



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 2 2008

THE ADMINISTRATOR

The Honorable Dirk A. Kempthorne
Secretary
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Dear Mr. Secretary:

Section 501 of the Surface Mining Control and Reclamation Act requires the concurrence of the Administrator of the U.S. Environmental Protection Agency in Office of Surface Mining final regulations addressing air or water quality standards. OSM intends to promulgate final regulations on Excess Spoil, Coal Mine Waste, and Buffers for Perennial and Intermittent Streams. We appreciate the opportunities for coordination provided by OSM during the development of this rule.

In the absence of a specific standard for EPA's concurrence articulated in section 501 of SMCRA, we have carefully considered previous Agency concurrence decisions under this provision and Congressional report language relevant to section 501. We have concluded that the relevant considerations for my concurrence focus on ensuring that nothing in the OSM regulation is inconsistent with the provisions of the Clean Water Act and that the rule does not inhibit EPA's authority to require that proposed mining activities in waters of the United States comply with all applicable CWA standards. This is the standard I have applied in making my concurrence decision.

As discussed in more detail below, EPA has coordinated closely with OSM to include improvements to the rule that ensure a more effective environmental evaluation under SMCRA of proposed mining practices. Among the more important revisions sought by EPA is a requirement that no mining activity may proceed in streams that would cause or contribute to a violation of applicable water quality standards. Consistent with our review of the final OSM rule, which includes revisions made in response to EPA comments, I concur in the promulgation of these regulations.

EPA appreciates the important improvements that have been incorporated into the new regulations governing review of proposed surface coal mining operations under SMCRA. Of particular significance to me, the regulation retains a provision recognizing the key requirement that all surface coal mining activities in streams must not cause or contribute to the violation of

state or federal water quality standards. This improvement requires that no mining activity potentially affecting water quality in the nation's rivers and streams may proceed unless it is approved under the CWA. OSM proposed to remove a similar provision from the Buffer Zone Rule but agreed to retain a requirement regarding water quality standards after discussions with EPA. This language will help ensure that mining activities in the nation's vital water resources comply with all relevant water quality standards established by EPA and the states.

The regulation also reflects other necessary improvements to protect water resources from potential impacts associated with coal mining. The final rule requires that mining operations be designed to minimize the creation of mining overburden that may be placed in streams and other waters by ensuring more of this material is placed back on the mine site. The rule also requires more effective consideration of alternatives to the placement in streams of overburden generated from mining activities. Potential alternatives to the placement of overburden in streams include use of abandoned mine sites, land disposal, and improved design of valley fills. Reliance on best current technology requirements contained in the new regulation should promote environmental protection by reducing the footprint of surface coal mining activities and by protecting water quality in watersheds where mining is occurring.

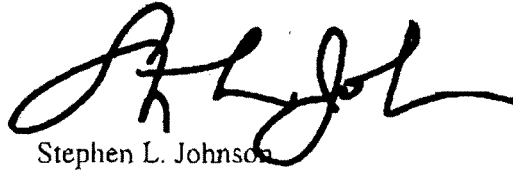
The new regulation reflects Congress's intent that SMCRA take the lead in providing a comprehensive engineering, safety, and environmental evaluation of proposed surface coal mining activities, including mine reclamation practices. In addition, SMCRA regulations include a pre-emption provision allowing states to adopt rules that are stricter than federal regulations, but prohibiting adoption of weaker requirements. As a result, the new OSM regulation will not affect state mining regulatory programs that establish more stringent limits on surface coal mining practices than the federal program. Further, the CWA establishes important tools for ensuring that potential mining-related impacts to water resources are effectively addressed. CWA programs, including the Section 402 and 404 permit programs, do not, however, presumptively prohibit categories of surface mining practices such as mountaintop removal coal mining. Federal and state agencies apply their CWA authorities to evaluate proposed mining activities in waters of the United States and make compliance determinations on a case-by-case basis. EPA, in coordination with the Army Corps of Engineers and the states, has worked cooperatively with U.S. Department of the Interior agencies, including OSM and the U.S. Fish and Wildlife Service, to improve the environmental review of proposed mining activities under all relevant statutes, including SMCRA, CWA, National Environmental Policy Act, and Fish and Wildlife Coordination Act.

This coordination has resulted in improved protection for fish and wildlife and water resources potentially affected by surface coal mining practices, and I am committed to ensuring this progress continues and additional improvements are made under the CWA. EPA will continue to work with states to establish and implement water quality standards programs that protect existing uses, aquatic life, and public health in streams and watersheds where surface coal mining activities occur. We are working with the U.S. Army Corps of Engineers and our partners in the states and tribes to ensure effective application of our regulatory tools under CWA Sections 402 and 404 to protect water quality, improve compensatory mitigation, and more effectively assess potential cumulative impacts on a watershed scale.

The President has emphasized efforts to promote the increased use of clean coal technologies in order to reduce our reliance on foreign oil as we meet the nation's energy needs. As a result, much of the coal being mined today is cleaner burning with low sulfur, low ash, and high BTU content. I know we share the President's perspective that the nation should continue to take advantage of the energy and environmental benefits of cleaner-burning coal while applying regulatory tools under SMCRA and CWA to ensure more effective protection for water and wildlife resources. Americans should not have to choose between clean coal or effective environmental protection; we can achieve both.

EPA is committed to assessing implementation of the OSM rule and its effectiveness, in coordination with CWA programs, in providing appropriate protection for wetlands, streams and other waters. EPA looks forward to working closely with the U.S. Department of the Interior as this rule is implemented and to coordinating with our CWA partners at the U.S. Army Corps of Engineers, the states, and tribes, to ensure our programs continue to provide effective protection for the nation's wildlife and water resources.

Sincerely,

A handwritten signature in black ink, appearing to read 'S. L. Johnson', written in a cursive style.

Stephen L. Johnson

cc: C. Stephen Allred
Assistant Secretary, Land and Minerals Management, DOI

Brent Wahlquist
Director, Office of Surface Mining Reclamation and Enforcement, DOI

Susan Dudley
Administrator, Office of Information and Regulatory Affairs, OMB