 817.74 of this chapter.

(8) *Additional requirements for keyway cuts or rock-toe buttresses.* If keyway cuts or rock-toe buttresses are required under § 817.71(d) of this chapter, the number, location, and depth of borings or test pits, which must be determined according to the size of the spoil disposal structure and subsurface conditions. You also must provide the engineering specifications used to design the keyway cuts or rock-toe buttresses. Those specifications must be based upon the stability analysis required under paragraph (a)(7)(v) of this section.

(b) *Design certification.* A qualified registered professional engineer experienced in the design of earth and rock fills must certify that the design of all fills and appurtenant structures meets the requirements of this section.

■ 12. Amend § 784.23 by removing "817.71(b)," in paragraph (c) and revising paragraph (b)(10) to read as follows:

§ 784.23 Operation plan: Maps and plans.

* * * * *

(b) * * *

(10) Locations of each siltation structure, permanent water impoundment, refuse pile, and coal mine waste impoundment for which plans are required by § 784.16 of this part, and the location of each fill for the disposal of excess spoil for which plans are required under § 784.19 of this part.

* * * * *

■ 13. Add § 784.28 to read as follows:

§ 784.28 Surface activities in or adjacent to perennial or intermittent streams.

(a) *Applicability.* (1) *In general.* Except as otherwise provided in paragraph (a)(2) of this section, this section applies to underground mining permit applications that propose to conduct surface activities in perennial or intermittent streams or on the surface of lands within 100 feet, measured horizontally, of perennial or intermittent streams.

(2) *Exceptions.* (i) *Coal preparation plants not located within the permit area of a mine.* This section does not apply to applications under § 785.21 of this chapter for coal preparation plants that are not located within the permit area of a mine.

(ii) *Stream-channel diversions.* Paragraphs (b) through (e) of this section do not apply to diversions of perennial or intermittent streams, which are governed by § 784.29 of this part and § 817.43 of this chapter.

(b) *Application requirements for activities in a perennial or intermittent stream.* If you propose to conduct one or more of the activities listed in paragraphs (b)(2) through (b)(4) of § 817.57 of this chapter in a perennial or intermittent stream, your application must demonstrate that—

(1) Avoiding disturbance of the stream is not reasonably possible; and

(2) The proposed activities will comply with all applicable requirements in paragraphs (b) and (c) of § 817.57 of this chapter.

(c) *Application requirements for surface activities within 100 feet of a perennial or intermittent stream.* If you propose to conduct surface activities within 100 feet of a perennial or intermittent stream, but not in the stream itself, and those activities would occur on the surface of land subject to

the buffer requirement of § 817.57(a)(1) of this chapter, your application must—

(1) Demonstrate that avoiding disturbance of land within 100 feet of the stream either is not reasonably possible or is not necessary to meet the fish and wildlife and hydrologic balance protection requirements of the regulatory program;

(2) Identify any lesser buffer that you propose to implement instead of maintaining a 100-foot undisturbed buffer between surface activities and the perennial or intermittent stream; and

(3) Explain how the lesser buffer, together with any other protective measures that you propose to implement, constitute the best technology currently available to—

(i) Prevent the contribution of additional suspended solids to streamflow or runoff outside the permit area to the extent possible, as required by §§ 784.14(g) and 817.41(d)(1) of this chapter; and

(ii) Minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible, as required by §§ 784.21(b) and 817.97(a) of this chapter.

(d) *Approval requirements for activities in a perennial or intermittent stream.* Before approving any surface activities in a perennial or intermittent stream, the regulatory authority must—

(1) Find in writing that—

(i) Avoiding disturbance of the stream is not reasonably possible; and

(ii) The plans submitted with the application meet all applicable requirements in paragraphs (b) and (c) of § 817.57 of this chapter.

(2) Include a permit condition requiring a demonstration of compliance with the Clean Water Act in the manner specified in § 817.57(a)(2) of this chapter before the permittee may conduct any activities in a perennial or intermittent stream that require authorization or certification under the Clean Water Act.

