

(ttt) By August 1, 1996, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption, to revise CSR § 38-2-14.19(d) to clarify that windrowing will not be allowed on the downslope in steep slope areas.

(uuu) By August 1, 1996, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption, to revise subsection 22.4(g) to require compliance with a PMP 6-hour standard, or demonstrate how the State would implement the PMP 24-hour standard at CSR 38-2-22.4(g).

6. Section 948.26 is amended by removing the text and reserving the heading as follows:

**§ 948.26 Required abandoned mine land reclamation program/plan amendments. [Reserved]**

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**30 CFR Part 950**

[SPATS No. WY-024-FOR]

**Wyoming Abandoned Mine Land Reclamation Plan**

**AGENCY:** Office of Surface Mining Reclamation and Enforcement, Interior.

**ACTION:** Final rule; approval of amendment.

**SUMMARY:** The Office of Surface Mining Reclamation and Enforcement (OSM) is approving, with certain exceptions and additional requirements, a proposed amendment to the Wyoming Abandoned Mine Land Reclamation (AMLR) plan (hereinafter referred to as the "Wyoming plan") under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). Wyoming is revising and adding statutes pertaining to noncoal lien authority and contractor eligibility. The amendment revises the Wyoming plan to be consistent with SMCRA, to incorporate the additional flexibility afforded by the revised Federal regulations, and to improve operational efficiency.

**EFFECTIVE DATE:** February 21, 1996.

**FOR FURTHER INFORMATION CONTACT:** Guy Padgett, Casper Field Office, Telephone: (307) 261-5776.

**SUPPLEMENTARY INFORMATION:**

**I. Background on the Wyoming Plan**

On February 14, 1983, the Secretary of the Interior approved the Wyoming plan. General background information

on the Wyoming plan, including the Secretary's findings and the disposition of comments, can be found in the February 14, 1983, Federal Register (48 FR 6536). Subsequent actions concerning Wyoming's plan and plan amendments can be found at 30 CFR 950.30, 950.35, and 950.36.

**II. Proposed Amendment**

By letter dated April 21, 1995, Wyoming submitted a proposed amendment to its plan (administrative record No. WY-AML-18-8) pursuant to SMCRA (30 U.S.C. 1201 *et seq.*). Wyoming submitted the proposed amendment at its own initiative and in response to a September 26, 1994, letter (administrative record No. WY-AML-18-1) that OSM sent to Wyoming in accordance with 30 CFR 884.15(b).

The provisions of Wyoming's statute that Wyoming proposed to revise and add were: Wyoming Statute (W.S.) 35-11-1206(a) and (b), liens for reclamation on private land, and W.S. 35-11-1209(a) and (b), contractor eligibility.

OSM announced receipt of the proposed amendment in the May 18, 1995, Federal Register (60 FR 26704), provided an opportunity for a public hearing or meeting on its substantive adequacy, and invited public comment on its adequacy (administrative record No. WY-AML-18-9). Because no one requested a public hearing or meeting, none was held. The public comment period ended on June 19, 1995.

During its review of the amendment, OSM identified concerns relating to the provisions of W.S. 35-11-1206 and the amount of the lien placed on reclaimed private lands. OSM notified Wyoming of the concerns by letter dated August 9, 1995 (administrative record No. WY-AML-18-16). Wyoming responded in a letter dated August 29, 1995, by submitting additional explanatory information for W.S. 35-11-1206 regarding the cost of reclamation in the lien computation (administrative record No. WY-AML-18-17).

Based upon the additional explanatory information for the proposed plan amendment submitted by Wyoming, OSM reopened the public comment period in the September 20, 1995, Federal Register (60 FR 48678, administrative record No. WY-AML-18-18). The public comment period closed on October 5, 1995.

