

## DEPARTMENT OF THE INTERIOR

## Office of Surface Mining Reclamation and Enforcement

## 30 CFR Part 875

RIN: 1029-AB99

## Abandoned Mine Land Reclamation Notices

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

ACTION: Final rule.

**SUMMARY:** We are revising our regulations governing the processing of State and tribal grant applications to build public facilities using Abandoned Mine Land (AML) Reclamation Funds. The existing regulations require us to publish a **Federal Register** notice whenever we receive a grant application to build a public facility. We are changing this requirement to one that requires us to publish a notice only when the Director of the Office of Surface Mining (OSM) finds it necessary to ensure adequate public notice of the grant application. We are also correcting errors in four cross-references.

EFFECTIVE DATE: March 31, 2003.

**FOR FURTHER INFORMATION CONTACT:** Danny Lytton, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue, NW., MS-121-SIB, Washington DC 20240; Telephone: 202-208-2788; E-mail: [dlytton@osmre.gov](mailto:dlytton@osmre.gov).

## SUPPLEMENTARY INFORMATION:

- I. Background and Discussion of the Final Rule
- II. Discussion of the Public Comments Received
- III. How Will This Rule Affect State and Indian Programs?
- IV. Procedural Matters and Required Determinations

## I. Background and Discussion of the Final Rule

On June 19, 2002, we published in the **Federal Register** (67 FR 41756) proposed revisions to our regulations at 30 CFR 875.15(f). Those regulations govern public notification for certain non-coal reclamation projects funded by the AML Reclamation Fund. There are 23 States and 3 Indian tribes with approved AML programs. Only 6 of these programs are currently certified for non-coal reclamation projects, *i.e.*, all of their existing known coal-related reclamation objectives have been completed. They are the programs of the States of Louisiana, Montana, Texas and Wyoming, and the Hopi Tribe and Navajo Nation. Only these 6 programs

are, therefore, eligible for 30 CFR part 875 AML funding of non-coal reclamation projects.

The current regulations at 30 CFR 875.15(f) require that the Director publish a **Federal Register** notice announcing the receipt of, and seeking comments on, AML grant applications for non-coal reclamation projects submitted by a governor of a State or the equivalent head of an Indian tribe. The grant applications are requests for funds for the construction of specific public facilities related to the coal or minerals industry in communities impacted by coal or other mineral mining and processing practices. Such construction projects are authorized by section 411(f) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) after all coal-related reclamation objectives have been or are in the process of being completed. For the reasons set forth below, we are making the OSM Director's (hereinafter Director) **Federal Register** notice requirement a discretionary action.

The current regulatory scheme for 30 CFR part 875 provides for a level of public notice that, in most cases, makes the additional **Federal Register** notice of § 875.15(f) redundant. For example, § 875.13 provides for a public notice of a State or Indian tribe's certification that it has completed all existing known coal-related reclamation objectives for eligible lands or waters. Section 875.15(d) then allows the State or Indian tribe to submit to the Director a grant application for AML funding of specific non-coal projects. Section 875.15(e) details the information required in the grant application. In particular, paragraph (e)(7) requires the Director to conduct an analysis and review of the procedures used by the State or Indian tribe to notify and involve the public in the funding request and a copy of all comments received and their resolution by the State or Indian tribe. The 1994 preamble discussion of the § 875.15(e) grant information requirements noted that they were intended to assist the Director in determining whether a "need" exists and whether the public had been "fully appraised and informed" of the grant request. May 31, 1994; 59 FR 28163.

Irrespective of the outcome of the Director's § 875.15(e) public notice determination, § 875.15(f) next requires that the Director prepare a **Federal Register** notice of the State's or Indian tribe's grant application. Following receipt and evaluation of comments generated by that **Federal Register** notice, the Director is to make his/her decision on the grant application. It is not clear why the 1994 rule required the

additional § 875.15(f) **Federal Register** notice of the grant application as there was no preamble discussion of this provision and the enabling statute for § 875.15 does not require the additional notice. May 31, 1994; 59 FR 28163-4; 30 U.S.C. 1240(a).

