

COMMENTS for SMCRA Proposed Rulemaking

Preamble

In 2006, Congress passed significant new amendments to SMCRA. In addition to renewing its commitment for reclaiming legacy coal mining problems, it also recognized the importance of water resources by giving new flexibility to states and tribes to fund abatement and treatment projects related to acid mine drainage (AMD). Provisions in the amended legislation exhibiting the clear intent of this flexibility are embodied in 402(g)(6) "the 30% AMD Set-aside", and in 403(a) - the ability to promote an adjacent Acid Mine Drainage (AMD) problem (associated with an existing Priority 1 or 2 feature) to Priority 1 or 2. Further intent is demonstrated with 403(b) - a change that would now allow up to 100% of a state or tribe's annual grant to address water supply issues caused by legacy mining.

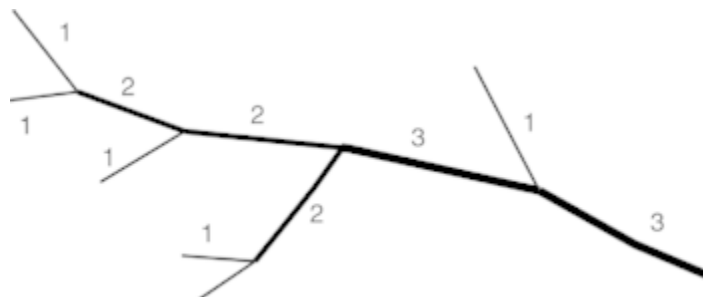
Each state and tribe has its own unique mix, circumstances, and needs with regard to its Priority 1, 2 and AMD problems. Rulemaking should generally recognize this uniqueness as well as the rights of states and tribes by avoiding prescriptive and restrictive "one-size-fits-all" rules so that each state or tribe may tailor solutions it deems to be most appropriate for its own circumstances. We believe the increased statutory flexibility given to states and tribes by Congress to select the mix of reclamation projects to be addressed should also extend to the implementation level defined through rulemaking.

AMD Set-aside: "Hydrologic Unit" and "Comprehensive Manner"

In the context of 402(g)(6), the AMD Set-aside, it would appear that OSM has deferred to the states and tribes the definitions of two crucial terms: "hydrologic unit" and "comprehensive manner". We believe this deference is appropriate. However, we believe OSM should explicitly assert this deference in rulemaking. If OSM is unable to make this assertion, it should, at a minimum, offer guidance to states and tribes for use of these terms in formulating reclamation strategies.

We offer a possible definition of a "*hydrologic unit*" we believe makes sense for Pennsylvania and perhaps Appalachian coal fields that would place reasonable limits on the extent of the *hydrologic unit* as a work area. Both the surface and sub-surface hydrology are recognized in the definition. Note: We also make reference to this in a comment below regarding "Definition of Adjacent in promoting AMD to Priority 1 or 2"

In the context of 402(g)(6), we recognize a number of differing opinions exist as well as confusion concerning what an appropriate definition of a "*hydrologic unit*" should or could be, reflecting the complexity of what may be encountered. As a workable spatial compromise, we like, as a start, the concept offered in comments by the Virginia Department of Mines and Minerals in defining hydrologic unit boundaries as the watershed boundaries of the third order stream [Strahler Method] . We contend the watershed of a third order stream generally represents about as much land area as is practically manageable from the standpoint of comprehensive restoration. However, we also see benefit at providing the discretion of working at smaller scales by allowing lesser stream order watersheds.



U.S. Corps of Engineer diagram showing the Strahler Stream Order
See http://en.wikipedia.org/wiki/Strahler_Stream_Order

STATUTORY LANGUAGE ESTABLISHING AMD SET-ASIDE

402(g)(6)

(A) Any State with an approved abandoned mine reclamation program pursuant to section 405 may receive and retain, without regard to the 3-year limitation referred to in paragraph (1)(D), up to 30 percent of the total of the grants made annually to the State under paragraphs (1) and (5) if those amounts are deposited into an acid mine drainage abatement and treatment fund established under State law, from which amounts (together with all interest earned on the amounts) are expended by the State for the abatement of the causes and the treatment of the effects of acid mine drainage in a **comprehensive manner** within qualified hydrologic units affected by coal mining practices.

(B) In this paragraph, the term "qualified hydrologic unit" means a **hydrologic unit**—

(i) in which the water quality has been significantly affected by acid mine drainage from coal mining practices in a manner that adversely impacts biological resources; and

(ii) that contains land and water that are—

(I) eligible pursuant to section 404 and include any of the priorities described in section 403(a); and

(II) the subject of the expenditures by the State from the forfeiture of bonds required under section 509 or from other States [sic] sources to abate and treat acid mine drainage.

The source of where AMD has its origins may occur at some distance from the actual expression of AMD (the outfall), quite possibly in different watersheds. For this reason, it may be preferable to define a hydrologic unit which includes both source and outfall, and hence different watersheds. In this case, we propose the ability to join the watersheds, but only if they border each other, in defining the boundaries of the hydrologic unit. This qualification has the effect of acknowledging that AMD may not respect watershed boundaries, while limiting the extent to which the hydrologic unit may be extended to adjoining third or less stream order watershed(s). The intent here is a pragmatic one that makes the area to be reclaimed in a comprehensive manner manageable and meaningful. We also see fit to honor existing "hydrologic units" that have already been defined.