**III. Director's Findings**

As discussed below, the Director, in accordance with SMCRA and 30 CFR 884.14 and 884.15, finds, with certain exceptions and additional requirements, that the proposed plan amendment submitted by Wyoming on April 21,

1995, and as supplemented with additional explanatory information on August 29, 1995, is in compliance with the Federal regulations at 30 CFR Subchapter R and is consistent with SMCRA. Thus, the Director approves, with certain exceptions and additional requirements, the proposed amendment.

**1. W.S. 35-11-1206(a) and (b), Liens for Reclamation on Private Lands**

Wyoming proposed to add the following italicized language to its provisions at W.S. 35-11-1206(a), concerning liens for reclamation on private lands, by providing, in part, that

[w]ithin six (6) months after the completion of projects to restore, reclaim, abate, control or prevent adverse effects of past coal or mineral mining practices on privately owned land, the director [of the Abandoned Mine Land Division] shall itemize the monies expended and may file a lien against the property with the appropriate county clerk. If the monies expended result in a significant increase in property value, a notarized appraisal by an independent appraiser shall be filed with the lien. The lien shall not exceed the *cost of reclamation work* or the amount determined by the appraisal to be the increase in the *fair* market value of the land as a result of the restoration, reclamation, abatement, control or prevention of the adverse effects of past coal or mineral mining practices, *whichever is less*.

In addition, Wyoming proposed the addition of the italicized language at W.S. 35-11-1206(b) to provide that

[t]he landowner may petition the district court for the district in which the majority of the land is located within sixty (60) days of the filing of the lien to determine the increase in the *fair* market value of the land. The amount reported to be the increase in value of the premises, *but not exceeding the cost of the reclamation work*, shall constitute the amount of the lien and shall be recorded with the lien.

As discussed below, the counterparts to these proposed State provisions are at sections 408 and 411(g) of SMCRA and in the Federal regulations at 30 CFR Part 882.

Section 408(a) of SMCRA requires that the lien shall not exceed the amount determined by the appraisal to be the increase in the market value of the land as a result of the restoration, reclamation, abatement, control, or prevention of the adverse effects of past coal mining practices. Section 408(b) of SMCRA provides that the landowner may petition to determine the increase in the market value of the land reclaimed and that the amount reported to be the increase in value of the premises shall constitute the amount of the lien. Section 411(g) of SMCRA allows the provisions of section 408 to be applied to noncoal sites after a State's

certification of completion of coal projects. OSM announced in the May 25, 1984, Federal Register (49 FR 22139) that Wyoming had certified to the completion of, or was in the process of completing, the reclamation of all known coal-related impacts eligible for funding under the State's AMLR program, and accordingly, Wyoming could use AMLR funds for noncoal projects that do not directly relate to public health or safety.

The Federal regulations at 30 CFR Part 882, which concern reclamation on private coal or noncoal land, provide at 882.12(a) that the appraisal shall state the estimated market value of the property in its unreclaimed condition and of the same property as reclaimed, and at 882.13(a), that OSM, the State, or Indian tribe has the discretionary authority to place or waive a lien against land reclaimed if the reclamation results in a significant increase in the "fair market value."

The Director finds that the language proposed by Wyoming at W.S. 35-11-1206(a) that allows the Abandoned Mine Land Division (Division) to place liens on lands affected by past mineral mining practices after the completion of projects to restore, reclaim, abate, control, or prevent adverse impacts on such lands is consistent with sections 408 and 411(g) of SMCRA. Therefore, the Director approves the revision of W.S. 35-11-1206(a) allowing liens to be placed on private lands adversely effected by past mineral mining practices.

In addition, the Director finds that the language proposed by Wyoming at W.S. 35-11-1206 (a) and (b) that limits the lien amount to the cost of reclamation work or the increase in the fair market value in inconsistent with SMCRA and the Federal regulations to the extent that sections 408 (a) and (b) of SMCRA and the Federal regulations at 30 CFR Part 882 do not allow for a lien that is less than the increase in the fair market value of the reclaimed land (i.e., they do not provide for a lien that is equal to the cost of reclamation work if the cost of reclamation work is less than the increase in the fair market value). Therefore, although the Director approves the work "fair" in proposed W.S. 35-11-1206(a) and (b), he does not approve the phrases "cost of the reclamation work or the" and "whichever is less" in W.S. 35-11-1206(a) and the phrase "but not exceeding the cost of the reclamation work," in W.S. 35-11-1206(b). The Director requires Wyoming to remove these phrases from W.S. 35-11-1206(a) and (b).