(e) *Approval requirements for surface activities within 100 feet of a perennial or intermittent stream.* Before approving any surface activities that would disturb the surface of land subject to the buffer requirement of § 817.57(a)(1) of this chapter, the regulatory authority must find in writing that—

(1) Avoiding disturbance of the surface of land within 100 feet of the stream either is not reasonably possible or is not necessary to meet the fish and wildlife and hydrologic balance protection requirements of the regulatory program; and

(2) The measures proposed under paragraphs (c)(2) and (c)(3) of this section constitute the best technology currently available to—

(i) Prevent the contribution of additional suspended solids to streamflow or runoff outside the permit area to the extent possible, as required by §§ 784.14(g) and 817.41(d)(1) of this chapter; and

(ii) Minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible, as required by §§ 784.21(b) and 817.97(a) of this chapter.

(f) *Relationship to the Clean Water Act.* (1) In all cases, your application must identify the authorizations and certifications that you anticipate will be needed under sections 401, 402, and 404 of the Clean Water Act, 33 U.S.C. 1341, 1342, and 1344, and describe the steps that you have taken or will take to procure those authorizations and certifications.

(2) The regulatory authority will process your application and may issue the permit before you obtain all necessary authorizations and certifications under the Clean Water Act, 33 U.S.C. 1251 *et seq.*, provided your application meets all applicable requirements of subchapter G of this chapter. However, issuance of a permit does not authorize you to initiate any activities for which Clean Water Act authorization or certification is required. Information submitted and analyses conducted under subchapter G of this chapter may inform the agency responsible for authorizations and certifications under sections 401, 402, and 404 of the Clean Water Act, 33 U.S.C. 1341, 1342, and 1344, but they are not a substitute for the reviews, authorizations, and certifications required under those sections of the Clean Water Act.

PART 816—PERMANENT PROGRAM PERFORMANCE STANDARDS—SURFACE MINING ACTIVITIES

■ 14. The authority citation for part 816 is revised to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 15. Section 816.10 is revised to read as follows:

§ 816.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.*, the Office of Management and Budget (OMB) has approved the information collection requirements of this part and assigned clearance number 1029–0047. Collection of this information is required under section 515 of SMCRA, which provides that permittees conducting surface coal mining and reclamation operations must meet all applicable performance standards of the regulatory program approved under the Act. The regulatory authority uses the information collected to ensure that surface mining activities are conducted in compliance with the requirements of the applicable regulatory program. Persons intending to conduct such operations must respond to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

■ 16. In § 816.11, revise paragraph (e) to read as follows:

§ 816.11 Signs and markers.

* * * * *

(e) *Buffer markers.* The boundaries of any buffer to be maintained between surface mining activities and a perennial or intermittent stream in accordance with §§ 780.28 and 816.57 of this chapter must be clearly marked to avoid disturbance by surface mining activities.

* * * * *

■ 17. Amend § 816.43 as follows:

■ A. Remove the last sentence of paragraph (a)(3);

■ B. Redesignate paragraph (a)(4) as paragraph (a)(5) and add a new paragraph (a)(4);

■ C. Revise paragraphs (b)(1) and (b)(4); and

■ D. Add paragraph (b)(5).

The revisions and additions will read as follows:

§ 816.43 Diversions.

(a) * * *

(4) A permanent diversion or a stream channel restored after the completion of mining must be designed and constructed so as to restore or approximate the premining characteristics of the original stream channel, including any natural riparian vegetation, to promote the recovery and enhancement of the aquatic habitat.

* * * * *

(b) * * *

(1) The regulatory authority may approve the diversion of perennial or intermittent streams within the permit area if the diversion is located and designed to minimize adverse impacts on fish, wildlife, and related environmental values to the extent possible, using the best technology currently available. The permittee must construct and maintain the diversion in accordance with the approved design.

