Original amendment submission date	Date of final publication	Citation/description
March 1, 2002	August 15, 2001	Sections 761.5 definitions of ''valid existing rights'' & ''public buildings;'' 761.11–.15; 761.16; 761.17; 761.200(a); 762.14–.15; 764.15(a)(7); 776.12; 778.16(c); 780.31(a)(2); 780.33; 780.37; 786.11(a)(4) & (a)(5); 786.14(c); and 786.19(d)(1) & (d)(4)–(d)(8); regulatory authority name change to Arkansas Department of Environmental Quality; and recodification of the statutes to Arkansas Code Annotated Title 15, Chapter 58, Subchapters 1–5.

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DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 914

[SPATS No. IN–151–FOR]

Indiana Regulatory Program

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

ACTION: Final rule; decision on amendment.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) is not approving an amendment to the Indiana regulatory program (Indiana program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Indiana proposed the addition of a statute concerning post mining land use changes as nonsignificant permit revisions. Indiana intended to revise its program to improve operational efficiency.

EFFECTIVE DATE: August 15, 2001.

FOR FURTHER INFORMATION CONTACT: Andrew R. Gilmore, Director, Indianapolis Field Office, Office of Surface Mining, Minton-Capehart Federal Building, 575 North Pennsylvania Street, Room 301, Indianapolis, Indiana 46204–1521. Telephone (317) 226–6700. Internet: IFOMAIL@indgw.osmre.gov.

SUPPLEMENTARY INFORMATION:

I. Background on the Indiana Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, ''a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of the Act * * *'' and ''rules and regulations consistent with regulations issued by the Secretary'' pursuant to the Act. See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Indiana program on July 29, 1982. You can find background information on the Indiana program, including the Secretary's findings, the disposition of comments, and the conditions of approval in the July 26, 1982, **Federal Register** (47 FR 32107). You can find later actions on the Indiana program at 30 CFR 914.10, 914.15, 914.16, and 914.17.

II. Submission of the Amendment

By letter dated May 14, 1998 (Administrative Record No. IND–1606), Indiana submitted a proposed amendment to OSM in accordance with SMCRA. The proposed amendment concerned revisions of and additions to the Indiana Code (IC) made by House Enrolled Act (HEA) No. 1074. Indiana intended to revise its program to incorporate the additional flexibility afforded by SMCRA and to provide the guidelines for permit revisions, including incidental boundary revisions. We announced receipt of the proposed amendment in the May 29, 1998, **Federal Register** (63 FR 29365), and invited public comment on its adequacy. The public comment period for the amendment closed June 29, 1998. During our review of the proposed amendment, we identified concerns relating to the proposed amendment. We notified Indiana of these concerns by letter dated September 15, 1998 (Administrative Record No. IND–1621). By letter dated December 21, 1998 (Administrative Record No. IND–1627), Indiana responded to our concerns by submitting additional explanatory information. Because Indiana did not make any substantive revisions to the amendment, we did not reopen the public comment period. On March 16, 1999, we approved Indiana's proposed amendment, with three exceptions (64 FR 12890). Specifically, we did not approve the amendment at IC 14–34–5–7(a) concerning guidance for permit revisions; the amendment at IC 14–34–5–8.2(4) concerning postmining land use changes; and the amendment at IC 14–34–5–8.4(c)(2)(K) concerning minor field revisions for temporary cessation of mining. On May 26, 1999, at Indiana's request, we provided clarification of our decision on Indiana's amendment (64 FR 28362).

On May 14, 1999, the Indiana Coal Council (ICC) filed a complaint in the United States District Court, Southern District of Indiana, to challenge our decision not to approve the proposed Indiana program amendments at IC 14–34–5–7(a) and IC 14–34–5–8.2(4). *Indiana Coal Council* v. *Babbitt,* No. IP 99–0705–C–M/S, (S. D. Ind.). On September 25, 2000, the Court issued its decision on the ICC's complaint. The Court found that, in the case of IC 14–34–5–7(a) concerning guidance for permit revisions, OSM was not arbitrary and capricious in not approving the amendment. Therefore, the Court upheld our decision. However, in the case of IC 14–34–5–8.2(4) concerning postmining land use changes, the Court found that our decision was arbitrary and capricious, and remanded the matter to OSM for ''further consideration.'' In accordance with the Court's ruling, we opened the public comment period for section IC 14–34–5–8.2(4) of Indiana's proposed amendment submitted on May 14, 1998, in the January 11, 2001, **Federal Register** (66 FR 2374). In the same document, we provided an opportunity for a public hearing or meeting on the adequacy of the amendment. The public comment period closed on February 12, 2001. We received comments from two industry groups and one Federal agency. However, because no one requested a public hearing or meeting, we did not hold one.

III. Director's Findings

Following, under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17, are the Director of OSM's findings concerning the proposed amendment to the Indiana program.

A. Indiana's Proposed Amendment at IC–14–34–5–8.2(4)

Indiana's proposed amendment at IC 14–34–5–8.2(4) provides that a proposed permit revision is nonsignificant, and therefore not subject to the notice and hearing requirements of IC 14–34, if it is a postmining land use change other than a change described in IC 14–34–5–8.1(8). IC 14–34–5–8.1(8) provides that a proposed permit revision is significant if a postmining land use will be changed to a residential land use, a commercial or industrial land use, a recreational land use, or developed water resources meeting MSHA requirements for a significant impoundment.