## 2. W.S. 35-11-1209, Contractor Eligibility

(a) W.S. 35-11-1209(a).—Wyoming proposed to create W.S. 35-11-1209(a) to require that the Division will not issue a contract to any construction contractor or professional services contractor if any surface coal mining and reclamation operation owned or controlled by the contractor, or by any person who owns or controls the contractor, has any (1) delinquent abandoned mine reclamation fees, (2) Federal or State failure-to-abate cessation orders, (3) unabated Federal or State imminent harm cessation orders, (4) delinquent civil penalties issued under SMCRA, (5) bond forfeitures where the violation upon which the forfeiture was based has not been corrected, and (6) unabated violations of Federal or State laws, rules, or regulations pertaining to air or water environmental protection incurred in connection with any surface coal mining operation.

There is no direct counterpart to these provisions in SMCRA. However, the Federal regulations at 30 CFR 874.16 (for coal) and 875.20 (for noncoal) do correspond to the proposed State statutory provisions and they provide that every successful bidder for an AMLR contract must be eligible under 30 CFR 773.15(b)(1) at the time of contract award to receive a permit or conditional permit to conduct surface coal mining operations and that bidder eligibility will be confirmed by OSM's automated Applicant/Violator System (AVS) for each contract to be awarded.

Wyoming proposed at W.S. 35-11-1209(a) certain provisions concerning issuance of an AMLR contract to any construction contractor or professional services contractor that are substantively identical to counterpart provisions provided at 30 CFR 773.15(b)(1), which is referenced at 30 CFR 874.16 and 875.20. Specifically, Wyoming included at paragraphs (i), (v), and (vi) delinquent abandoned mine reclamation fees, bond forfeitures involving uncorrected violations, and unabated violations of Federal and State laws, rules, and regulations pertaining to air or water environmental protection incurred in connection with any surface coal mining operation. The Director finds that the proposed criteria provided at W.S. 35-11-1209(a)(i), (v), and (vi) are in compliance with 30 CFR 874.16 and 875.20 and he approves these provisions.

Wyoming proposed at W.S. 35-11-1209(a)(ii) and (iii) other requirements that are not in compliance with 30 CFR 874.16 and 875.20. Wyoming's proposed

list of criteria that prohibit the awarding of an AMLR contract do not include all of the criteria of the referenced Federal regulation at 30 CFR 773.15(b)(1). In drafting the language for W.S. 35-11-1209(a), Wyoming used provisions substantively identical to language that previously existed in 30 CFR 773.15(b)(1). However, Wyoming was not aware of or did not take into account revisions to this Federal regulation that OSM published in the October 28, 1994, Federal Register (59 FR 54306).

The Federal regulations at 30 CFR 773.15(b)(1) now include, in addition to the criteria included in Wyoming's proposed statute, violations "of the Act [(SMCRA)], any Federal rule or regulation promulgated pursuant thereto, [and of] a State program." Although Wyoming's proposed language includes Federal or State failure-to-abate and imminent harm cessation orders in its criteria list used to determine a contractor's eligibility to receive an AMLR contract, it does not include Federal and State notices of violations and any other "written notification from a governmental entity, whether by letter, memorandum, judicial or administrative pleading, or other written communication, of a violation of the Act; any Federal rule or regulation promulgated pursuant thereto; [or a] State program," which is set forth in the definition of "violation notice" at 30 CFR 773.5. Therefore, in this respect, proposed W.S. 35-11-1209(a)(ii) and (iii) are not in compliance with 30 CFR 874.16 and 875.20, which reference 30 CFR 773.15(b)(1). The Director requires Wyoming to revise W.S. 35-11-1209(a), or otherwise amend its statute, rules, and/or plan, to include as a criterion for awarding AMLR contracts, Federal and State notices of violations and any other written notification from a governmental entity, whether by letter, memorandum, judicial or administrative pleading, or other written communication, of a violation of the Act; any Federal rule or regulation promulgated pursuant thereto; or a State program.

