

**Statement of the Kentucky Resources Council In Response To Obama
Administration Proposed Mining Reforms**
Tom FitzGerald, Director
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The Council appreciates the steps that have been proposed by the Obama Administration to better coordinate and enhance the review of applications for permits to place fill material in waters of the United States associated with coal mining. The failure of previous Administrations to fully implement mining and water quality laws since 1981 has allowed mining activities to impose a unnecessary and heavy burden on the land, water and people of the nation's and Appalachian region's coalfields.

That said, the Council harbors serious concerns regarding whether the proposed reforms go far enough to assure full implementation both of the Clean Water Act **and** the Surface Coal Mining and Reclamation Act of 1977.

The first concern is that the procedural Memorandum of Understanding detailing how EPA and the Corps of Engineers will coordinate review of the 108 pending requests for Section 404 authorization by coal companies in the Appalachian region, sets a schedule for EPA review and identification of proposed authorization of concern, that may result in inadequate substantive review of many of the applications. That only 6 of 48 requests for authorization reviewed by EPA since March were flagged by EPA, suggests that a number of the 108 may go forward due to agency staffing and time constraints.

The second concern is that, while the MOU addresses all mining techniques in the central Appalachian region, the media release and media focus continues to be on "mountaintop mining" and on using only the Clean Water Act to reduce the number of fills and number of sediment ponds and streams affected. The Office of Surface Mining should take a much more significant role in minimizing the footprint of mining, since all forms of surface coal mining generate spoil material that has to be managed, and it is in the design and approval of mining plans and spoil handling that aquatic impacts can be avoided.¹

The only actions proposed by the Obama Administration for the Office of Surface Mining are more effective oversight of state permitting and enforcement, better protection of federally-protected species, and better application of the stream buffer zone rule.

The keys to reducing the footprint of mining on the land and water resources in the Appalachian region, which should be implemented **both** by OSM through regulatory and policy changes **and** by EPA and the Corps in their interpretation and application of the

¹ It is also important to keep in mind that not only fills, but also slurry impoundments associated with mining, cause significant adverse impacts on aquatic resources. Slurry impoundments should rarely, if ever, be approved under Section 404 since dry filter pressing, controlled pneumatic or hydraulic backstowing, and upland dry disposal of processing material are routinely available practicable alternatives.

requirement that “practicable alternatives” to placing fill material in valleys be exhausted, include:

1. Revising OSM’s interpretation of “approximate original contour” to include both restoration of the premining aspect **and** elevation. Where the law contemplates that the approximate contour of land be restored both in elevation and configuration, the elevation requirement has been ignored, and significant amounts of spoil material have been disposed of in valley fills that should have been replaced on the mined area. Regulatory clarification is needed that “approximate original contour” means both that the reclaimed area should resemble the area before mining in both aspect (or slope) and elevation.

2. Eliminating dumped fills. Excess spoil fills are associated with all forms of surface mining in mountainous terrain, not just mountaintop or “area” mines, as well as surface face ups of underground mines. Where the 1979 regulations required haulage and placement of the rock and soil in compacted, constructed, engineered fills, OSM weakened the rules to allow end-dumping and wing-dumping from the mine bench of excessive amounts of mine “spoil” - the soil and rock removed from above coal seams, into headwater streams. Much more could be done regarding mine planning to require the maximum safe retention of the soil and rock on the mined area and the use of excess material to reclaim abandoned mines, with the goal of reducing the size and number of fills in valleys. So-called “durable rock” or “end-dumped” fills should be disallowed by restoring the requirement for compacted, constructed fills. These fills are among the largest man-made structures and are created with little knowledge of the long-term stability of the structures.

3. Restoring meaning to the concept of “contemporaneous reclamation.” Congress intended that the choice of technology would follow, rather than dictate, environmental protection, and that the essence of mine planning was to reduce the time from initial disturbance of the ground until reestablishment of vegetation. Yet the coal industry has systematically replaced the workforce with larger machines more indiscriminate to the terrain, and concepts such as “contemporaneous reclamation” have been weakened in order to accommodate this shift.

Unless OSM gives meaning to the concept, and EPA and the Corps include within their review of “practicable alternatives” to placing fill material in headwater streams, a requirement that the **choice** of technology and **method** of mining be demonstrated to produce the smallest and least-duration footprint, then efforts to meaningfully reduce mining impacts will be unsuccessful.

4. Evaluating “practicable alternatives” must include mine method and mine plan design.

No discharge can be authorized under the 404 program unless that applicant demonstrates that all “practicable alternatives” that would not result in placing fill material in a water have been exhausted. The EPA letter does not expound on what EPA will expect of the Corps concerning this demonstration. At a minimum, the Council believes that it must include:

- a. documentation using peer-reviewed protocol for demonstrating that the mine plan, design and sequencing (both of the mining of each seam and the mining of all seams) has been designed to minimize the amount of disturbed area at any one time and to minimize the off-loading of spoil into waters of the United States;
 - b. a demonstration and commitment by the applicant that in restoring the mined site to the approximate original premining contour, that both elevation and aspect will be considered and that the material will be backstacked to the maximum extent possible consistent with stability;
 - c. documentation that all reasonably available upland sites (including pre-law and post-SMCRA mine sites) within a certain distance from the permit boundary of the proposed mine and the existing adjacent mining complex, have been evaluated for upland disposal of the fill material;
 - d. engineering designs for use of compacted, constructed fills rather than end- or side-dumping of waste, since so-called durable rock fills are typically lower in the watershed and affect more stream reach than constructed fills where the material is hauled and placed, rather than dumped, and is compacted in lifts;
 - e. use of on-bench sediment structures in order to avoid the necessity for or to allow downsizing of in-stream sediment structures; and
 - f. consolidation of proposed fills into fewer watersheds.
5. Requiring that state regulatory authorities properly conduct a Cumulative Hydrologic Impact Analysis before issuance of mine permits.

The cumulative impact of fills on watersheds (both surface and groundwater) was required by Congress to be evaluated by state mining agencies before permit issuance under SMCRA, yet OSM has allowed the states to issue permits for 25+ years without conducting meaningful CHIA reviews. The CHIA requirement was intended as a backstop against cumulative incremental degradation from numerous mining operations, yet state program implementation of the CHIA requirement has ranged from spotty to nonexistent. OSM should demand that the individual states coordinate the CHIA requirement with the “cumulative impact” requirement of the 404 program to assure that material damage is avoided not merely from individual mining operations, but the cumulative impacts of all current, past and foreseeable mining within the immediate and downstream watersheds.

Fully five months after taking office, the current Administration has not filled the position of Director of the Office of Surface Mining. The people of the Appalachian coalfields, indeed the nation’s coalfields, need and deserve a Director who will go to work each day with the goal of restoring the restoring to a troubled agency the morale, staff, and regulatory tools that have been lost and weakened since 1981. OSM must be a

full partner, utilizing all available regulatory tools to do what Congress directed in 1977: “to protect society and the environment from the adverse effects of surface coal mining operations” and to assure that areas mined are reclaimed “as contemporaneously as possible.”