B. Summary of the Court's Decision

In the U.S. District Court case, the ICC argued that our original decision not to approve IC 14–34–5–8.2(4) was arbitrary and capricious for two reasons: (1) Because we offered conflicting reasons for our decision; and (2) because we gave no reason for distinguishing Indiana's definition of a significant permit revision from the nearly identical program we approved for Tennessee.

In evaluating whether we offered conflicting reasons for our decision, the Court stated that it did appear that we had changed our position as to whether the Director of the Indiana Department of Natural Resources (IDNR) retained discretion to determine if a proposed permit revision concerning a postmining land use change is significant. But, the Court stated that our ultimate conclusion—that the amendment was inconsistent with the Act because it would allow for certain significant changes to be made without notice and hearing requirements—never changed. Thus, the Court found that we had not been arbitrary and capricious just because we changed our position as it concerned the INDR Director's discretion.

However, the Court found that we did not distinguish Indiana's definition of a significant permit revision from the definition in the Tennessee program. The Court concluded that, by adding the provision at IC 14–34–5–8.2(4), Indiana made its program essentially the same as the Tennessee program by providing that if a change did not fall under the definition of significant, it was nonsignificant. Specifically, the Court stated that ''it appears that the Tennessee and Indiana statutes would dictate the same results with respect to classifying certain postmining land use changes as either significant or nonsignificant.'' In the case of the example we used in our March 16, 1999, decision—a change from cropland to forest—the Court states, ''[a]ssuming such change would be significant, it is not one of the changes listed in Tennessee's approved definition of 'significant.' Thus, by default, it would be 'nonsignificant' under the Tennessee program''—just as it would under the Indiana program. *Indiana Coal Council* v. *Babbit,* No IP 99–0705–C–M/S, slip op. at 14, (S. D. Ind., Sept. 25, 2000). Thus, it appeared to the Court that the existing Tennessee program and the proposed Indiana amendment would dictate the same results with respect to classifying certain postmining land use changes as significant or nonsignificant. The Court stated that we provided no explanation for not approving Indiana's statute when we had a regulation under the Tennessee program that was nearly identical. Because it appeared that we departed from our prior rulings and failed to explain why, the Court found that our ruling was arbitrary and capricious.

C. Analysis of the Court's Decision

The existing Tennessee program and the proposed Indiana amendment would not dictate the same results with respect to classifying certain postmining land use changes as significant or nonsignificant. Under the Tennessee program, the Director of OSM retains discretion to determine whether land use changes other than those listed in 30 CFR 942.774(c)(8) are significant or nonsignificant permit revisions. A postmining land use is not, by default, a nonsignificant permit revision just because it is not one of the changes listed in Tennessee's approved definition of ''significant.'' Instead, the Director of OSM makes that determination on a case-by case basis. We have always maintained that this discretion is a necessary part of the Tennessee program. In the December 5, 1988, preamble to 30 CFR 942.774, we state, ''OSMRE believes that some flexibility in language is necessary to allow for contingencies or applications that are not possible to foresee'' (53 FR 49104). Thus, in the case of the example we cited in our March 16, 1999, decision—a change from cropland to forest—the change may be processed as either a significant or nonsignificant permit revision depending upon the Director of OSM's determination.

Indiana's provision at IC 14–34–5–8.2(4), on the other hand, eliminates the IDNR Director's discretion to determine whether a postmining land use change would classify as significant. Under IC 14–34–5–8.2(4), all postmining land use changes other than those listed at IC 14–34–5–8.2(4) have to be nonsignificant. In the case of the example we cited in our March 16, 1999, decision—a change from cropland to forest—the change must be considered nonsignificant. Indiana's proposed amendment would not allow for any other determination. Clearly, the two programs are different. For these reasons, we conclude that our decision not to approve the Indiana amendment at IC 14–34–5–8.2(4) was not a departure from our prior ruling in the Tennessee program. Instead, our decision was consistent with our longstanding position that some flexibility in language is necessary to allow for contingencies or applications of the rule that were not covered by the provision at 30 CFR 942.774(c). IC 14–34–5–8.2(4) would eliminate such flexibility.

D. Director's Findings

Given the differences between the Indiana proposed amendment and the approved Tennessee program, and taking into account all the comments we received on this amendment, we find that our original decision not to approve IC 14–34–5–8.2(4) was correct in its result. We agree with the Court that our original decision not to approve required additional consideration and explanation of our rationale. Based on our additional consideration and explanation, we find IC 14–34–5–8.2(4) conflicts with section 511(a)(2) of SMCRA, which requires notice and hearing requirements for any significant alterations in a reclamation plan. IC 14–34–5–8.2(4) would allow many changes that could produce significant alterations in a reclamation plan without notice and hearing requirements. For example, it would allow a change from cropland to forest without notice and hearing requirements. Depending on the circumstances, this change could be a significant permit revision. The IDNR Director must be free to determine if such a change would constitute a significant permit revision so as to assure that appropriate procedures are provided for the public's participation in the revision of reclamation plans as required under section 102(i) of SMCRA. Indiana's proposed amendment at IC 14–34–5–8.2(4) does not provide for such a determination.