Additionally, Wyoming proposed in its list of criteria that prohibit the awarding of an AMLR contract at W.S. 35-11-1209(a)(iv) the criterion "delinquent civil penalty issued under SMCRA." 30 CFR 874.16 and 875.20, which by reference to the provisions of 30 CFR 773.15(b)(1), implement the provisions of section 518 of SMCRA. This section of SMCRA includes requirements for OSM civil penalty assessments. The Director interprets Wyoming's use of the phrase "delinquent civil penalty issued under SMCRA" to mean delinquent civil

penalties issued under any SMCRA State or Federal program. Using this interpretation, the Director finds that W.S. 35-11-1209(a)(iv) is in compliance with 30 CFR 874.16 and 875.20 and is consistent with section 518 of SMCRA. The Director approves this statute.

Finally, Wyoming did not indicate at proposed W.S. 35-11-1209 how the Division will determine whether a construction contractor or professional services contractor is "eligible" to receive an AMLR contract. The Federal regulations at 30 CFR 874.16 and 875.20 indicate that bidder eligibility must be confirmed by OSM's AVS for each contract to be awarded.

Because proposed W.S. 35-11-1209 does not include provisions for Wyoming to verify through AVS a contractor's eligibility, the Director requires Wyoming to revise W.S. 35-11-1209, or otherwise revise its statute, rules and/or plan to indicate that any construction contractor or professional services contractor be confirmed through AVS as eligible to receive an AMLR contract prior to receiving the award.

b. *W.S. 35-11-1209(b)*.—Wyoming also proposed newly created W.S. 35-11-1209(b) to provide that "ownership and controlling interest," as used in W.S. 35-11-1209, means the same as this term means as defined at 30 CFR Part 773.5. 30 CFR 874.16 and 875.20, by referencing 30 CFR 773.15(b)(1), provide for a review of all reasonably available information concerning ownership and control links. The Federal regulations at 30 CFR 773.5 address ownership and control relationships in the definition of the terms "owned or controlled" and "owns or controls;" however, 30 CFR 773.5 does not define "ownership and controlling interest." The Director interprets W.S. 35-11-1209(b) to mean that Wyoming's term "ownership and controlling interest" has the same meaning as the Federal terms "owned or controlled" and "owns or controls" at 30 CFR 773.5. The Director also interprets Wyoming's proposed use of the terms "owned and controlled" or "owns or controls" at W.S. 35-11-1209(a) to mean the same thing as the definitions for these terms at 30 CFR 773.5. The Director finds W.S. 35-11-1209(b) to be in compliance with the ownership and control relationship definitions included at 30 CFR 773.5. Therefore, the Director approves this statutory provision.

(c) *Policy Statement Concerning AVS Contractor Eligibility at W.S. 35-11-1209*.—Wyoming provided a policy statement dated April 21, 1995, that consists of a memorandum prepared by

the State's AMLR attorney and addressed to the administrator of the Division. The policy statement specifically excludes subcontractors from the requirements at W.S. 35-11-1209. Wyoming's policy states that any subcontractor would not have to receive AVS clearance before being allowed to work on an AMLR contract. There are no Federal counterpart requirements to Wyoming's proposed policy. However, the preamble for the Federal regulations at 30 CFR 874.16 and 875.20 does not address whether subcontractors must also clear AVS (May 31, 1994; 59 FR 28136, 28158 and 28164). In the absence of any Federal requirements concerning subcontractors, Wyoming's policy is not inconsistent with the Federal regulations at 30 CFR 874.16 and 875.20. If, at any time in the future, OSM decides to promulgate regulations or an interpretive rule to address subcontractors, it would notify Wyoming in accordance with 30 CFR Part 884.15(b) of any needed revisions to the Wyoming plan. For this reason, the Director finds that Wyoming's proposed policy statement issued in support of W.S. 35-11-1209 concerning subcontractors is in compliance with the Federal regulations at 30 CFR 874.16 and 875.20. Therefore, the Director approves the proposed policy statement.