* * * * *

(4) A permanent stream-channel diversion or a stream channel restored after the completion of mining must be designed and constructed using natural channel design techniques so as to restore or approximate the premining characteristics of the original stream channel, including the natural riparian vegetation and the natural hydrological characteristics of the original stream, to promote the recovery and enhancement of the aquatic habitat and to minimize adverse alteration of stream channels on and off the site, including channel deepening or enlargement, to the extent possible.

(5) A qualified registered professional engineer must separately certify both the design and construction of all diversions of perennial and intermittent streams and all stream restorations. The design certification must certify that the design meets the design requirements of this section and any design criteria set by the regulatory authority. The construction certification must certify that the stream-channel diversion or stream restoration meets all construction requirements of this section and is in accordance with the approved design.

* * * * *

§ 816.46 [Amended]

■ 18. In § 816.46, remove paragraph (b)(2) and redesignate paragraphs (b)(3) through (b)(6) as (b)(2) through (b)(5), respectively.

■ 19. Revise § 816.57 to read as follows:

§ 816.57 Hydrologic balance: Activities in or adjacent to perennial or intermittent streams.

(a)(1) *Buffer requirement.* Except as provided in paragraph (b) of this section and consistent with paragraph (a)(2) of this section, you, the permittee or operator, may not conduct surface mining activities that would disturb the surface of land within 100 feet, measured horizontally, of a perennial or intermittent stream, unless the regulatory authority authorizes you to do so under § 780.28(e) of this chapter.

(2) *Clean Water Act requirements.* Surface mining activities, including those activities in paragraphs (b)(1) through (b)(4) of this section, 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.

(b) *Exception.* The buffer requirement of paragraph (a) of this section does not apply to those segments of a perennial or intermittent stream for which the regulatory authority, in accordance with § 780.28(d) of this chapter or § 816.43(b)(1) of this part, approves one or more of the activities listed in paragraphs (b)(1) through (b)(4) of this section.

(1) Diversion of a perennial or intermittent stream. You must comply with all other applicable requirements of the regulatory program, including the requirements of § 816.43(b) of this part for the permanent or temporary diversion of a perennial or intermittent stream.

(2) Placement of bridge abutments, culverts, or other structures in or within 100 feet of a perennial or intermittent stream to facilitate crossing of the stream by roads, railroads, conveyors, pipelines, utilities, or similar facilities. You must comply with all other applicable requirements of the regulatory program, including the requirements of §§ 816.150, 816.151, and 816.181 of this part, as appropriate.

(3) Construction of sedimentation pond embankments in a perennial or intermittent stream. This provision extends to the pool or storage area created by the embankment. You must comply with all other applicable requirements of the regulatory program, including the requirements of § 816.45(a) of this part. Under § 816.56 of this part, you must remove and reclaim all sedimentation pond embankments before abandoning the permit area or seeking final bond release unless the regulatory authority approves retention of the pond as a permanent impoundment under § 816.49(b) of this part and provisions have been made for sound future maintenance by the permittee or the landowner in accordance with § 800.40(c)(2) of this chapter.

(4) Construction of excess spoil fills and coal mine waste disposal facilities in a perennial or intermittent stream. You must comply with all other applicable requirements of the regulatory program, including the requirements of paragraphs (a) and (f) of § 816.71 of this part for excess spoil fills and the requirements of §§ 816.81(a), 816.83(a), and 816.84 of this part for coal mine waste disposal facilities.

(c) *Additional clarifications.* All surface mining activities conducted in or within 100 feet of a perennial or intermittent stream must comply with paragraphs (b)(10)(B)(i) and (b)(24) of section 515 of the Act and the regulations implementing those provisions of the Act, including—

(1) The requirement in § 816.41(d)(1) of this part that surface mining activities be conducted according to the plan approved under § 780.21(h) of this chapter and that earth materials, ground-water discharges, and runoff be handled in a manner that prevents, to the extent possible using the best technology currently available, additional contribution of suspended solids to streamflow outside the permit area; and otherwise prevents water pollution.