In its December 21, 1998, letter, Indiana stated that it interprets this section to mean that the Director of the State regulatory authority retains discretion under IC 14–34–5–8.2(5) to determine whether land use changes other than those listed in IC 14–34–5–8.1(8) could be significant revisions. Indiana further stated that all permit

revision decisions are appealable under the Indiana Administrative Orders and Procedures Act.

We agree that the IDNR Director retains discretion as to whether a permit revision is significant or nonsignificant. However, in the instance of postmining land use changes, it is clear on its face that the provision at IC 14–34–5–8.2(4) removes such discretion. Thus, as explained above, the statute is inconsistent with, and less stringent than, section 511(a)(2) of SMCRA, which requires notice and hearing requirements for any significant alterations in a reclamation plan. The fact that all permit revision decisions are appealable under the Indiana Administrative Orders and Procedures Act does not justify the inclusion of a provision in this section that is inconsistent with, and less stringent than, section 511(a)(2) of SMCRA. Therefore, we do not approve IC 14–34–5–8.2(4).

IV. Summary and Disposition of Comments

Federal Agency Comments

On January 5, 2001, under section 503(b) of SMCRA and 30 CFR 732.17(h)(11)(i) of the Federal regulations, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Indiana program (Administrative Record No. IND–1709). The Fish and Wildlife Service (FWS) responded on January 16, 2001 (Administrative Record No. IND–1706). The FWS states that in its previous comments dated June 19, 1998 (Administrative Record No. IND–1615), it had expressed concern that the amendment would result in reduced opportunities for the FWS to review land use changes that might adversely affect fish and wildlife resources. However, the amendment to IC 14–34–5–8.1(5), which provides that permit revisions that may result in an adverse impact on fish, wildlife, and related environmental values beyond that previously considered must be addressed as significant permit revisions, appears to have satisfied its concern, assuming that ''permit revisions'' include postmining land use changes. The FWS states that the amendment to IC 14–35–5–8.2(4) would allow changes from forest or fish and wildlife land to a category other than the four specified categories to be processed as nonsignificant permit revisions without notice and hearing requirements. The FWS contends that such a change could be in conflict with 8.1(5) because it may allow a postmining land use change that may result in an adverse impact on fish, wildlife and related environmental values beyond that previously considered to be addressed as a nonsignificant permit revision. The FWS states that this incompatibility should be resolved prior to approval. The FWS recommends that 8.2(4) be modified to include 8.1(5) as well as 8.1(8).

We agree that IC 14–34–5–8.2(4) may allow a postmining land use change that may result in an adverse impact on fish, wildlife and related environmental values beyond that previously considered to be addressed as a nonsignificant permit revision. For that reason, we find that the provision conflicts with section 511(a)(2) of SMCRA, which requires notice and hearing requirements for any significant alterations in a reclamation plan, and we are therefore not approving the provision. Please refer to III. Director's Findings. Because we are not approving IC 14–34–5–8.2(4), there is no need to modify it.

Environmental Protection Agency (EPA)

Under 30 CFR 732.17(h)(11)(ii), we are required to obtain the written concurrence of the EPA for those provisions of the program amendment that relate to air or water quality standards issued 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 Indiana proposed to make in this amendment pertain to such air or water quality standards. Therefore, we did not ask the EPA for its concurrence.

Under 30 CFR 732.17(h)(11)(i), we requested comments on the amendment from the EPA (Administrative Record No. IND–1709). The EPA did not respond to our request.

State Historical Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP)

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and ACHP for amendments that may have an effect on historic properties. On January 5, 2001, we requested comments from the SHPO and ACHP on Indiana's amendment (Administrative Record No. IND–1706), but neither responded to our request.

Public Comments

OSM requested public comments on the proposed amendment. We received comments from two groups representing the coal industry. By letter dated February 5, 2001, the ICC submitted comments on the proposed amendment (Administrative Record No. IND–1707). Also, by letter dated February 12, 2001, the National Mining Association (NMA) submitted comments on the proposed amendment (Administrative Record No. IND–1708). Both organizations provided comments supporting the amendment. For ease of discussion, the comments have been organized by topic and are discussed below.

In addition, in its letter dated February 5, 2001, the ICC informed us that it had requested information from the Knoxville OSM Field Office under the Freedom of Information Act. The ICC stated that if it did not receive the information it requested, ''the ICC will be requesting an extension'' to the public comment period for this amendment. Although we did not receive a request for an extension, the ICC submitted additional comments on the proposed amendment by a letter dated February 28, 2001 (Administrative Record No. IND–1710). Given the level of interest the ICC has in this proposed amendment, we have incorporated the ICC additional comments into the discussion below.

1. Indiana Added the Proposed Language at IC 14–34–5–8.2(4) Because OSM Recommended It

Both the ICC and the NMA contend that IC 14–34–5–8.2(4) was added to HEA 1074 at OSM's suggestion. As support for this contention, both organizations refer to a letter dated February 20, 1998, that we sent Indiana, providing preliminary comments on the legislative bill that was later enacted as HEA 1074. The ICC points out that, as originally proposed, HEA 1074 contained the provision at IC 14–34–5–8.1 classifying certain postmining land uses as significant permit revisions and an additional provision in IC 14–34–5–8.2 stating that a revision is nonsignificant if it does not involve a significant change in land use. The ICC states that in our preliminary comments:

> OSM expressed concern that ''[t]he two standards for determining which revision requirements apply to a specific land use change * * * may result in different determinations, depending on which section of the statute is used.'' OSM suggested ''that guidance be provided for one or the other, but not both. * * * Generally then if a revision doesn't meet the standards specified in the program, it is by default that other type of revision.''