#### V. Summary and Disposition of Comments

Following are summaries of all substantive written comments on the proposed amendment that were received by OSM, and OSM's responses to them.

##### 1. *Public Comments*

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

##### 2. *Federal Agency Comments*

Pursuant to 30 CFR 884.15(a) and 884.14(a)(2), OSM solicited comments on the proposed amendment from various Federal agencies with an actual or potential interest in the Wyoming plan (administrative record Nos. WY-AML-18-10 and -11).

The Bureau of Land Management (BLM), Wyoming State Office, responded on June 8, 1995, that the degree of involvement by the subcontractor in the overall project should be considered (administrative record No. WY-AML-18-12). BLM stated that if the involvement of the subcontractor is major, the subcontractor should be subject to the same rules as the contractor. BLM also questioned whether W.S. 35-11-1209 and Wyoming's policy regarding its

implementation in Wyoming would set up a system whereby a contractor in violation can have another party bid the project and then subcontract to circumvent the system.

As discussed in finding No. 2(c) above, the Federal regulations at 30 CFR 874.16 and 875.20 are silent as to whether subcontractors are required to pass the same AVS checks required for the successful bidder on an AMLR contract. Because the Federal regulations do not specifically require subcontractors to meet the eligibility requirements applied to the successful bidder for an AMLR contract, OSM cannot require Wyoming to make subcontractors comply with the requirements of W.S. 35-11-1209. In response to BLM's expressed concern that Wyoming's policy may allow a contractor who would not normally pass the AVS check to circumvent the system by becoming a subcontractor on a specific project, OSM acknowledges that the Federal regulations do not prevent this type of occurrence, however, OSM expects that these incidents would be infrequent. If OSM determines that the frequency of such occurrences is greater than expected, it would, as provided in finding No. 2(c) above, promulgate regulations or an interpretive rule to address subcontractors.

The U.S. Army Corps of Engineers responded on June 13, 1995, that it found the amendment to be satisfactory (administrative record No. WY-AML-18-13).

By letter dated June 13, 1995, the Mine Safety and Health Administration (MSHA) stated that the amendment has no apparent impact upon miners' health and safety (administrative record No. WY-AML-18-14). MSHA also indicated that its enabling legislation limits its jurisdiction to specify mining and mining-related activities and does not extend to state contractor reclamation of abandoned mine properties nor to the recovering of costs of reclamation.

The U.S. Department of Agriculture, Natural Resources Conservation Service, responded on June 16, 1995, that it had no comment on the amendment (administrative record No. WY-AML-18-15).

#### VI. Director's Decision

Based on the above findings, the Director approves, with certain exceptions and additional requirements, Wyoming's proposed plan amendment as submitted on April 21, 1995, and as supplemented with additional explanatory information on August 29, 1995.

The Director approves, as discussed in finding No. 1, certain revisions to

W.S. 35-11-1206 (a) and (b), concerning the placement of liens on private lands adversely affected by past coal and mineral mining practices. With the requirement that Wyoming further revise its statute, rules, and/or plan, the Director does not approve, as discussed in Finding No. 1, other revisions to W.S. 35-11-1206 (a) and (b), concerning the use of the cost of reclamation in determining the amount of liens for reclamation on private land.

With the requirement that Wyoming further revise its statute, rules, and/or plan, the Director approves, as discussed in finding No. 2(a), W.S. 35-11-1209(a), concerning contractor eligibility.

