

Federal Coal Mining Stream Protection Rule Nullified

February 16, 2017

On February 16, 2017, President Trump approved a joint resolution of Congress nullifying the U.S. Department of the Interior's Office of Surface Mining and Reclamation Enforcement's (OSMRE) controversial Stream Protection Rule. The joint resolution was passed pursuant to the 1996 Congressional Review Act (CRA), which allows a new Congress to use special fast-track procedures to invalidate federal agency rules submitted in the last 60 session or legislative days of the previous session of Congress. This marks the second time that President Trump has approved a CRA joint resolution, and the third time ever that the CRA has been utilized successfully.

The Stream Protection Rule was finalized in December 2016 and became effective on the last day of President Obama's second term. The rule would have created a more onerous regulatory framework for protecting surface and groundwater sources from adverse impacts of coal mining operations. Among other things, the rule would have established more stringent permitting standards on coal mining activities deemed to adversely impact water bodies and imposed new data collection, monitoring and bonding obligations on coal mine operators, which many in the coal mining industry alleged would drastically curtail domestic coal activity.

OSMRE is charged with enforcing the 1977 Surface Mining Control and Regulation Act, which requires, among other things, that mining companies avoid causing "material damage to the hydrologic balance outside the permit area." The agency clarified this statutory standard thirty-four years ago in 1983 with a rule creating a 100 foot "buffer zone" adjacent to streams, while leaving the definition of "material damage" vague. That rule was further expanded upon by a 2008 rulemaking, which was challenged in court by environmental groups and ultimately vacated. The Stream Protection Rule that was nullified today would have defined "material damage" in this context for the first time.

The disapproval of the Stream Protection Rule leaves in place the 1983 "buffer zone" rule, with its attendant ambiguities. Because the CRA prevents an agency from undertaking any new rulemaking that is "substantially the same" as a voided rule, absent additional statutory authorization, the 1983 rule is likely to remain the final word on this topic for some time.

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