

mining, and soil removal, stockpiling, and replacement requirements for prime farmland. Oklahoma submitted the amendment with the intent of revising its rules to be consistent with the corresponding Federal regulations, clarifying ambiguities, and improving operational efficiency.

EFFECTIVE DATE: March 29, 1995.

FOR FURTHER INFORMATION CONTACT: James H. Moncrief, Telephone: (918) 581-6430.

SUPPLEMENTARY INFORMATION:

I. Background on the Oklahoma Program

On January 19, 1981, the Secretary of the Interior conditionally approved the Oklahoma program. General background information on the Oklahoma program, including the Secretary's findings, the disposition of comments, and the conditions of approval of the Oklahoma program can be found in the January 19, 1981, **Federal Register** (46 FR 4902). Subsequent actions concerning Oklahoma's program and program amendments can be found at 30 CFR 936.15, 936.16, and 936.30.

II. Submission of Amendment

On September 14, 1994, Oklahoma submitted a proposed amendment to its program pursuant to SMCRA (30 U.S.C. 1201 *et seq.*, administrative record No. OK-963). Oklahoma submitted the proposed amendment in part at its own initiative and in part with the intent of revising the Oklahoma program to be consistent with the corresponding Federal regulations.

Oklahoma proposed to revise the Oklahoma Coal Rules and Regulations at Department of Mines/Rules and Regulations (DOM/RR) sections 816.46 and 817.46, hydrologic balance and siltation structures; section 823.12, prime farmland soil removal; section 823.13, prime farmland soil stockpiling; and section 823.14, prime farmland soil replacement. Oklahoma also proposed to recodify its rules in accordance with the standards set forth by the Oklahoma State Legislature and the Office of Administrative Code.

OSM announced receipt of the proposed amendment in the September 27, 1994, **Federal Register** (59 FR 49223), provided an opportunity for a public hearing or meeting on its substantive adequacy, and invited public comment on its adequacy (administrative record No. OK-963.03). Because no one requested a public hearing or meeting, none was held. The public comment period ended on October 27, 1994.

During its review of the amendment, OSM identified concerns relating to the provisions of recodified Oklahoma Administrative Code (OAC) 460:20-27-20(b) and 460:20-31-17(b), primary road certification requirements for road systems and transportation facilities. OSM also identified concerns with Oklahoma's proposed rule recodification relating to OAC 460:20-43-12(f)(8), sedimentation pond storage volume; OAC 460:20-43-47 and 460:20-43-48, subsidence control for surface mining activities; OAC 460:20-45-28, protection of underground mining; and various editorial and citation inconsistencies. OSM notified Oklahoma of the concerns by letter dated November 22, 1994 (administrative record No. OK-963.08).

By letter dated December 20, 1994, Oklahoma responded to the concerns identified in OSM's November 22, 1994, letter by submitting the revised amendment and additional explanatory information (administrative record No. OK-963.10). The provisions that Oklahoma proposed to revise and add were: OAC 460:20-27-20(b) and 460:20-31-17(b), concerning the as-built requirements regarding primary road certification for road systems and transportation facilities; OAC 460:20-43-12(f)(8), concerning the requirement that sediment shall be removed from a structure when the sediment storage volume is 80 percent filled; OAC 460:20-45-47 and 460:20-45-48, concerning subsidence control for surface mining activities; and OAC 460:20-45-28, concerning the protection of underground mining. Oklahoma also proposed revisions to and provided additional explanatory information for the recodification of its coal mining rules.

Based upon the revisions to and additional explanatory information for the proposed program amendment submitted by Oklahoma, OSM reopened the public comment period in the December 30, 1994, **Federal Register** (59 FR 67694; administrative record No. OK-963.12). The public comment period closed on January 17, 1995.

After the closing of the reopened comment period, OSM became aware that both Oklahoma's September 14, 1994, and December 20, 1994, amendment submittals contained a number of rule revisions that were previously approved by OSM on December 18, 1990 (55 FR 51902), and promulgated by Oklahoma on July 25, 1994. Because the previously approved provisions were formatted in such a manner so as to appear as if they were being submitted for the first time, OSM, in both the September 27, 1994, and

December 30, 1994, **Federal Register** notices opening and reopening the public comment period, inadvertently identified those previously approved Oklahoma rules as being currently proposed revisions to the Oklahoma program. To alleviate confusion as to which provisions were actually unapproved when submitted to OSM for approval, this notice addresses only the unapproved provisions submitted by Oklahoma.