Our definition of *hydrologic unit* becomes:

A hydrologic unit is spatially defined as the area of land defined by the watershed boundaries of the third or less order stream (at the state or tribe's discretion) in which either the AMD source and/or its outfall occur. In the case where AMD source and outfall occur in different watersheds (of a third or lesser stream order) and those watersheds border each other, the hydrologic unit boundaries may be extended to include both. Hydrologic units developed prior to the adoption of this definition are also recognized.

Definition of Adjacent in promoting AMD to Priority 1 or 2

With regard to 403(a) and Sec 874.13(a) in the proposed definition of "adjacent" to mean "geographically contiguous", we assert that definition be deferred to the states and tribes for the following reasons:

STATUTORY LANGUAGE ALLOWING PROMOTION OF ADJACENT AMD TO PRIORITY 1 OR 2

SEC. 403. OBJECTIVES OF FUND

(a) Priorities.

Expenditure of moneys from the fund on lands and water eligible pursuant to section 404 for the purposes of this title, except as provided for under section 411, shall reflect the following priorities in the order stated:

- (1)
 - (A) the protection of public health, safety, and property from extreme danger of adverse effects of coal mining practices;
 - (B) the restoration of land and water resources and the environment that—
 - (i) have been degraded by the adverse effects of coal mining practices; and
 - (ii) are adjacent to a site that has been or will be remediated under subparagraph (A);
- (2)
 - (A) the protection of public health and safety from adverse effects of coal mining practices;
 - (B) the restoration of land and water resources and the environment that—
 - (i) have been degraded by the adverse effects of coal mining practices; and
 - (ii) are adjacent to a site that has been or will be remediated under subparagraph (A); and
- (3) the restoration of land and water resources and the environment previously degraded by adverse effects of coal mining practices including measures for the conservation and development of soil, water (excluding channelization), woodland, fish and wildlife, recreation resources, and agricultural productivity.

1. *The flexibility given by Congress to select the mix of reclamation projects to be addressed should also extend to the implementation level;*
2. Regional and local differences that states and tribes may experience are better dealt with at the state or tribe level, as opposed to a one-size-fits-all approach.

Should OSM dismiss the aforementioned assertion, we must address the proposed 874.13(a) *adjacent* definition as follows.

Mining, by its nature, does not limit its effects to surface expressions. This is particularly true with the formation and conveyance of AMD. Subsurface hydrology may have been altered and connected by mining activities in complex ways having little to do with surface boundaries. An entirely surface based definition of *adjacent* is inadequate and likely not the intent of the statute. Further, subsurface hydrology can play a fundamental role in the surface expression (outfall) of AMD which may not fall within the proposed meaning of *adjacent*. We assert subsurface hydrologic connectedness should be a part of the *adjacent* definition. At the same time, we recognize any definition should also put practical limits on what is *adjacent*. Using similar reasoning to that developed for a possible definition for *hydrologic unit* above, we develop a compatible definition of *hydrologic adjacency*. First, we believe to qualify for *hydrologic adjacency*, the hydrologic connectedness of the qualifying Priority 1 or 2 feature with the AMD to be addressed must be reasonably demonstrated, with the majority of the expressed AMD directly linked with the qualifying Priority 1 or 2 feature. This implies that the qualifying Priority 1 or 2 is largely responsible for the expressed AMD. (For instance, the mining activities having created a highwall might reasonably be linked with AMD expressed elsewhere, whereas the need to remove dangerous equipment or structures probably would not.) Second, practical spatial limitations should be imposed as we did with the *hydrologic unit* definition above. Thus, if the demonstrated expression of AMD to be addressed and the qualifying Priority 1 or 2 feature both fall within the watershed boundaries of a third or lesser order stream, or one that extends the boundaries to a geographically contiguous watershed of a third or lesser stream order, then *hydrologic adjacency* is asserted.

Our definition of *adjacent* then becomes either (a) the "geographically contiguous" adjacency proposed in 874.13(a) OR (b) the *hydrologic adjacency* described above, where either of (a) or (b) or both may elevate the AMD to a Priority 1 or Priority 2 feature.

On using certified in-lieu funds for any purpose

We are not in agreement with proposed rule Sec. 872.34 nor the rationale used in proposing it. Sec. 872.34 states " You [certified states and tribes] may use certified in-lieu funds for *any purpose* [emphasis added]." We contend that sections 411(b) through (g) provide the context and guidance for how all certified funds are to be used, regardless of origin. Further, Title IV of SMCRA provides the overall context and mechanisms in dealing with impacts from coal or minerals development. A lack of explicit provisions within the statute on how certified in-lieu funds can be used should not be construed as a green light to use the funds *for any purpose*. Contrary to OSM's rationale, we assert the opposite: Congress could have easily inserted an explicit provision in the statute allowing the use of certified in-lieu funds for any purpose, but didn't. We contend as long as a certified state or tribe has remaining impacts from coal or minerals development, certified funds should be used exclusively for the purposes of addressing those impacts. Using in-lieu funds as a replacement for funds derived directly from reclamation fee payments should not lift the limits and restrictions which would otherwise be in place. To do otherwise would be ingenuous to the intent of the legislation.

The following are topics are addressed by the IMCC/NAAML in comments made May 21, 2008 to Brent Whalquist of OSM for which we wish to assert our agreement:

Funding for Minimum Program States

WPCAMR joins the IMCC/NAAML in their opinion that minimum program states are both deserving and due a minimum of \$3 million annually for their AML programs.

Use of Unappropriated State Share Balances for Noncoal Reclamation and AMD Set-Aside

The AML Campaign joins the IMCC/NAAML in their opinion asserting the Use of Unappropriated State Share Balances for Noncoal Reclamation and AMD Set-Aside.