(2) The requirement in § 816.45(a) that appropriate sediment control measures be designed, constructed, and maintained using the best technology currently available to prevent, to the extent possible, additional contributions of sediment to streamflow or to runoff outside the permit area.

(3) The requirement in § 816.97(a) of this part that the operator must, to the extent possible using the best technology currently available, minimize disturbances and adverse impacts on fish and wildlife and related environmental values and achieve enhancement of those resources where practicable.

(4) The requirement in § 816.97(f) of this part that the operator avoid disturbances to, enhance where practicable, restore, or replace wetlands, habitats of unusually high value for fish and wildlife, and riparian vegetation along rivers and streams and bordering ponds and lakes.

■ 20. In § 816.71, revise paragraphs (a) through (d) to read as follows:

§ 816.71 Disposal of excess spoil: General requirements.

(a) *General.* You, the permittee or operator, must place excess spoil in designated disposal areas within the permit area in a controlled manner to—

(1) Minimize the adverse effects of leachate and surface water runoff from the fill on surface and ground waters;

(2) Ensure mass stability and prevent mass movement during and after construction;

(3) Ensure that the final fill is suitable for reclamation and revegetation compatible with the natural surroundings and the approved postmining land use; and

(4) Minimize disturbances to and adverse impacts on fish, wildlife, and related environmental values to the extent possible, using the best technology currently available.

(b) *Static safety factor.* The fill must be designed and constructed to attain a minimum long-term static safety factor of 1.5. The foundation and abutments of

the fill must be stable under all conditions of construction.

(c) *Compliance with permit.* You, the permittee or operator, must construct the fill in accordance with the design and plans submitted under § 780.35 of this chapter and approved as part of the permit.

(d) *Special requirement for steep-slope conditions.* When the slope in the disposal area exceeds 2.8h:1v (36 percent), or any lesser slope designated by the regulatory authority based on local conditions, you, the permittee or operator, must construct keyway cuts (excavations to stable bedrock) or rock-toe buttresses to ensure fill stability.

* * * * *

PART 817—PERMANENT PROGRAM PERFORMANCE STANDARDS—UNDERGROUND MINING ACTIVITIES

■ 21. The authority citation for part 817 is revised to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 22. Section 817.10 is revised to read as follows:

§ 817.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.*, the Office of Management and Budget (OMB) has approved the information collection requirements of this part and assigned clearance number 1029–0047. Collection of this information is required under section 516 of SMCRA, which provides that permittees conducting underground coal mining operations must meet all applicable performance standards of the regulatory program approved under the Act. The regulatory authority uses the information collected to ensure that surface mining activities are conducted in compliance with the requirements of the applicable regulatory program. Persons intending to conduct such operations must respond to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

■ 23. In § 817.11, revise paragraph (e) to read as follows:

§ 817.11 Signs and markers.

* * * * *

(e) *Buffer markers.* The boundaries of any buffer to be maintained between surface activities and a perennial or intermittent stream in accordance with §§ 784.28 and 817.57 of this chapter must be clearly marked to avoid disturbance by surface operations and facilities.

* * * * *

■ 24. Amend § 817.43 as follows:

■ A. Remove the last sentence of paragraph (a)(3);

■ B. Redesignate paragraph (a)(4) as paragraph (a)(5) and add a new paragraph (a)(4);

■ C. Revise paragraphs (b)(1) and (b)(4); and

■ D. Add paragraph (b)(5).

The revisions and additions will read as follows:

§ 817.43 Diversions.

(a) * * *

(4) A permanent diversion or a stream channel restored after the completion of mining must be designed and constructed so as to restore or approximate the premining characteristics of the original stream channel, including any natural riparian vegetation, to promote the recovery and enhancement of the aquatic habitat.