III. Director's Findings

As discussed below, the Director, in accordance with SMCRA and 30 CFR 732.15 and 732.17, finds that the proposed program amendment submitted by Oklahoma on September 14, 1994, and as revised by it on December 20, 1994, is no less effective than the corresponding Federal regulations. The Director approves the proposed amendment.

1. Nonsubstantive Recodification of Oklahoma's Rules

Oklahoma, in accordance with the standards set forth by the Oklahoma State Legislature and the Oklahoma Office of Administrative Code, proposed to recodify its coal mining rules as OAC title 460, chapter 20, with underlying subchapters specifying the various surface and underground coal mining provisions.

Oklahoma's proposed recodification of its rules is nonsubstantive in nature, and the Director finds that the recodification does not make its rules less effective than the Federal regulations. Therefore, the Director approves the proposed recodification. OSM uses Oklahoma's recodified rule citations throughout this **Federal Register** notice.

2. Substantive Revisions to Oklahoma's Rules That Are Substantively Identical to the Corresponding Provisions of the Federal Regulations

Oklahoma proposed revisions to OAC 460:20-49-5(a)(1), 460:20-49-6, and 460:20-49-7(5), concerning soil removal, stockpiling, and replacement requirements for prime farmland, that are substantive in nature and contain language that is substantively identical to the requirements of the corresponding Federal regulations at 30 CFR 701.5, 823.12(c)(1), and 823.14(e).

Because these proposed Oklahoma rules are substantively identical to the corresponding provisions of the Federal regulations, the Director finds that they are no less effective than the Federal regulations. The Director approves these proposed rules.

3. OAC 460:20-27-20(b), 460:20-31-17(b), 460:20-43-53(1), and 460:20-45-53(1), *Primary Road Certification Requirements for Road Systems and Transportation Facilities*

Oklahoma proposed to revise its rules by moving the "as-built" certification requirements for primary roads from its permitting rules at OAC 460:20-27-20(b) and 460:20-31-17(b) to its performance standard rules at 460:20-43-53(1) and 460:20-45-53(1). As-built certifications ensure that structures are constructed as designed.

The Federal as-built regulations at 30 CFR 816.151(a) and 817.151(a) require, in pertinent part, that the construction or reconstruction of primary roads shall be certified in a report to the regulatory authority by a qualified, registered, professional engineer, or in any State which authorizes land surveyors to certify the construction or reconstruction of primary roads, a qualified, registered, professional land surveyor with experience in the design and construction of roads.

Oklahoma's moving of its as-built requirements for primary roads from the permitting requirements of OAC 460:20-27-20(b) and 460:20-31-17(b) to the performance standard requirements of OAC 460:20-43-53(1) and 460:20-45-53(1) is consistent with the as-built counterpart Federal regulations at 30 CFR 816.151(a) and 817.151(a), which are contained in the Federal road performance standards.

The Director finds that Oklahoma's proposed revisions to OAC 460:20-43-53(1), and 460:20-45-53(1) are no less effective than the Federal regulations at 30 CFR 816.151(a) and 817.151(a). The Director approves Oklahoma's rule revisions.

4. OAC 460:20-43-12(b)(3) and 460:20-45-12(b)(3), *Certification of Construction of Siltation Structures by Qualified, Registered Professional Engineers and Land Surveyors*

At OAC 460:20-43-12(b)(3) and 460:20-45-12(b)(3), Oklahoma proposed to delete the references to OAC 460:20-27-14(a) and 460:20-31-9(a). Existing OAC 460:20-43-12(b)(3) and 460:20-45-12(b)(3) authorize both qualified, registered professional engineers and land surveyors in Oklahoma to certify the construction of siltation structures; existing referenced OAC 460:20-27-14(a) and 460:20-31-9(a) authorize only qualified, registered professional engineers to certify design plans for siltation structures. OSM approved these existing rules on December 18, 1990, (finding No. 2, 55 FR 51902, 51903-4) on the basis that the by-laws

of the Oklahoma State Board of Registration of Professional Engineers and Surveyors authorizes qualified, registered professional engineers to certify the construction and design of siltation structures but authorizes qualified, professional land surveyors to certify only the construction of siltation structures. In this approval, OSM found Oklahoma's rules to be no less effective than the corresponding Federal regulations at 30 CFR 816.46(b)(3) and 817.46(b)(3).

Oklahoma's proposed deletions in the construction certification rules at OAC 460:20-43-12(b)(3) and 460:20-45-12(b)(3) of the references to the design certification rules at OAC 460:20-27-14(a) and 460:20-31-9(a) eliminate any possible confusion on what certifications qualified, registered professional engineers and land surveyors can make under the approved Oklahoma program.