Accordingly, we are making the **Federal Register** notice required by § 875.15(f) discretionary. We believe that if the Director can determine from the § 875.15(e)(7) information previously submitted by the State or Indian tribe in its grant application that the public has already been "fully appraised and informed" of the grant request, a subsequent § 875.15(f) required **Federal Register** notice covering the same ground would not meaningfully add to the Director's decision-making process. Conversely, if the Director cannot determine from the (e)(7) information submitted by the State or Indian tribe that the public has been "fully appraised and informed" of the grant request, the Director should prepare a § 875.15(f) **Federal Register** notice of the grant request so as to ensure adequate public notice. This final rule will give the Director the option of requiring an additional **Federal Register** notice dependent on the extent of prior (e)(7) public notice. This seems to be a reasonable course. It ensures adequate public notice of the State's or Indian tribe's grant request (with or without a **Federal Register** notice) while avoiding the delay and expense of an unnecessary **Federal Register** notice. We are, therefore, revising § 875.15(f) by inserting the words "if necessary to ensure adequate public notification." The first sentence of § 875.15(f), with inserts italicized, will read as follows: "After review of the information contained in the application, the Director shall, *if necessary to ensure adequate public notification*, prepare a **Federal Register** notice regarding the State's or Indian tribe's submission and provide for public comment."

There are several other practical reasons to reject the current rule's § 875.15(f) requirement of a **Federal Register** notice and to adopt the proposed rule's more flexible approach. The first is that, since the rule was initially promulgated seven years ago, there have been no comments submitted in response to any of the required **Federal Register** notices published by the Director. This fact was brought to light as a result of an inquiry from several of the States and Indian tribes attending the August 2001 AML Conference held in Athens, Ohio, who questioned the need for the Director's required § 875.15(f) **Federal Register**

notice. We subsequently reviewed our own records and discovered that we had never received any public comments to the required § 875.15(f) **Federal Register** notices. We then polled the 6 eligible AML programs on the public response to their own subsection (e)(7) public notice efforts. All of the programs questioned the need for the required § 875.15(f) **Federal Register** notice and reported a general lack of public response to their individual (e)(7) public notice efforts. The response of Wyoming, which is by far the largest of the AML programs certified under § 875.13 and which has funded thirty-six (36) § 875.15 public facilities projects with AML grant funds, was of particular note. Although Wyoming's AML program provides for extensive local public notice and a public hearing on all proposed § 875.15 projects, that State reported that "even these local opportunities for comment elicit little if any response from those directly impacted by the project." This consistent lack of local response to local notice from the Wyoming AML program regarding prospective § 875.15 projects underscores the fact that the current rule's requirement for additional **Federal Register** notice, while helpful in theory, has not produced meaningful public notice and comment.

Our polling of the 6 States and Indian tribes brought to light additional reasons not to retain the current rule's **Federal Register** notice requirement. The Navajo Nation, which has a substantial number of applications ready for processing as soon as its revised AML plan is approved, strongly opposes the current rule's required **Federal Register** notice because of its own internal AML notice procedures. By tribal law, the Navajo Nation has had to hold public meetings for each of its 100 or more individual political units whenever AML funds are to be used anywhere in their tribal boundaries for the construction of public facilities. The current rule's § 875.15(f) required **Federal Register** notice would, therefore, trigger a redundant, time-consuming round of tribal meetings on the very same projects.

Another reason given by some of the States and Indian tribes for opposing the continuance of the § 875.15(f) required **Federal Register** notice is that, for programs with shorter construction seasons like those of Montana and Wyoming, the required **Federal Register** notice adds 45 to 60 days to the project approval process. These additional 45 to 60 days can push completion of a funded public facility well into the next construction season.

In light of the above, we are removing the requirement in § 875.15(f) that the Director always publish a **Federal Register** notice informing the public of the grant application. Instead, the Director will retain the option of publishing such notice if his/her analysis and review of the notice information required under § 875.15(e)(7) indicates that inadequate procedures were used to notify and involve the public in the funding request. In this way, we can ensure that the public has been fully apprised of the grant application while also being protected from the delay and expense of an unnecessary **Federal Register** notice.

#### Technical Corrections

In addition to the above, we are also revising our regulations at §§ 875.15(d) and (e) to correct errors in four existing cross-references. In § 875.15(d), we are changing the cross references from paragraphs (a), (d), and (e) to paragraphs (b), (e), and (f), respectively. In § 875.15(e), we are changing the cross reference from paragraph (c) to paragraph (d). These revisions to the cross references will not result in any substantive changes in the application of our regulations.

Finally, we have rewritten § 875.15(f) in plain language format by incorporating numbered paragraphs to make the section more reader friendly. No substantive changes resulted from using the plain language format.

#### II. Discussion of the Public Comments Received

Comments were requested on the proposed rule and a total of two comments were received. They were from the State of Wyoming's Abandoned Mine Land Program and the Interstate Mining Compact Commission. Both commenters supported the proposed revisions. No one requested a public hearing and none was held.