The ICC maintains that Indiana followed our suggestion and inserted a provision at IC 14–34–5–8.2(4) which classified as nonsignificant revisions all postmining land use changes not defined as significant revisions at IC 14–34–5–8.1(8). The NMA asserts that

''[a]gencies should not recommend a course of action and then penalize IDNR for following their advice.''

Response: The ICC has taken the comments in our February 20, 1998, letter out of context. In the letter, we offered specific comments on section 8.2(a)(5)(B), which provided that a revision was nonsignificant if it did not involve a significant change in land use. We expressed concern that the provision at 8.2(a)(5)(B) conflicted with the provision in section 8.1(8) which provided that land use changes to residential, commercial or industrial, recreational, or developed water resources are significant revisions. Specifically, we stated that there appear to be two standards for determining whether a post mining land use change is significant. We further stated that the two standards may result in different determinations, depending on which section of the statute is used.

We then offered a general comment concerning permit revisions as a whole. Specifically, we stated:

> We recognize that it is not possible to list every kind of [permit] revision that might occur. Therefore, it is difficult to provide specific guidance that identifies all [permit] revisions that are significant and also all those [permit revisions] that are nonsignificant. We suggest that guidance be provided for one or the other, but not for both. That is the approach used by most other states. Generally, then if a [permit] revision doesn't meet the standards specified in the program, it is by default the other type of [permit] revision.

Thus, we were not talking specifically about postmining land use changes when we commented, ''[g]enerally, then if a revision doesn't meet the standards specified in the program, it is by default that other type of revision.'' We were talking about permit revisions as a whole. Further, it is erroneous to assume, based on this comment, that revisions that do not meet the standards specified in a regulatory program are automatically the other type of revision because the comment was qualified by the word ''generally.'' The word ''generally'' clearly leaves the door open for discretion in determining if a revision that does not meet the standards specified in a regulatory program is significant or nonsignificant, just as the Tennessee program does. Finally, the only suggestion in the entire paragraph was that Indiana provide guidelines for only one type of permit revision. That way, Indiana would have guidelines for making permit revision determinations, but those guidelines would not eliminate Indiana's ability to determine, on a case-by-case basis, whether a permit revision was a significant or nonsignificant revision. Indiana did not adopt this suggestion. Therefore, the NMA's concern that we penalized IDNR for following our advice is unfounded.

2. OSM Tried To Not Approve the Amendment by Insisting That All Postmining Land Use Changes Must Be Considered Significant Permit Revisions.

Both the ICC and the NMA contend that we first attempted to justify our decision not to approve IC 14–34–5–8.2(4) in the March 16, 1999, final rule (64 FR 12890) by claiming that all postmining land use changes should be treated as significant permit revisions. The ICC implies that we made this claim when we stated that ''changes in postmining land use are the kind of issue that the public should have an opportunity to comment on.'' The NMA asserts that such a claim is contradicted by the legislative history of SMCRA. The NMA states that Congress considered but rejected specific language that would have required a permit revision prior to modification of proposed future land use. The NMA argues that this legislative history demonstrates that not all modifications of future land uses must invoke notice and hearing requirements ''as alleged by OSM.'' It may even imply that some modifications of the proposed future land use do not require a permit revision at all.

Response: We disagree that we attempted to justify our decision not to approve IC 14–34–5–8.2(4) by claiming that all postmining land use changes should be treated as significant permit revisions. We did not approve IC 14–34–5–8.2(4) because it was inconsistent with section 511(a)(2) of SMCRA, which requires public notice and hearing procedures for any significant alteration in a reclamation plan. Please refer to III. Director's Findings 6. of our March 16, 1999, final rule in which we stated:

> Section 511(a)(2) of SMCRA requires the State to establish guidelines for determining which revision requests are subject to notice and hearing requirements. However, it also requires, at a minimum, notice and hearing requirements for any significant alterations in a reclamation plan. IC 14–34–5–8.2(4) would allow many changes that could produce significant alterations in a reclamation plan, such as a change from cropland to forest, without notice and hearing requirements. Allowing such a change without notice and hearing requirements is inconsistent with, and less stringent than, section 511(a)(2) of SMCRA (64 FR 12892).

Further, we do not maintain that all postmining land use changes should be treated as significant permit revisions, and we disagree with the implication that we made such a claim with our statement concerning opportunities for public comments. The central purpose of our May 26, 1999, final rule clarification was to make it clear that we in no way intended to indicate that all land use changes other than those listed at IC 14–34–5–8.1(8) must be considered significant revisions. Thus, we would agree with the NMA's assertion that the legislative history of SMCRA demonstrates that not all modifications of future land uses must invoke notice and hearing requirements. However, we do not agree that the legislative history implies that some modifications of the proposed future land use do not require a permit revision at all. The ICC made this basic contention in its comments on Indiana's proposed program amendment at IC 14–34–5–7(a) when it argued that nothing in SMCRA specifically states that all mining or reclamation changes are revisions subject to regulatory authority approval (Administrative Record No. IND–1617). However, as we explained in our decision not to approve that proposed program amendment, we have established that all revisions must be incorporated into the permit since they are changes to that document (64 FR 12894). As stated above, the ICC challenged our decision not to approve IC 14–34–5–7(a) and the Court upheld our decision. *Indiana Coal Council* v. *Babbitt*, No IP 99–0705–C–M/S (S. D. Ind, Sept. 25, 2000).