Oklahoma's proposed revisions to OAC 460:20-43-12(b)(3) and 460:20-45-12(b)(3) deleting the references to OAC 460:20-27-14(a) and 460:20-31-9(a) are consistent with OSM's previous approval and are no less effective than the Federal regulations at 30 CFR 816.46(b)(3) and 817.46(b)(3). Accordingly, the Director approves Oklahoma's rule revisions.

5. OAC 460:20-43-12(f)(8), *Sedimentation Pond Storage Volume*

Oklahoma proposed to revise OAC 460:20-43-12(f)(8) to delete the requirement that sediment be removed from a sedimentation pond when the sediment storage volume is 80 percent filled. It did so to be consistent with its rule at OAC 460:20-43(c)(1)(C)(vi) and the Federal regulations at 30 CFR 816.46(c)(iii)(F) that require that ponds be maintained to provide periodic sediment removal sufficient to maintain adequate volume for the design event. Oklahoma's proposed deletion of OAC 460:20-43-12(f)(8) alleviates the regulatory inconsistency in its rules with the provision at OAC 460:20-43-12(c)(1)(C)(vi) and is consistent with and no less effective than the Federal regulations at 30 CFR 816.46(c)(iii)(F). Accordingly, the Director approves Oklahoma's proposed rule revision.

6. OAC 460:20-43-47 and 48, *Subsidence Control and Public Notice*

Oklahoma proposed to revise its surface mining activities performance standards provisions at OAC 460:20-43-47 and 48 to add subsidence control and public notice measures that apply to underground mining activities. Oklahoma explained that it was doing so because it issues underground mine

permits pursuant to the surface mine requirements included in Subchapter 43 (administrative record No. OK-963.10).

The Federal regulations corresponding to OAC 460:20-43-47 and 48 are at 30 CFR 817.121 and 817.122. These Oklahoma rules include the same subsidence control and notice requirements as these Federal regulations. However, OSM notes it has proposed revisions to 30 CFR 817.121 to comply with revisions to SMCRA made by the Energy Policy Act of 1992 (58 FR 50174, September 24, 1993). Once OSM promulgates new regulations, it will notify Oklahoma in accordance with 30 CFR 732.17(d) of any necessary revisions to Oklahoma's program. Until such time the Director finds that Oklahoma's proposed subsidence control and notice rules at OAC 460:20-43-47 and 48 are no less effective than the currently promulgated regulations at 30 CFR 817.121 and 817.122. Therefore, the Director approves the proposed rule revisions.

7. OAC 460:20-45-28, *Protection of Underground Mining*

Oklahoma proposed to revise its underground mining performance standards at OAC 460:20-45-28 to delete a provision regarding the protection of underground mining operations from the effects of surface mining activities. However, Oklahoma still retains in its surface mining performance standards at OAC 460:20-43-28 an identical requirement. Therefore, the Oklahoma rules still provide an identical level of protection to underground mining operations from the adverse effects of surface mining activities.

There are no Federal underground mining regulations that correspond to the deleted Oklahoma rule. However, the Federal surface mining regulation at 30 CFR 816.79 sets forth provisions regarding the protection of underground mining operations from the effects of surface mining activities that are substantively identical to the Oklahoma surface mining requirements at OAC 460:20-43-28. Therefore, the Director finds that the proposed deletion of the underground mining protection provision at OAC 460-20-45-28 and retention of an identical provision at OAC 460:20-43-28 is no less effective than the Federal regulations at 30 CFR 816.79. The Director approves the proposed rule revision.

IV. Summary and Disposition of Comments

The Director notes that the following public and Federal agency comments were received in response to the

September 27, 1994, and December 30, 1994, proposed rule **Federal Register** notices that inadvertently identified certain previously approved Oklahoma rules as being currently proposed revisions to the Oklahoma program.

1. Public Comments

OSM invited public comments on the proposed amendment, but none were received.

2. Federal Agency Comments

Pursuant to 732.17(h)(11)(i), OSM solicited comments on the proposed amendment from various Federal agencies with an actual or potential interest in the Oklahoma program (administrative record No. OK-963.02).

The U.S. Army Corps of Engineers responded on September 30, 1994, that Oklahoma's proposed revisions were satisfactory (administrative record No. OK-963.04).

