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## View Rule

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**DOI/OSMRE**
**RIN:** 1029-AC04

**Publication ID:** Fall 2008

**Title:** Placement of Excess Spoil

**Abstract:** This rule will establish permit application requirements and review procedures for applications that propose to place excess spoil or coal mine waste from surface coal mining operations into waters of the United States. Among other things, it will require that mine operators minimize the creation of excess spoil and the adverse environmental impacts resulting from the construction of excess spoil fills. In addition, it will clearly specify the activities to which that requirement does and does not apply, and revise the findings required for a variance from the buffer requirement to more closely track the underlying statutory provisions.

**Agency:** Department of the Interior(DOI)

**Priority:** Other Significant

**RIN Status:** Previously published in the Unified Agenda

**Agenda Stage of Rulemaking:** Final Rule Stage

**Major:** No

**Unfunded Mandates:** No

**CFR Citation:** 30 CFR 780; 30 CFR 784; 30 CFR 816; 30 CFR 817 (To search for a specific CFR, visit the [Code of Federal Regulations.](#))

**Legal Authority:** [30 USC 1201 et seq](#)
**Legal Deadline:** None

**Statement of Need:** This rule will provide long-term regulatory stability by clearly specifying the activities to which the buffer requirement does and does not apply and describing the relationship between our rules and the Clean Water Act. It also will promote environmental protection by requiring that mining operations be designed to minimize both the creation of excess spoil and adverse environmental impacts resulting from the disposal of excess spoil and coal mine waste.

**Summary of the Legal Basis:** General rulemaking authority: Section 201(c)(2) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1211(c)(2), directs the Secretary of the Interior (the Secretary), acting through OSM, to publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of SMCRA. Legal basis under SMCRA: Sections 515(b)(10)(B)(i) and 516(b)(9)(B) of SMCRA, 30 U.S.C. 1265(b)(10)(B)(i) and 1266(b)(9)(B), require that surface coal mining operations be conducted so as to prevent the contribution of additional suspended solids to streamflow or runoff outside the permit area to the extent possible using the best technology currently available. Sections 515(b)(24) and 516(b)(11) of SMCRA, 30 U.S.C. 1265(b)(24) and 1266(b)(11), require that surface coal mining and reclamation operations be conducted to minimize disturbances to and adverse impacts on fish, wildlife, and related environmental values "to the extent possible using the best technology currently available." These statutory provisions form the basis for the new rules concerning excess spoil, coal mine waste, and buffer zones for waters of the United States.

**Alternatives:** Alternatives considered in the Environmental Impact Statement include: A. Alternative 1 – Changing the Excess Spoil and Stream Buffer Zone Regulations (OSM's Preferred Alternative and Most Environmentally Protective Alternative): OSM would revise the regulations applicable to excess spoil generation and placement to further lessen the adverse environmental effects stemming from excess spoil fill construction. OSM would require the applicant for a surface coal mining permit to demonstrate that (1) the operation has been designed to minimize the creation of excess spoil and (2) excess spoil fills have been designed to be no larger than needed to accommodate the anticipated volume of excess spoil that the operation will generate. Finally, OSM would require the applicant to consider various alternative spoil disposal plans in which the size, numbers, and locations of the excess spoil fills vary, and to submit an analysis showing that the preferred excess spoil disposal plan would result in the least adverse environmental impact. Similarly, OSM would revise its coal mine waste disposal regulations to require permit applicants to describe the steps to be taken to minimize adverse environmental impacts and identify and analyze the environmental impacts associated with alternative disposal methods and potential locations. OSM would revise the stream buffer zone regulation to clarify which kinds of coal mining activities are subject to the rule. Surface mining and reclamation activities occurring adjacent to, but not in, waters of the United States would be subject to the rule. Stream crossings, sedimentation ponds, excess spoil fills, mining through waters of the United States, and coal mine waste disposal facilities would not be subject to the prohibition on disturbance of the buffer zone. OSM would also revise the criteria for authorizing variances from the 100-foot buffer zone to more accurately reflect the statutory basis for the rule. The stream buffer zone is principally based on two SMCRA provisions: Sections 515(b)(10)(B)(i) and 515(b)(24). The first provision requires, among other things, that surface coal mining operations be conducted so as to prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow or runoff outside the permit area. The second provision, Section 515(b)(24), requires that to the extent possible using the best technology currently available, surface coal mining and reclamation operations must minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable. Variances to use of a 100-foot buffer as BTCA could be authorized if equally or more effective alternative means to achieve the performance standards of sections 515(b)(10)(B)(i) and (24) would be used. Finally, OSM would also extend the requirement of a 100-foot buffer zone to other water bodies in addition to streams, so as to apply the rule to lakes, ponds, and adjacent wetlands (to the extent those water bodies constitute "waters of the United States" under the Clean Water Act). As a variant of this alternative, OSM is also considering largely retaining the existing buffer zone rule language at 30 CFR 816.57(a) and 817.57(a), but modifying the criteria for allowing a variance from the 100-foot buffer