3. OSM Tried To Not Approve the Amendment by Claiming That It Deprived the IDNR of Discretion.

The ICC states that we changed the reasoning behind our decision not to approve IC 14–34–5–8.2(4) in the May 26, 1999, final rule clarification (64 FR 28362) by claiming that the problem with the Indiana program amendment was that it deprived IDNR of discretion to require that post mining land use changes be treated as significant permit revisions. The ICC points out that the IDNR had explained that it interpreted IC 14–34–5–8.2 to mean that its Director would retain discretion under IC 14–34–5–8.2(5) to determine that land use changes other than those listed in IC 14–34–5–8.1(8) could be significant permit revisions. The NMA asserts that this interpretation by the IDNR Director refutes our argument that the proposed amendment would remove the IDNR Director's discretion to determine whether post mining land use changes other than the ones listed at IC 14–34–5–8.1(8) are significant. Both the ICC and the NMA further assert that we agreed with the IDNR's interpretation in the March 16, 1999, final decision. The

ICC states that nothing in either of our prior decisions explains how we can reconcile our statement that we agree with the IDNR's interpretation with our ''clarified'' position that section 14–34–5–8.2 deprives the IDNR of discretion.

Response: In our May 26, 1999, final rule clarification (64 FR 28362), we specifically stated that we were supplementing our previous findings—not replacing them. Furthermore, the Court specifically stated that we never changed our ultimate conclusion that IC 14–34–5–8.2(4) was inconsistent with section 511(a)(2) of SMCRA. Therefore, it is incorrect to assert that we changed our original decision. Please refer to III. Director's Findings 6. of our March 16, 1999, final rule in which we stated:

> Section 511(a)(2) of SMCRA requires the State to establish guidelines for determining which revision requests are subject to notice and hearing requirements. However, it also requires, at a minimum, notice and hearing requirements for any significant alterations in a reclamation plan. IC 14–34–5–8.2(4) would allow many changes that could produce significant alterations in a reclamation plan, such as a change from cropland to forest, without notice and hearing requirements. Allowing such a change without notice and hearing requirements is inconsistent with, and less stringent than, section 511(a)(2) of SMCRA (64 FR 12892).

We published the May 26, 1999, final rule clarification at the request of a May 12, 1999, letter we received from the IDNR. In that letter, the IDNR asked us to ''provide clarification of the **Federal Register** language which disapproved portions of the program amendment pursuant to those issues which were subject to our May 10, 1999 discussions.''

On May 10, 1999, we held a telephone conference with representatives from both the IDNR and the ICC to discuss the ICC's concerns with the portions of the Indiana's May 29, 1998, amendment that we did not approve. During that meeting, the ICC argued that our decision not to approve IC 14–34–5–8.2(4) eliminated the IDNR's discretion to determine whether postmining land use changes are nonsignificant permit revisions because we had declared that all postmining land use changes should be treated as significant permit revisions.

In our final rule clarification, we stated that it was not our intent to indicate that all other land use changes must be considered a significant revision or to alter OSM's position as reflected in other regulatory actions relating to significant permit revisions, such as those for the Federal program in Tennessee (see the response to comments under 3. above).

We further went on to explain that we felt it is essential for Indiana to continue to have the discretion to determine, on a case-by-case basis, that land use changes other than those listed in section IC 14–34–5–8.1(8) may constitute a significant revision. Thus, one of the purposes of our clarification was to explain that, contrary to the ICC's assertion, our decision not to approve IC 14–34–5–8.2(4) did not eliminate IDNR's discretion to determine whether postmining land use changes are nonsignificant permit revisions. Instead, it was ''clear on its face that the proposed change would remove such discretion.'' Our decision not to approve IC 14–34–5–8.2(4) preserved IDNR's discretion. Therefore, we agreed with the IDNR when it claimed that its Director retained discretion as to whether a change is significant or nonsignificant. Our decision not to approve IC 14–34–5–8.2(4) guaranteed that.

4. The Proposed Amendment Is Identical to the Federal Program in Tennessee

The NMA contends that our objections to Indiana's proposed amendment are particularly unusual because the current proposal at issue was copied almost verbatim from part of the Federal SMCRA program promulgated and approved by OSM on behalf of the State of Tennessee. Further, the NMA argues that the language of OSM's Federal program in Tennessee at 30 CFR 942.774 implies that items not listed as ''significant'' are not significant. The NMA states, ''the Federal program run by OSM in Tennessee expressly considers changes to the reclamation plan of the type being cited by the agency as objectionable (cropland to forest) to be ''insignificant'' that do not require notice and hearings.''