* * * * *

(b) * * *

(1) The regulatory authority may approve the diversion of perennial or intermittent streams within the permit area if the diversion is located and designed to minimize adverse impacts on fish, wildlife, and related environmental values to the extent possible, using the best technology currently available. The permittee must construct and maintain the diversion in accordance with the approved design.

* * * * *

(4) A permanent stream-channel diversion or a stream channel restored after the completion of mining must be designed and constructed using natural channel design techniques so as to restore or approximate the premining characteristics of the original stream channel, including the natural riparian vegetation and the natural hydrological characteristics of the original stream, to promote the recovery and enhancement of the aquatic habitat and to minimize adverse alteration of stream channels on and off the site, including channel deepening or enlargement, to the extent possible.

(5) A qualified registered professional engineer must separately certify both the design and construction of all diversions of perennial and intermittent streams and all stream restorations. The design certification must certify that the design meets the design requirements of this section and any design criteria set by the regulatory authority. The construction certification must certify that the stream-channel diversion or stream restoration meets all construction requirements of this section and is in accordance with the approved design.

* * * * *

§ 817.46 [Amended]

■ 25. In § 817.46, remove paragraph (b)(2) and redesignate paragraphs (b)(3) through (b)(6) as (b)(2) through (b)(5), respectively.

■ 26. Revise § 817.57 to read as follows:

§ 817.57 Hydrologic balance: Surface activities in or adjacent to perennial or intermittent streams.

(a)(1) *Buffer requirement.* Except as provided in paragraph (b) of this section and consistent with paragraph (a)(2) of this section, you, the permittee or operator, may not conduct surface activities that would disturb the surface of land within 100 feet, measured horizontally, of a perennial or intermittent stream, unless the regulatory authority authorizes you to do so under § 784.28(e) of this chapter.

(2) *Clean Water Act requirements.* Surface activities, including those activities in paragraphs (b)(1) through (b)(4) of this section, 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.

(b) *Exception.* The buffer requirement of paragraph (a) of this section does not apply to those segments of a perennial or intermittent stream for which the regulatory authority, in accordance with § 784.28(d) of this chapter or § 817.43(b)(1) of this part, approves one or more of the activities listed in paragraphs (b)(1) through (b)(4) of this section.

(1) Diversion of a perennial or intermittent stream. You must comply with all other applicable requirements of the regulatory program, including the requirements of § 817.43(b) of this part for the permanent or temporary diversion of a perennial or intermittent stream.

(2) Placement of bridge abutments, culverts, or other structures in or within 100 feet of a perennial or intermittent stream to facilitate crossing of the stream by roads, railroads, conveyors, pipelines, utilities, or similar facilities. You must comply with all other applicable requirements of the regulatory program, including the requirements of §§ 817.150, 817.151, and 817.181 of this part, as appropriate.

(3) Construction of sedimentation pond embankments in a perennial or intermittent stream. This provision extends to the pool or storage area created by the embankment. You must

comply with all other applicable requirements of the regulatory program, including the requirements of § 817.45(a) of this part. Under § 817.56 of this part, you must remove and reclaim all sedimentation pond embankments before abandoning the permit area or seeking final bond release unless the regulatory authority approves retention of the pond as a permanent impoundment under § 817.49(b) of this part and provisions have been made for sound future maintenance by the permittee or the landowner in accordance with § 800.40(c)(2) of this chapter.

(4) Construction of excess spoil fills and coal mine waste disposal facilities in a perennial or intermittent stream. You must comply with all other applicable requirements of the regulatory program, including the requirements of paragraphs (a) and (f) of § 817.71 of this part for excess spoil fills and the requirements of §§ 817.81(a), 817.83(a), and 817.84 of this part for coal mine waste disposal facilities.

