

Guide for Commenting on the Proposed Stream Protection Rule

Stream Protection Rule Hearing Information

The U.S. Office of Surface Mining and Reclamation (OSM) is holding a public hearing on September 10, 2015, from 5:00-9:00 PM at the Double Tree Hotel in Green Tree, 500 Mansfield Ave., Pittsburgh, PA 15205. The purpose of this meeting is to accept comments from people in the coalfields about the proposed stream protection rule which will impact the way mining is regulated nationwide, including in Pennsylvania. The proposed rule will protect more than 6,500 miles of streams from the impacts of both surface and underground coal mining. With only six hearings scheduled in the country, here in Pittsburgh the public will have an opportunity to comment on the proposed rule. OSM will use the comments received in writing and at this hearing to write and adopt a final rule.

Background Information

The Office of Surface Mining's (OSM) proposed Stream Protection Rule represents the first major changes to federal mining regulations in decades. It has important implications for all types of surface coal mining and underground longwall mining. While the rule has some areas that need to be much stronger to adequately protect waterways and communities impacted by surface mining, on the whole it represents a modest and much-needed improvement in current mining regulation.

Commenting

OSM will provide opportunities for interested parties to deliver or write comments at the public hearing. Participants can speak with a court reporter who will transcribe their verbal comments for the written record. Additionally, participants will be able to speak in a public hearing format. During the public hearing, comments will be limited to two minutes in order to allow as many people to speak as possible. No prior registration is required to speak.

OSM is accepting written comments by mail, delivery at the hearing, or electronically through www.regulations.gov. OSM must receive all comments no later than September 25, 2015.

Comments

There are three important points you should make in your comments:

- First, identify the issues that you are experiencing, have experienced or are concerned about related to stream damage from coal mining.
- Second, connect those issues to the improvements we support in the Stream Protection Rule using the talking points provided in Table 1 below.
- Third, give recommendations on ways that the rule can be improved to alleviate or reduce impacts using Table 2 below.

Example: I often hike and recreate along the streams in Ryerson Station State Park that are within a new longwall mine permit expansion. I am concerned about those streams being destroyed by this future mining activity. The Act 54 report found that 74% of streams undermined by longwall mining have been impaired or destroyed and that is just unacceptable. To alleviate this impact of longwall mining, OSM should adopt the new “material damage” provision in the proposed Stream Protection Rule. OSM should additionally ensure this provision is consistent with the Clean Water Act by defining “preclude” to mean “partially or completely eliminate or significantly degrade” the existing or designated use.

Table 1: Provisions We Support

This table discusses provisions in the proposed rule that will strengthen the existing law.

<i>Impact Experienced/ Concerned About</i>	<i>How This is Addressed in the Proposed Rule</i>	<i>Why It Is Important</i>
Water pollution from coal mining	The proposed rule requires more extensive monitoring of water quality and stream flow in areas impacted by mining, including requirements to monitor for selenium, conductivity and other pollutants, as well as the presence of important aquatic species.	Under the current rule minimal monitoring of water quality and stream flow is required of mining companies. This has allowed for significant water pollution from contaminants including selenium and conductivity. Lack of monitoring has allowed land subsidence from underground mining to cause low or loss of flow in streams and pooling. Presence of aquatic species like macroinvertebrates is an important indicator of water quality. This type of monitoring will allow for early identification of impacts and will help protect aquatic life in small streams.
Protection of headwater streams from longwall mining	The rule makes clear that regulatory agencies “may not approve any proposed operation that is predicted to cause subsidence that would result in the dewatering of perennial or intermittent streams.”	Headwater streams provide important flow for downstream users and are incredibly important for downstream water quality. About 117 million Americans, over one-third of the US, rely on

		intermittent, ephemeral or headwater streams for drinking water, according to EPA.
Material damage from coal mining including subsidence from longwall mining	<p>Existing regulations define the term “material damage,” and it applies to damage as a result of subsidence from underground mining.</p> <p>Existing regulations do not define "existing damage to the hydrologic balance outside the permit area" and the new rule includes the first-ever definition of this term. This proposed definition does not change the existing definition of "material damage" and it includes damage from subsidence caused by longwall mining.</p> <p>However, the new rule does not provide specifics regarding what baseline data must be collected or how “material damage” should be assessed.</p> <p>The rule will require state agencies, like DEP, to prepare an analysis (Cumulative Hydrological Impact Analysis) before issuing a mining permit that ensures that the mining operation will prevent “material damage” to surface and ground water outside the permit area and will minimize such damage within the permit area. This analysis will contain enforceable, site-specific criteria based on a number system for each issue of concern.</p>	This regulatory change should significantly limit damage from underground longwall mining, as this method of mining often causes land subsidence and associated lower stream flow, stream de-watering, and pooling both inside and outside of the permit area.
Restoration	The proposed rule requires mine operators to restore both the physical, hydrologic form and ecological functions of stream segments disturbed by mining, consistent with the Clean Water Act. OSM has proposed a requirement that the restored stream be in good biological condition and able to support aquatic life.	Requiring restored streams to be in good condition and able to support aquatic life would make the rule consistent with the federal Clean Water Act which requires consideration of a stream’s structure and function. The restored stream’s condition would also need to support uses that

		existed prior to mining.
Bonding Provisions	OSM is changing bonding requirements in the proposed rule to financial assurances like trust funds held by or accessible to the permitting state rather than a bond.	To ensure a mine operator has sufficient funds to cover long-term pollution discharges, OSM requires that operators put up bonds for such costs. A shift to more stable financial assurances is important because many mining companies are in increasingly shaky financial situations, even filing for bankruptcy.

Table 2: Suggested Improvements

This table outlines important ways OSM could further improve the proposed Stream Protection Rule.