Response: The Tennessee SMCRA program provisions concerning permit revisions at 30 CFR 942.774 do not contain a counterpart to ''the current proposal at issue''—IC 14–34–5–8.2(4). Further, the language at 30 CFR 942.774 does not imply that items not listed as ''significant'' are not significant. Nor does it expressly consider changes to the reclamation plan of the type being cited by the agency as objectionable (cropland to forest) to be ''insignificant.'' As stated in III. Director's Findings, in the preamble to the final rule approving 30 CFR 942.774, we explain that the language at 30 CFR 942.774 was intentionally written in such a way ''to allow for contingencies or applications of the rule that are not possible to foresee'' (53 FR 49104). Thus, we have always maintained that revisions other that those found at 30 CFR 942.774 could be considered significant.

5. The Proposed Amendment Is Similar to the Federal Program in Tennessee

The ICC argues that IC 14–34–5–8.1 is similar to the corresponding provision of the Federal SMCRA program adopted by OSM for the state of Tennessee. The ICC contends that IC 14–34–5–8.1 is virtually identical to 30 CFR 942.744(c)(8). The only way that Indiana's program differs from Tennessee's program is that Indiana's amendment added a new section 14–34–5–8.2(4) which provides that postmining land use changes other than those enumerated in section 14–34–5–8.1 are classified as nonsignificant revisions. The Tennessee program has no provision defining nonsignificant revisions.

Response: We agree that IC 14–34–5–8.1 is virtually identical to 30 CFR 942.744(c)(8) and we acknowledged this in our March 16, 1999, final rule when we approved IC 14–34–5–8.1 (64 FR 12892). However, we do not agree that the only way that Indiana's program differs from Tennessee's program is that Indiana's amendment added a new section 14–34–5–8.2(4). For example, the Tennessee program does not have a counterpart to any of the provisions at IC 14–34–5–8.2 concerning nonsignificant permit revisions. Still, even if Indiana's program were similar to the Tennessee program, Indiana's program is not entitled to instant approval. We still must review Indiana's program to determine if it is as stringent as the Federal program. We have determined it is not. Please refer to III. Director's Findings.

6. OSM Has Never Exercised Discretion in Tennessee

The ICC questions whether we have in fact ever exercised our discretion under the Federal Tennessee program to require that a postmining land use change other than the ones specified in 30 CFR 942.774(c)(8) be treated as a significant permit revision. On January 31, 2001, under the Freedom of Information Act, the ICC submitted a request to the OSM Knoxville Field Office for information concerning ''any correspondence, internal memoranda or notes, or permit decision documents reflecting any decision by OSM to require any permit revision to a surface coal mining and reclamation operations permit issued under the federal program for the State of Tennessee * * * to be treated as a significant permit revision.'' On February 20, 2001, the Knoxville Field Office responded to the ICC's

request by providing information about one permit revision which involved a change from non-commercial forest to an industrial postmining land use. Thus, the ICC states that OSM, as the regulatory authority under the Tennessee Federal program, has never required any change in postmining land use to be treated as a significant permit revision other than a change in one of the categories specifically listed in 30 CFR 9472.774(c)(8). Furthermore, the ICC argues that, to the extent that we may have retained discretion under the Tennessee program regulations to treat other categories of postmining land use changes as significant permit revisions, it does not appear that we have ever had occasion to exercise that discretion. In light of this experience under the Tennessee program, the ICC believes that we should reevaluate our prior position that Indiana must retain such discretion in order for its program to be no less effective than the federal regulations. The ICC contends that if postmining land use changes other than those specified at 30 CFR 942.774(c)(8) are not treated as significant permit revisions in practice in Tennessee, the Indiana program would be no less effective than OSM's rules regardless if the IDNR has discretion to so treat them. The NMA argues that the language of our Federal program in Tennessee does not provide for discretion by the Director of OSM, and that we have not provided any examples of discretion being exercised in Tennessee.

Response: As stated above in the response to comment 4. and in III. Director's Findings, the language of our Federal program in Tennessee does provide for discretion by the Director of OSM, as it was written in such a way ''to allow for contingencies or applications of the rule that are not possible to foresee'' (53 FR 49104). In fact, under the Tennessee SMCRA program, every decision of the Director of OSM on a land use change revision other than those listed at 30 CFR 942.774(c)(8) is discretionary.

As for whether we have ever required a postmining land use change other than the ones specified in 30 CFR 942.774(c)(8) to be treated as a significant permit revision, the answer is no. However, this does not mean that we have never exercised our discretion under the Federal Tennessee program. In fact, we maintain that every decision the Director of OSM has made under the Federal Tennessee program relating to postmining land use changes not listed at 30 CFR 942.774(c)(8) is an exercise of discretion. The Director of OSM has merely determined that the postmining land use changes to date are nonsignificant. Under Indiana's proposed amendment, the IDNR Director would not be able to make such a determination. As stated above in III. Director's Findings, elimination of the IDNR Director's discretion in the Indiana program would render Indiana's program less effective than the Federal program and conflict with section 511(a)(2) of SMCRA. Therefore, we are not approving the provision at IC 14–34–5–8.2(4).

Finally, the ICC argues that eliminating INDR discretion will not affect the way in which Indiana executes its program. If that is true, then preserving INDR discretion as we have by not approving IC 14–34–5–8.2(4) will also not affect the way in which Indiana executes its program. Therefore, the ICC's concerns are unwarranted.