(c) *Additional clarifications.* All surface activities conducted in or within 100 feet of a perennial or intermittent stream must comply with paragraphs (b)(9)(B) and (b)(11) of section 516 of the Act and the regulations implementing those provisions of the Act, including—

(1) The requirement in § 817.41(d)(1) of this part that surface activities be conducted according to the plan approved under § 784.14(g) of this chapter and that earth materials, ground-water discharges, and runoff be handled in a manner that prevents, to the extent possible using the best technology currently available, additional contribution of suspended solids to streamflow outside the permit area; and otherwise prevents water pollution.

(2) The requirement in § 817.45(a) that appropriate sediment control measures be designed, constructed, and maintained using the best technology currently available to prevent, to the extent possible, additional contributions of sediment to streamflow or to runoff outside the permit area.

(3) The requirement in § 817.97(a) of this part that the operator must, to the extent possible using the best technology currently available, minimize disturbances and adverse impacts on fish and wildlife and related environmental values and achieve enhancement of those resources where practicable.

(4) The requirement in § 817.97(f) of this part that the operator avoid disturbances to; enhance where practicable; restore; or replace wetlands, habitats of unusually high value for fish and wildlife, and riparian vegetation along rivers and streams and bordering ponds and lakes.

■ 27. In § 817.71, remove paragraph (k) and revise paragraphs (a) through (d) to read as follows:

§ 817.71 Disposal of excess spoil: General requirements.

(a) *General.* You, the permittee or operator, must place excess spoil in designated disposal areas within the permit area in a controlled manner to—

(1) Minimize the adverse effects of leachate and surface water runoff from the fill on surface and ground waters;

(2) Ensure mass stability and prevent mass movement during and after construction;

(3) Ensure that the final fill is suitable for reclamation and revegetation compatible with the natural surroundings and the approved postmining land use; and

(4) Minimize disturbances to and adverse impacts on fish, wildlife, and related environmental values to the extent possible, using the best technology currently available.

(b) *Static safety factor.* The fill must be designed and constructed to attain a minimum long-term static safety factor of 1.5. The foundation and abutments of the fill must be stable under all conditions of construction.

(c) *Compliance with permit.* You, the permittee or operator, must construct the fill in accordance with the design and plans submitted under § 784.19 of this chapter and approved as part of the permit.

(d) *Special requirement for steep-slope conditions.* When the slope in the disposal area exceeds 2.8h:1v (36 percent), or any lesser slope designated by the regulatory authority based on local conditions, you, the permittee or operator, must construct keyway cuts (excavations to stable bedrock) or rock-toe buttresses to ensure fill stability.

* * * * *

[FR Doc. E8–29150 Filed 12–11–08; 8:45 am]
BILLING CODE 4310–05–P

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL PARKS CONSERVATION ASSOCIATION,

Plaintiff,

v.

KEN SALAZAR, Secretary of the United States Department of the Interior, et al.,

Defendants.

Civil Action 09-00115 (HHK)

MEMORANDUM OPINION AND ORDER

The National Parks Conservation Association ("NPCA") brings this suit against Ken Salazar, Secretary of the Department of the Interior, Glenda Owens, Acting Director of the Office of Surface Mining Reclamation and Enforcement ("OSM"), and Lisa Jackson, Administrator of the Environmental Protection Agency ("EPA"), (collectively, the "Federal defendants") challenging the promulgation of OSM's Final Rule for "Excess Spoil, Coal Mine Waste, and Buffers for Perennial and Intermittent Streams," 73 Fed. Reg. 75,814 (Dec. 12, 2008) ("SBZ Rule"), and the EPA's written determination concurring in the promulgation of the Rule. NPCA alleges that the Federal defendants violated the Administrative Procedures Act, 5 U.S.C. § 551 *et seq.* ("APA"), the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1276, subsection 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2) ("ESA"), and sections 101 and 303 of the Clean Water Act, 33 U.S.C. §§ 1251, 1313. The National Mining Association ("NMA") has been permitted intervene as a defendant.