The U.S. Bureau of Mines (BOM) responded on September 27, 1994, that while Oklahoma's proposed rule to OAC 460:20-27-14(a)(1)(A) deletes the reference to preparation and certification of the design of ponds, impoundments, banks, dams and embankments, by a "professional geologist, or a qualified, registered, professional land surveyor," the proposed rule to OAC 460:20-43-12(b)(3) then adds the statement that siltation structure construction may be certified by a "registered professional land surveyor" (administrative record No. OK-963.05). BOM further stated that this appears to be a contradiction in that in one instance, qualified, registered, professional land surveyors are not allowed to design the ponds, yet they are allowed to certify that the ponds are constructed correctly. Finally, BOM commented that this same contradiction occurs in OAC 460:20-45-12 for underground mining activities.

As discussed in finding No. 4 and OSM's December 18, 1990, final rule **Federal Register** notice, Oklahoma's by-laws of the State Board of Registration for Professional Engineers and Surveyors do not authorize registered land surveyors in Oklahoma to prepare and/or certify engineered designs, but they do authorize land surveyors to certify the construction of siltation structures since certification that a structure is built according to design does not require the same qualified expertise as the actual design of the structure (finding No. 2, 55 FR 51902, 51903-4). Accordingly, Oklahoma's rules at OAC 460:20-27-14(a)(1)(A), 460:20-31-9(a)(1)(A), 460:20-43-

12(b)(3), and 460:20-45-12(b)(3) do not contradict each other.

The U.S. Bureau of Land Management (BLM) responded on October 12, 1994, by commenting that under OAC 460:20-45-12(b)(3), a registered professional land surveyor is authorized to certify that siltation structures are constructed as designed, but the authorization for a registered professional land surveyor to prepare and certify siltation structure plans designs has been removed elsewhere in Oklahoma's rules (administrative record No. OK-963.06). BLM then inquired as to whether OSM intended to retain the certification authorization for registered professional land surveyors at OAC 460:20-45-12(b)(3). In response to this comment, the Director refers BLM to the discussion above, which responds to BOM concerns regarding the same issue.

BLM further commented that it questioned the practicality of the change under the prime farmland soil removal rule at OAC 460:20-49-5(a)(1) where Oklahoma proposed to delete language that would have allowed surface coal mining and reclamation operations on prime farmland to remove other suitable soil materials which will create a final soil having productive capacity equal to that which existed prior to mining.

BLM commented that when soil is removed, stockpiled, and reapplied there is some loss and mixing due to the limitations of the handling process itself. When soil is removed and stockpiled there is a mycorrhizal degradation within the soil. Further, more significant mycorrhizal degradation occurs over time within the stockpile. Mycorrhizal degradation lowers soil productivity. BLM also stated that expecting greater productivity from soil which has undergone such disturbance is not reasonable and that it would be more productive for the guidelines to recommend seeding topsoil piles with a temporary cover grass for the duration of stockpiling. Finally, BLM commented that such seeding would maintain some of the mycorrhizal community within the stockpiled topsoil.

The Director acknowledges BLM's concerns regarding diminished soil productivity. However, section 515(b)(7)(A) of SMCRA requires, in pertinent part, that "[f]or all prime farm lands * * * the operator shall, as a minimum, be required to * * * segregate the A horizon of the natural soil, except where it can be shown that other available soil materials will create a final soil having a *greater* productivity capacity * * *" (emphasis added). Also, the corresponding Federal regulations at 30 CFR 823.12(c)(1)

require, in pertinent part, that "[s]oil removal and stockpiling operations on prime farmland shall be conducted to * * * remove other suitable soil materials where such other soil materials will create a final soil having a *greater* productive capacity than that which exist prior to mining" (emphasis added). OSM previously approved Oklahoma's rule revision in the December 18, 1990, final rule **Federal Register** notice (55 FR 51902, 51903), as being substantively identical to the corresponding provisions of the Federal regulations at 30 CFR 823.12(c)(1). Accordingly, Oklahoma's deletion of the aforementioned phrase "an equal or" is no less stringent than section 515(b)(7)(A) of SMCRA and no less effective than the corresponding Federal regulations at 30 CFR 823.12(c)(1).

In addition, the Director notes that the State and Federal requirements that a final soil have a greater productive capacity than that which existed prior to mining applies only to *topsoil substitutes*, and not the original topsoil material. Finally, the Director refers BLM to the Federal regulations at 30 CFR 816.22(c)(2)(iii), which require, in pertinent part, that "[s]tockpiled topsoil materials shall be protected from wind and water erosion through prompt establishment and maintenance of an effective, quick growing vegetative cover or through other measures approved by the regulatory authority." Oklahoma's counterpart rule at OAC 460:20-43-7(c)(2)(C) is substantively identical to 30 CFR 816.22(c)(2)(iii). While OSM cannot dictate that Oklahoma always require operators to seed topsoil, by virtue of the fact that nearly all operators in Oklahoma do seed topsoil, BLM's recommendation for seeding topsoil piles is almost always implemented in Oklahoma.