7. The Proposed Amendment Would Not Change the Way Indiana Has Been Handling Postmining Land Use Changes Since 1989

Both the ICC and the NMA contend that, in practice, changes in post mining land uses of the type being proposed have not been considered significant permit revisions under IDNR's regulations since 1989. The ICC indicates this is because of an IDNR's Hearings Division determination in Albrecht v. DNR, Cause #88–294R (June 13, 1989) that postmining land uses were not significant permit revisions under IDNR's regulations. The NMA states that we have not offered any evidence that refutes this fact. Further, the ICC and the NMA point out that we have not noted any problems with the IDNR's practice over the past 12 years.

Response: As stated above, if eliminating INDR discretion will not affect the way in which Indiana executes its program, then preserving INDR discretion as we have by not approving IC 14–34–5–8.2(4) will also not affect the way in which Indiana executes its program. Therefore, the ICC's and NMA's concerns are unwarranted.

8. There Is No Public Concern Over the Proposed Amendment

The ICC contend there is no need for OSM to strain for reasons to not approve IC 14–34–5–8.2(4) because whether postmining land use changes are treated as significant permit revisions or not, existing provisions of the approved Indiana program already insure that postmining land use changes cannot be approved without consultation with the landowner or appropriate land management agency. The ICC suggests that it is the landowner or land management agency, not the public at large, which is most likely to be interested in proposed postmining land use changes. The NMA points out that OSM has not identified any public comments from the last round of notice and comments objecting to IDNR's proposed amendment.

Response: We disagree with the contention that the public at large is not interested in proposed postmining land use changes. In fact, such a claim is in direct conflict with section 102(i) of SMCRA, which states that SMRCA was designed to assure that appropriate procedures are provided for the public participation in the revision of reclamation plans. As we stated in III. Director's Findings, we believe it is essential that regulatory authorities retain discretion to determine which revisions qualify as significant permit revisions so that the purposes of section 102(i) can be met. Therefore, we are not approving IC 14–34–5–8.2(4).

9. OSM Does Not Define ''Significant,'' So It Should Defer to Indiana's Definition

The NMA also argues that Indiana's proposed language is consistent with SMCRA section 511(a)(2) because neither SMCRA nor OSM regulations define ''significant.'' Therefore, there can be no direct showing that the proposed amendment is ''less stringent than'' the requirement in section 511(a)(2) of SMCRA. The NMA argues that since there is no definition of ''significant'' in SMCRA or OSM's regulations, it is the State regulatory authority that should determine what constitutes ''significant'' revisions to the reclamation plan. The NMA argues that this position is supported by the fact that SMCRA and OSM's implementing regulations clearly provide that: (1) States are supposed to enjoy ''exclusive'' jurisdiction over the regulation of surface coal mining and reclamation operations (30 USC 1253(a)), and (2) nonsignificant permit revisions are subject only to the review procedures established under the State or Federal programs (48 FR 44377). According to the NMA, then, it is appropriate for OSM to defer to the IDNR's reasonable definition of ''significant.''

Response: Indiana defined and provided eight specific examples of significant permit revisions at IC 14–34–5–8.1, and we approved the provisions on March 16, 1999 (64 FR 12890). Therefore, we have accepted the IDNR's reasonable definition of significant permit revisions. Furthermore, Indiana's definition of significant permit revisions is not all inclusive. We recognized this when we stated in our approval that

''this list cannot be considered all inclusive, as there are many other changes not listed at IC 14–34–5–8.1 that would be considered significant permit revisions.'' Indiana's provision at IC 14–5–34–8.2(4) would make the provision at IC 14–34–5–8.1(8) all inclusive, thereby eliminating the possibility that a postmining land use change not listed at IC 14–34–5–8.1(8) could be considered a significant permit revision. Thus, the provision at IC 14–34–5–8.2(4) conflicts with Indiana's own reasonable definition of significant permit revisions. Our decision not to approve IC 14–34–5–8.2(2) is consistent with our approval of Indiana's reasonable definition of significant permit revisions.

10. Indiana Must Have Regulations That Are as Effective as OSM's

The NMA points out that for almost twenty years, OSM has held that States do not have to adopt regulations that are identical to the Secretary's. Further, States do not need to demonstrate that alternative regulations are necessary to meet local requirements, environment, or agricultural conditions. Instead, States must demonstrate that their laws and regulations are as effective as the Secretary's in meeting the requirements of the Act. The NMA contends that there is no evidence in the record that IDNR's proposal would be less effective. The NMA states that OSM should be faithful to its longstanding policies of allowing States freedom to develop regulations that meet their needs, and approve the proposed amendment, especially when the evidence in the record supports the adoption of the proposed amendment and does not suggest that it would be less effective than OSM regulations. The NMA maintains that Indiana's proposed language is consistent with SMCRA section 511(a)(2).

Response: As explained under III. Director's Findings, the provision at IC 14–34–5–8.2(4) would eliminate the IDNR Director's discretion to determine if a revision other than those listed at IC 14–34–8.1(8) would constitute a significant permit revision and make it impossible for the IDNR Director to assure that appropriate procedures are provided for the public participation in the revision of reclamation plans as required under section 102(i) of SMCRA. Thus, Indiana's provision is less effective than the Secretary's regulations. Therefore, we are not approving it.