Before the Court are the motions of the Federal defendants to remand and vacate the SBZ Rule [#10] and to dismiss this action for lack of jurisdiction [#12] on the grounds that there no longer exists a case and controversy. Upon consideration of the motions, the oppositions thereto, and the record in this case, the Court concludes that the motions should be denied.

I. BACKGROUND

On December 12, 2008, after publishing notice and soliciting public comment on its proposed amendment to regulations regarding stream buffer zones, OSM published the SBZ Rule, which regulates excess mining spoil, disposal of mine waste, stream buffer zones, and stream-channel diversions. NPCA filed this suit in January 2009 alleging that the Federal defendants violated several statutes in promulgating and concurring in the promulgation of the SBZ Rule. In April 2009, Secretary Salazar "determined that the OSM erred in failing to initiate consultation with the U.S. Fish and Wildlife Service under the ESA to evaluate possible effects of the SBZ Rule on threatened and endangered species." Defs.' Mot. for Remand & Vacatur at 2. Accordingly, the Federal defendants move to remand and vacate the SBZ Rule and to dismiss this action. NMA opposes the Federal defendants' motions and the NPCA supports the motions.

II. ANALYSIS

The Federal defendants argue that this Court should employ its equitable authority to remand, as well as vacate, the SBZ Rule because Secretary Salazar has confessed serious legal deficiencies in the rulemaking and vacatur will not result in disruptive consequences. The Federal defendants further argue that there no longer exists a case or controversy between the parties, and that judicial efficiency counsels in favor of the Federal defendants' position that this

case should be dismissed, because dismissal would afford plaintiff the same relief that it would receive if it won on the merits.

In opposition, the NMA argues that the Federal defendants should not be permitted to bypass the APA's procedures for repealing an agency rule. The NMA disputes the Federal defendants' assertion that there was any legal deficiency in the rule making leading up to the promulgation of the SBZ Rule and the Federal defendants' contention that vacating the rule would not cause disruption. The NMA's position has merit.

The cases cited by the Federal defendants provide scant support for their position that remand and vacatur is appropriate here because the circumstances addressed in those cases are materially different from those extant here. For example in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146, 150-51 (D.C. Cir. 1993), and *United Mine Workers v. Dole*, 870 F.2d 662, 673-74 (D.C. Cir. 1989), a court remanded and vacated an agency action only after reaching the merits of the challenge. Here, the Federal defendants seek a remand and vacatur of the SBZ Rule without a determination on the merits that the SBZ Rule is legally deficient. Other cases cited by the Federal defendants relate to an agency's motion for voluntary remand upon a finding of significant new evidence. *See Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993) (holding that where there was significant new evidence, a remand was appropriate). Here, the Federal defendants point to no new evidence and ask the Court not only to remand the case, but to vacate the SBZ Rule.

Building Industries Legal Defense Foundation v. Norton, 231 F. Supp. 2d 100 (D.D.C. 2002) and *National Association of Home Builders v. Evans*, No. 00-cv-02799, 2002 WL 1205743 (D.D.C. 2002) also addressed materially different circumstances. In *National Association of*

Home Builders, the court approved a consent decree that vacated and remanded an agency rule over the objections of *amici curiae* where the Secretary of Commerce confessed legal error in light of an adverse Tenth Circuit decision. 2002 WL 1205743, at *3. There, all parties to the case agreed that the rule should be remanded and vacated. *Id.* Here, NMA, a full party to the case as an intervenor, *see District of Columbia v. Merit Sys. Protection Bd.*, 762 F.2d 129, 132 (D.C. Cir. 1985), opposes the Federal defendants' motion for vacatur. Further, while not reaching the merits itself, the court in *National Association of Home Builders* reviewed the Tenth Circuit decision on the merits, which had caused the Secretary of Commerce to confess error, and found the other court's opinion to be "well-reasoned" and founded in "persuasive rationale." 2002 WL 1205743, at *3. In *Building Industry Legal Defense Foundation*, the case which NMA concedes to be most factually analogous to this case, the court granted a motion for remand and vacatur over the objections of intervenor environmental groups where the Secretary of the Interior decided that a rule required reconsideration in light of the same Tenth Circuit decision. 231 F. Supp. 2d at 108. There, however, all parties agreed that the rule should be remanded because legal error existed in the rulemaking process and the only dispute concerned how the agency should be instructed upon remand and whether vacatur was also appropriate. *Id.* at 103.

