



# Public Service Commission

## State of North Dakota

NOV 20 2007

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November 15, 2007

Office of Surface Mining Reclamation and Enforcement  
Administrative Record  
Room 252 SIB  
1951 Constitution Ave., NW  
Washington, DC 20240

RE: Comments on RIN 10290AC04  
Proposed Rules on Excess Spoil, Coal Mine Waste, and Buffers for Waters of the United States

This letter contains comments from the Reclamation Division of the North Dakota Public Service Commission on proposed rules by the Office of Surface Mining Reclamation and Enforcement (OSM) concerning excess spoil, coal mine waste, and buffer zones for waters of the United States. The rules were published in the August 24, 2007 Federal Register. The Public Service Commission is the state regulatory authority for surface coal mining and reclamation operations in North Dakota.

We understand that OSM wants the proposed rules to provide greater clarity regarding the proper interpretation of the stream buffer zone rule that was adopted in 1983. The current rule, 30 CFR 816.57, provides special protection to perennial and intermittent streams as defined elsewhere in the rules. OSM proposes to change this protection to "waters of the United States" to the extent that those waters are defined and regulated under the Clean Water Act. However, we believe OSM's proposed rule will further complicate the matter, not clarify it.

The term "waters of the United States" has many unresolved issues and jurisdictional difficulties in light of recent Supreme Court rulings. The guidance provided by the U.S. Army Corps of Engineers on these decisions remains in limbo and lawsuits on these issues will likely continue for years. OSM asks in its preamble whether this proposed change in the administration of SMCRA regulatory programs makes sense, and whether the benefits outweigh the problems. We believe the proposed rule does neither and recommend keeping the current rule that provides adequate protection to perennial and intermittent streams. North Dakota's regulatory program has provided the required protection to perennial and intermittent streams in a manner similar to the current OSM rule without any significant issues or controversy for years.

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With regard to the proposed rules and alternatives analysis that is proposed for excess spoil fills and coal mine waste disposal, we do not believe these provisions will have much effect on surface coal mining activities in North Dakota. However, we would like to go on record in support of the comments submitted by the Interstate Mining Compact Commission regarding this matter.

If anyone has any questions on these comments, please contact me.

Sincerely,

A handwritten signature in blue ink, appearing to read "James R. Deutsch".

James R. Deutsch  
Director  
Reclamation Division

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