3. Environmental Protection Agency (EPA) Concurrence and Comments

Pursuant to 30 CFR 732.17(h)(11)(ii), OSM is required to solicit the written concurrence of EPA with respect to those provisions of the proposed program amendment that relate to air or water quality standards promulgated under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*).

None of the revisions that Oklahoma proposed to make in its amendment pertain to air or water quality standards. Therefore, OSM did not request EPA's concurrence.

Pursuant to 30 CFR 732.17(h)(11)(i), OSM solicited comments on the proposed amendment from EPA (administrative record No. OK-963.02). It responded on October 13, 1994, that

it had no objections to the approval of Oklahoma's proposed regulations (administrative record No. OK-963.07).

4. *State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP)*

Pursuant to 30 CFR 732.17(h)(4), OSM solicited comments on the proposed amendment from the SHPO and ACHP (administrative record No. OK-963.02). Neither SHPO nor ACHP responded to OSM's request.

V. **Director's Decision**

Based on the above findings, the Director approves Oklahoma's proposed amendment as submitted on September 14, 1994, and as revised on December 20, 1994.

The Director approves, as discussed in: Finding No. 1, concerning Oklahoma's proposed recodification of its coal mining rules; finding No. 2, OAC 460:20-49-5(a)(1), 460:20-49-6, and 460:20-49-7(5), concerning soil removal, stockpiling, and replacement requirements for prime farmland; finding No. 3, OAC 460:20-27-20(b), 460:20-31-17(b), 460:20-43-53(1), and 460:20-45-53(1), concerning primary road certification requirements for road systems and transportation facilities; finding No. 4, OAC 460:20-43-12(b)(3) and 460:20-45-12(b)(3), concerning certification of construction of siltation structures by qualified, registered professional engineers and land surveyors; finding No. 5, OAC 460:20-43-12(f)(8), concerning sedimentation pond storage volume; finding No. 6, OAC 460:20-43-47 and -48, concerning subsidence control and public notice; and finding No. 7, OAC 460:20-45-28, concerning protection of underground mining.

The Director approves the rules as proposed by Oklahoma with the provision that they be fully promulgated in identical form to the rules submitted to and reviewed by OSM and the public.

The Federal regulations at 30 CFR Part 936, codifying decisions concerning the Oklahoma program, are being amended to implement this decision. This final rule is being made effective immediately to expedite the State program amendment process and to encourage States to bring their programs into conformity with the Federal standards without undue delay. Consistency of State and Federal standards is required by SMCRA.

VI. **Procedural Determinations**

1. *Executive Order 12866*

This rule is exempted from review by the Office of Management and Budget

(OMB) under Executive Order 12886 (Regulatory Planning and Review).

2. *Executive Order 12778*

The Department of the Interior has conducted the reviews required by section 2 of Executive Order 12778 (Civil Justice Reform) and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

3. *National Environmental Policy Act*

No environmental impact statement is required for this rule since section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)).

4. *Paperwork Reduction Act*

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

5. *Regulatory Flexibility Act*

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal which is the subject of this rule is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic

impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

List of Subjects in 30 CFR Part 936

Intergovernmental relations, Surface mining, Underground mining.

Dated: March 25, 1995.

Charles E. Sandberg,

Acting Assistant Director, Western Support Center.

For the reasons set out in the preamble, Title 30, Chapter VII, Subchapter T of the Code of Federal Regulations is amended as set forth below:

PART 936—OKLAHOMA

1. The authority citation for Part 936 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

2. Section 936.15 is amended by adding paragraph (p) to read as follows:

§ 936.15 Approval of amendments to the Oklahoma regulatory program.

* * * * *

(p) Recodification of Oklahoma's rules and revisions to the following provisions of Oklahoma's recodified rules, as submitted to OSM on September 14, 1994, and as revised on December 20, 1994, are approved effective March 29, 1995:

OAC 460:20-43-12(b)(3) and 460:20-45-12(b)(3), certification of construction of siltation structures by qualified, registered professional engineers and land surveyors;

OAC 460: 20-43-12(f)(8), sedimentation pond storage volume;

OAC 460: 20-43-47 and 48, subsidence control for surface mining activities;

OAC 460: 20-43-53(1) and 460:20-45-53(1), primary road certification requirements for road systems and transportation facilities;

OAC 460: 20-45-28, protection of underground mining; and

OAC 460: 20-49-5(a)(1), 460: 20-49-6, and 460:20-49-7(5), soil removal, soil stockpiling, and soil replacement requirements for prime farmland.

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