The Court finds no precedent to support the proposition that it should remand and vacate the SBZ Rule under the circumstances presented here. Moreover, the NMA has the better argument that granting the Federal defendants' motion would wrongfully permit the Federal defendants to bypass established statutory procedures for repealing an agency rule. The APA requires government agencies to follow certain procedures, including providing for public notice and comment, before enacting or amending a rule. 5 U.S.C. § 553(b), (c). An agency must follow

the same procedure in order to repeal a rule. 5 U.S.C. § 551(5) ("'[R]ule making' means agency process for formulating, amending, or *repealing* a rule."(emphasis added)); *see Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) ("[A]n agency changing its course by repealing a rule is obligated to supply a reasoned analysis for the change."); *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 446 (D.C. Cir. 1982), *aff'd*, 463 U.S. 1216 (1983) ("[T]he APA expressly contemplates that notice and an opportunity to comment will be provided prior to agency decisions to repeal a rule."). While notice and comment procedure is not required where a court vacates a rule after making a finding on the merits, *see, e.g., Cement Kiln Recycling Coal v. EPA*, 255 F.3d 855, 872 (D.C. Cir. 2001), granting vacatur here would allow the Federal defendants to do what they cannot do under the APA, repeal a rule without public notice and comment, without judicial consideration of the merits.

III. CONCLUSION

For the reason set forth above and because this case quite clearly presents a continuing "case and controversy," it is this 12th day of August 2009, hereby

ORDERED that defendants' motions for voluntary remand and vacatur [#10] is **DENIED**; and it is further

ORDERED that defendants' motion to dismiss [#12] is **DENIED**.

Henry H. Kennedy, Jr.
United States District Judge

EXHIBIT C

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EXHIBIT D

Assumptions for the Stream Buffer Impact Estimate for Underground Longwall Mining Method

9/22/2011

Using CONSOL's current 10 year plans extrapolated forward, self-defined streams and very high level calculations, we have been able to develop an indication of the order of magnitude of the impact that OSM's proposed stream protection legislation could potentially have on Consol's Longwall mines. To date, our work has given us a sense of "Cautious Validity." Based on what we have calculated thus far, we can make the following statement:

"Our preliminary study indicates that even using a moderate interpretation of a protected stream will result in a 40% loss of eastern longwall minable reserves to Consol (over 1 billion tons lost) which at current market prices reduces future revenues by over $66 billion. Additionally, the increased quantity and frequency of longwall moves due to avoidance of protected streams, reduces the mine's annual production 25 to 30 percent and potentially increases production costs by 20 to 35 percent making all of Consol's Pittsburgh Seam longwall mines unprofitable at today's coal prices."

Stream Assumptions

Hydrologic stream mapping was obtained from the USGS's *National Map* webpage.

Subsidence of the USGS defined streams WOULD NOT be allowed.

A buffer was established around each stream to define underground locations where longwall mining could not occur.

The size of the buffer around each stream was determined using the following equation:

$$Horizontal\ Buffer\ Distance = Overburden \times \tan(15°) + 100\ feet$$

Mining Assumptions

An in-panel longwall move-around takes twice as long as a regular longwall move from panel to panel.

Reasonable effort will be made to meet timing deficiencies, including the following:

- Hiring of additional crews to increase available shifts in the mains and development sections.
- Hiring of additional people for the increased number of longwall moves allowing the mains and development section to run during the longwall moves.

Longwall production rates and availabilities remained constant due to the same limitations that currently limit production (skip or belt limitations).