11. OSM Has Violated Section 503(c) of SMCRA and Section 553 of the Administrative Procedure Act (APA)

The NMA asserts that OSM failed to provide any new rationale or basis for not approving Indiana's proposed amendment at IC 14–34–5–8.2(4) in our January 11, 2001, **Federal Register** notice. The NMA contends that OSM has violated section 503(c) of SMCRA and section 553 of the Administrative Procedure Act by failing to allow the IDNR and the public a meaningful opportunity to comment on why OSM plans to deny the proposed amendments to the Indiana regulatory program. The NMA points to a Court ruling in *Macon County Samaritan Memorial Hospital* v. *Shalala,* 7 F. 3d 762, 765–766 (8th Cir. 1993); *quoting Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto Ins. Co.,* 463 U.S. 29, 42 (1983) to argue that if a new agency rule reflects departure from the agency's prior policy, the agency must apply reasoned analysis for change beyond that which may be required when the agency does not act in the first instance. The NMA also points to a Court ruling in *Office of Communications of the Unitied Church of Christ* v. *FCC,* 560 F. 2d 529, 532 (2nd Cir. 1977) and contends that for an agency to change its previous holdings, there must be a thorough and comprehensive statement of reasons for the decision. The NMA states that it would be much more meaningful to provide comments as to whether Indiana's amendment satisfies the applicable program approval criteria of 30 CFR 732.15 if OSM explained in the notice exactly what part of the criteria the agency believes are not satisfied. The NMA states because OSM has chosen not to provide any additional information for the record and has not provided any new rationale for denying the amendment, the amendment should be approved. If OSM plans to attempt to not approve the amendment a second time, SMCRA and the APA require that it must at least provide the public and IDNR a meaningful opportunity to comment on that new rationale before the agency makes a final decision.

Response: SMCRA and the Federal regulations are clear as to the review and decision process for proposed changes to State programs. We have followed those procedures. The U.S. District Court, Southern District of Indiana, required us to reconsider our initial decision. Therefore, we provided an opportunity to the public to comment on the proposed amendment as required by law.

V. Director's Decision

Based on the above findings, we are not approving the amendment as remanded to us for further consideration by the U.S. District Court, Southern District of Indiana on September 25, 2000.

To implement this decision, we are amending the Federal regulations at 30 CFR Part 914, which codify decisions concerning the Indiana program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that the state's program demonstrates that the state has the capability of carrying out the provisions of the Act and meeting its purposes. Making this regulation effectively immediately will expedite that process and will encourage Indiana to bring its program into conformity with the Federal standards. SMCRA requires consistency of State and Federal standards.

Effect of Director's Decision

Section 503 of SMCRA provides that a State may not exercise jurisdiction under SMCRA unless the State program is approved by the Secretary. Similarly, 30 CFR 732.17(a) requires that any alteration of an approved State program be submitted to OSM for review as a program amendment. The Federal regulations at 30 CFR 732.17(g) prohibit any changes to approved State programs that are not approved by OSM. In our oversight of the Indiana program, we will recognize only the statutes, regulations and other materials approved by the Secretary or by us, together with any consistent implementing policies, directives and other materials. We will require the enforcement by Indiana of only such provisions.

VI. Procedural Determinations

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget under Executive Order 12866.

Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulations.

Executive Order 13132—Federalism

This rule does not have federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the

purposes of SMCRA is to ''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'' Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be ''in accordance with'' the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations ''consistent with'' regulations issued by the Secretary under SMCRA.

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that, to the extent allowed by law, 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 because each 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 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.

Executive Order 13211—Regulations That Significantly Affect The Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

Section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that a decision on a proposed State regulatory program provision does not constitute a major Federal action within the meaning of section 102(2)(C) of the National Environmental Policy Act (NEPA) (42 U.S.C. 4332(2)(C)). A determination has been made that such decisions are categorically excluded from the NEPA process (516 DM 8.4.A).

Paperwork Reduction Act

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

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.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of $100 million; (b) will not cause a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; and (c) does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises.

This determination is based upon the fact that the State submittal which is the subject of this rule is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose a cost of $100 million or more in any given year on any governmental entity or the private sector.

List of Subjects in 30 CFR Part 914

Intergovernmental relations, Surface mining, Underground mining.

Dated: August 24, 2001.

Charles E. Sandberg,

Acting Regional Director, Mid-Continent Regional Coordinating Center.

For the reasons set out in the preamble, 30 CFR Part 914 is amended as set forth below:

PART 914—INDIANA

1. The authority citation for Part 914 continues to read as follows:

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

2. Section 914.17 is amended by revising the section heading and paragraph (b) to read as follows:

§ 914.17 State regulatory program and proposed program amendment provisions not approved.

* * * * *

(b) The amendment at Indiana Code 14–34–5–8.2(4) submitted on May 14, 1998 concerning postmining land use changes is not approved effective August 15, 2001.

* * * * *

[FR Doc. 01–20447 Filed 8–14–01; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 938

[PA–133–FOR]

Pennsylvania Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Final rule; approval of amendment.

SUMMARY: OSM is announcing the approval of a proposed amendment to the Pennsylvania regulatory program (Pennsylvania program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The amendment references Pennsylvania's anthracite coal mining regulations when describing conditions for meeting Stage 2 bond release where prime farmlands were present prior to mining. The amendment is intended to satisfy the conditions of the required regulatory program amendment at 30 CFR 938.16(p) and make the Pennsylvania program consistent with the corresponding federal regulations.

EFFECTIVE DATE: August 15, 2001.