#### III. How Will This Rule Affect State and Indian Programs?

Following publication of this final rule, we will evaluate the State and Indian programs approved under section 405 of SMCRA to determine any changes in those programs that may be necessary. When we determine that a particular State program provision should be amended, the particular State will be notified in accordance with the provisions of 30 CFR 884.15. We have made a preliminary determination that no program revisions will be required.

#### IV. Procedural Matters and Required Determinations

##### *Executive Order 12866—Regulatory Planning and Review*

This document is not a significant rule and is not subject to review by the Office of Management and Budget under Executive Order 12866.

a. This rule will not have an effect of \$100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities. The elimination of the mandatory requirement to publish a **Federal Register** notice is not expected to have an adverse economic impact on States and Indian tribes. It may in fact reduce construction costs in northern climates by eliminating delays.

b. This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

c. This rule does not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients.

d. This rule does not raise novel legal or policy issues.

##### *Regulatory Flexibility Act*

The Department of the Interior certifies 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.*). As previously stated, the elimination of the requirement for a mandatory **Federal Register** notice is not expected to have an adverse economic impact. Further, the rule produces no adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States enterprises to compete with foreign-based enterprises in domestic or export markets.

##### *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 or more.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

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 for the reasons stated above.

#### *Unfunded Mandates*

This rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, Tribal, or local governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1534) is not required.

#### *Executive Order 12630—Takings*

In accordance with Executive Order 12630, the rule does not have significant takings implications.

#### *Executive Order 12612—Federalism*

In accordance with Executive Order 12612, the rule does not have significant Federalism implications to warrant the preparation of a Federalism Assessment for the reasons discussed above.

#### *Executive Order 12988—Civil Justice Reform*

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

#### *Executive Order 13175—Consultation and Coordination With Indian Tribal Governments*

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally recognized Indian tribes and have determined that the rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. As previously stated, 2 tribes will be

affected by the rule, the Hopi Tribe and Navajo Nation. The rule will most likely shorten the processing time for most grant applications received from the Hopi and Navajo by eliminating the mandatory requirement to publish a **Federal Register** notice whenever we receive a grant application to build a public facility.

#### *Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This rule is not considered a “significant energy action” under Executive Order 13211. The elimination of the mandatory requirement to publish a **Federal Register** notice will not have a significant affect on the supply, distribution, or use of energy. The elimination of the mandatory requirement may reduce construction costs in northern climates by eliminating delays.

#### *Paperwork Reduction Act*

This rule does not require an information collection from 10 or more parties and a submission under the Paperwork Reduction Act to the Office of Management and Budget is not required.

#### *National Environmental Policy Act*

We have reviewed this rule and determined that it is categorically excluded from the National Environmental Policy Act process in accordance with the Departmental Manual 516 DM 2, Appendix 1.10.

#### **List of Subjects in 30 CFR Part 875**

Grant program—natural resources, Indian lands, Reclamation, Surface mining, Underground mining.

Dated: January 29, 2003.

**Rebecca W. Watson,**

*Assistant Secretary, Land and Minerals Management.*

Accordingly, we are amending 30 CFR part 875 as set forth below.

## **PART 875—NONCOAL RECLAMATION FUND**

1. The authority citation for part 875 continues to read as follows:

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

2. Amend § 875.15 as follows:

a. In paragraph (d), remove the phrases “paragraph (a),” “paragraph (d),” and “paragraph (e)” and in their place add “paragraph (b),” “paragraph (e),” and “paragraph (f),” respectively.

b. In paragraph (e), remove the phrase “paragraph (c)” and add “paragraph (d).”

c. Revise paragraph (f) to read as follows:

#### **§ 875.15 Reclamation priorities for noncoal program.**

\* \* \* \* \*

(f) After review of the information contained in the application, the Director will, if necessary to ensure adequate public notification, prepare a **Federal Register** notice regarding the State’s or Indian Tribe’s submission and provide for public comment. The Director will then:

- (1) Evaluate any comments received;
- (2) Determine whether the funding meets the requirements of this part;
- (3) Determine whether the funding is in the best interest of the State or Indian tribe AML program;
- (4) If the determinations under paragraphs (f)(2) and (f)(3) of this section are positive, approve the request for funding the activity or construction; and
- (5) Approve funding under paragraph (f)(4) of this section only at a cost commensurate with its benefits towards achieving the purposes of the Surface Mining Control and Reclamation Act of 1977.

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