The Director approves, as discussed in finding No. (2)(b), W.S. 35-11-1209(b), concerning ownership and control relationships, and finding No. (2)(c), an April 21, 1995, policy statement for W.S. 35-11-1209, concerning subcontractors.

In accordance with 30 CFR 884.15(e), the Director is also taking this opportunity to clarify in the required amendment section at 30 CFR 950.36 that Wyoming must by the date indicated submit to OSM a reasonable timetable, which is consistent with Wyoming's established administrative or legislative procedures, for submitting an amendment to the State reclamation plan.

The Federal regulations at 30 CFR Part 950, codifying decisions concerning the Wyoming plan, are being amended to implement this decision. This final rule is being made effective immediately to expedite the State plan amendment process and to encourage States to bring their plans into conformity with the Federal standards without undue delay. Consistency of State and Federal standards is required by SMCRA.

## VII. Procedural Determinations

### 1. Executive Order 12866

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866 (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 AMLR plans and revisions thereof since each such plan is drafted and promulgated by a specific State, not by OSM. Decisions on

proposed State AMLR plans and revisions thereof submitted by a State are based on a determination of whether the submittal meets the requirements of Title IV of SMCRA (30 U.S.C. 1231-1243) and the applicable Federal regulations at 30 CFR Parts 884 and 888.

### 3. National Environmental Policy Act

No environmental impact statement is required for this rule since agency decisions on proposed State AMLR plans and revisions thereof are categorically excluded from compliance with the National Environmental Policy Act (42 U.S.C. 4332) by the Manual of the Department of the Interior (516 DM 6, appendix, 8, paragraph 8.4B(29)).

### 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 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 established by SMCRA or 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 in the analyses for the corresponding Federal regulations.

#### List of Subjects in 30 CFR Part 950

Abandoned mine reclamation programs, Intergovernmental relations, Surface mining, Underground mining.

Dated: February 12, 1996.

Richard J. Seibel,

Regional Director, Western Regional Coordinating Center.

For the reasons set out in the preamble, part 950 of the Code of Federal Regulations is amended as set forth below:

## PART 950—WYOMING

1. The authority citation for part 950 continues to read as follows:

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

2. Section 950.35 is amended by adding paragraph (c) to read as follows:

### § 950.35 Approval of abandoned mine land reclamation plan amendments.

\* \* \* \* \*

(c) With the exceptions of Wyoming Statute (W.S.) 35-11-1206(a) to the extent that it includes the phrases "cost of reclamation work or the" and " , whichever is less" and W.S. 35-11-1206(b) to the extent that it includes the phrase " , but not exceeding the cost of the reclamation work," the revisions to W.S. 35-11-1206 (a) and (b), concerning lien authority on private lands, and the addition of newly created W.S. 35-11-1209 (a) and (b), including the policy statement dated April 21, 1995, concerning contractor eligibility, as submitted to OSM on April 21, 1995, and as supplemented with additional information on August 29, 1995, are approved effective February 21, 1996.

3. Section 950.36 is added to read as follows:

### § 950.36 Required abandoned mine land plan amendments.

Pursuant to 30 CFR 884.15, Wyoming is required to submit to OSM by the date specified a reasonable timetable, which is consistent with Wyoming's established administrative and legislative procedures, for submitting an amendment to the State reclamation plan.

(a) By March 22, 1996, Wyoming shall submit a schedule for revising W.S. 35-11-1206(a) to remove the phrases "cost of reclamation or the" and " , whichever is less" and revising W.S. 35-11-1206(b) to remove the phrase " , but not exceeding the cost of the reclamation work,".

(b) By March 22, 1996, Wyoming shall submit a schedule for revising W.S. 1209(a), or otherwise revise its statute, rules and/or plan, to include:

(1) Notices of violation in the criteria for determining the eligibility of construction contractors or professional services contractors awarded an abandoned mine land reclamation contract; and

(2) A requirement that a contractor's eligibility shall be confirmed using OSM's Applicant/Violator System.

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