Concern	Background	Suggested Improvement
Stream buffers	The proposal eliminates the stream buffer requirement that has been in place for years and prohibits mining disturbances within 100 feet of a stream if the disturbance will adversely affect the environmental resources of the stream.	In the final rule, OSM should restore this provision.
Natural water courses and approximate original contour	The proposal eliminates a provision that prohibits damage to “natural watercourses” – i.e., streams – by operations that receive a variance from the “approximate original contour” (AOC) requirement.	In the final rule, OSM should restore this provision.
Water quality	Coal mining states routinely issue Clean Water Act discharge (NPDES) permits that allow mining companies to evade compliance with water quality standards. Consequently, there has been essentially no enforcement of water quality standard violations caused by selenium and conductivity pollution from mountaintop removal mines except by citizen groups.	OSM should clarify that coal mining operations must comply with water quality standards. OSM should also make clear that the requirement to comply with water quality standards is directly enforceable under SMCRA. In technical parlance, OSM should clarify that the SMCRA “savings clause” does not prevent citizens from enforcing that requirement.
Water quality monitoring	The enhanced monitoring requirements within the rule are important, however, simply conducting in-stream monitoring downstream from a discharge point from a coal mine does not allow DEP to determine if a particular mine is causing or contributing to violations of water quality standards. Monitoring at the point of discharge itself (outfall) is necessary to make the connection between mining discharges and water conditions downstream.	The final rule should require monitoring directly at the outfalls where mining operations discharge pollution, not just in-stream monitoring. The final rule should require monitoring at outfalls for selenium, conductivity, pH, iron, aluminum, manganese, as well as calcium, bicarbonate, sulfate and magnesium.

Existing uses vs. pre-mining uses	In Appalachia alone, hundreds of miles of streams are already impaired by coal mining. Preserving the “existing uses” when new mining applications are submitted seems like it would only protect the existing impairment caused by earlier mining in the same watershed. Instead, the rule should require DEP to look to the condition of the streams before mining occurred in the area.	OSM should replace the term “existing uses” with “pre-mining uses”.
Protection of ephemeral streams from longwall mining	Ephemeral streams, those only running after rainfall, “are an important component of headwater streams”, as OSM has recognized. EPA has similarly found that “all tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers”. The proposed rule requires restoration of stream <i>form</i> for ephemeral streams, but not restoration of <i>ecological functions</i> .	<p>The final rule should include a clear prohibition on dewatering perennial and intermittent streams. OSM should require permitting agencies to consider whether previous, similar mining operations have dewatered streams and provide scientific reasoning for why the new operation will not result in dewatering.</p> <p>OSM should extend the same protections afforded to perennial and intermittent streams to ephemeral streams including the restoration of ecological functions after mining.</p>
Protection of streams from material damage	<p>OSM’s methods for protecting streams from “material damage” (e.g. stream restoration and recreation) are unproven and undocumented; the agency should not rely on those methods to achieve its goal of preventing long-term material damage.</p> <p>In the proposed rule, OSM assumes that the ecological functions of undermined and mined-through stream segments can be restored and that constructing new streams is just as feasible as restoring existing streams. Available scientific evidence flatly contradicts those</p>	OSM must recognize that stream recreation does not work, and it should reject proposed mining operations that will not adequately protect streams and prevent the loss of stream segments.

	<p>assumptions. In Pennsylvania, the most recent report on Act 54, PA's underground mining law, studied streams damaged by mining that had undergone restoration, and concluded, "...the ability to repair damage to streams remains largely unknown."</p> <p>OSM's objective criteria for agencies conducting material damage analyses should be as protective as the Clean Water Act.</p>	<p>Material damage criteria should specifically include the State's water quality standards</p>
Material damage definition	<p>The "material damage" definition is based on the standard that material damage occurs only if mining impacts "preclude" existing or designated use of the surface or groundwater outside the permit area. This standard is similar, but not consistent with the federal Clean Water Act.</p>	<p>OSM should define "preclude" to mean "partially or completely eliminate or significantly degrade" the existing or designated use, in order make this section consistent with the Clean Water Act.</p>
Material damage definition involving the hydrologic balance outside the permit area	<p>"Material damage to the hydrologic balance outside the permit area" is a new definition which also includes the impacts of subsidence from underground mining. However, part of the rule seems to narrowly define the adverse impacts of subsidence as direct dewatering of perennial or intermittent streams or water supplies.</p>	<p>OSM should clarify that "Material damage to the hydrologic balance outside the permit area" includes <i>all</i> of the impacts of subsidence from underground mining on water resources (like low flow and pooling as well as dewatering of streams and water supplies).</p>
Protection of threatened and endangered species	<p>In watersheds across the nation and through Appalachia in particular threatened and endangered species are negatively impacted by coal mining operations. OSM is taking steps toward protecting species listed as threatened and endangered under our Endangered Species Act from the harmful effects of coal mining, but the agency needs to go further.</p>	<p>In watersheds across the nation with threatened or endangered wildlife, strict buffers and no variances are necessary to protect water quality and the wildlife that depend on our waterways.</p>
Bonding Provisions	<p>Bonding provisions are shifting to financial assurances that should not be any form of bond, but should consist of trust funds or annuities held by the permitting</p>	<p>Prohibit the use of alternative bonding schemes which would still be permissible under the proposed rule.</p>

	agency or accessible to them.	Ensure regulators consider the biological conditions of perennial and intermittent streams when setting amounts for the assurances. Revise bond release provisions to require ground and surface water monitoring, and specify criteria for bond release.
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Contact Veronica at 724-229-3550 or veronica@coalfieldjustice.org or Krissy at 724-455-4200 or krissy@mtwatershed.com if you have questions or want assistance drafting your comments.