requirement: The first modification would retain the current criterion that requires that the regulatory authority find that the "mining activities will not cause or contribute to the violation of applicable State or Federal water quality standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream." This variant would explicitly note that the appropriate Federal and State Clean Water Act agencies in accordance with sections 401, 402, or 404 would make this determination. The second modification would replace the phrase "adversely affect" with "significantly degrade." B. Alternative 2 – January 7, 2004 Proposed Rule OSM would change the excess spoil regulations essentially as described in Alternative 1 but would change the stream buffer zone regulations at 30 CFR 816.56 and 817.57 as described in the January 7, 2004 Federal Register notice of the previous proposed stream buffer zone rule [69 FR 1036]. OSM would retain the prohibition on disturbance of land within 100 feet of a perennial or intermittent stream for surface coal mining operations but allow the regulatory authority to grant a variance to this requirement if the regulatory authority finds in writing that the activities would, to the extent possible, use the best technology currently available: (1) Prevent additional contributions of suspended solids to the section of stream within 100 feet downstream of the mining activities, and outside the area affected by mining activities; and (2) Minimize disturbances and adverse impacts on fish, wildlife, and other related environmental values of the stream. C. Alternative 3 – Change Only the Excess Spoil Regulations OSM would change the excess spoil regulations as described in Alternative 1. No changes would be made to the stream buffer zone regulations. D. Alternative 4 – Change Only the Stream Buffer Zone Regulations OSM would change the stream buffer zone regulations as described in Alternative 1. No changes would be made to the excess spoil regulations. E. Alternative 5 – No Action Alternative: OSM would not adopt any new rules. The current regulations applicable to excess spoil generation and fill construction and the stream buffer zone would remain unchanged.

**Anticipated Costs and Benefits:** It is anticipated that some of the regulatory changes will result in an increase in the costs and burdens placed on coal operators and on some primacy States. We estimate that the total annual increase for operators would be approximately \$240,500, and for the primacy States the total annual increase is estimated at approximately \$24,200. These increases are a result of the requirement to document the analyses and findings required by the regulatory changes. This estimated increase in costs would likely only affect those coal operators and States (Kentucky, Virginia, and West Virginia) located in the steep slope terrain of the central Appalachian coalfields, where the bulk of excess spoil is generated. Because all of the regulatory agencies in the Appalachian coalfields have implemented policies to minimize the volume of excess spoil, no significant additional costs of implementing these regulatory changes are anticipated other than those required to document the strengthened requirements to consider all alternative excess spoil construction and disposal sites. One of the primary benefits of the rule is an expected reduction in the placement of excess spoil with resulting positive environmental consequences. The rule is also expected to clarify mining requirements for steep slope and mountaintop mining operations in Appalachia and thereby establish regulatory certainty for the coal industry, which has been hesitant to expend large sums of money on this type of mining operations because of legal uncertainty.

**Risks:** If the proposed rule is not adopted, the controversy and uncertainty concerning the meaning of the existing stream buffer zone rule may continue to exist. That uncertainty creates the risk of additional litigation concerning the existing rule, which could result in regulatory instability and a reluctance on the part of coal mining companies to invest in new mining projects. There is also the risk that not all of the environmental benefits of the excess spoil minimization rules would be achieved. Finally, failure to adopt this rule would result in the retention of legally and technically obsolete provisions of the existing rules.

**Timetable:**

Action	Date	FR Cite
NPRM	01/07/2004	<a href="#">69 FR 1036</a>
NPRM Comment Period End	03/08/2004	
Second NPRM	08/24/2007	<a href="#">72 FR 48890</a>
Other/Second NPRM Comment Period End	11/23/2007	
Final Action	11/00/2008	

**Regulatory Flexibility Analysis Required:** No

**Government Levels Affected:** Federal, State

**Federalism:** No

**Included in the Regulatory Plan:** Yes

**RIN Data Printed in the FR:** No

**Agency Contact:**

Dennis Rice  
 Regulatory Analyst  
 Department of the Interior  
 Office of Surface Mining Reclamation and Enforcement  
 MS 10, 1951 Constitution Avenue NW.,  
 Washington, DC 20240  
 Phone: 202 208-2829  
 Email: drice@osmre.gov