

*Unfunded Mandates*

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of \$100 million or more in any given year. 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 did not impose an unfunded mandate.

**List of Subjects in 30 CFR Part 934**

Intergovernmental relations, Surface mining, Underground mining.

Dated: May 27, 2003.

**Allen D. Klein,**  
*Regional Director, Western Regional Coordinating Center.*

■ For the reasons set out in the preamble, 30 CFR part 934 is amended as set forth below:

**PART 934—NORTH DAKOTA**

■ 1. The authority citation for part 934 continues to read as follows:

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

■ 2. Section 934.15 is amended in the table by adding a new entry in chronological order by date of final publication to read as follows:

**§ 934.15 Approval of North Dakota regulatory program amendments**

\* \* \* \* \*

Original amendment submission date	Date of final publication	Citation/description
* * * * *	* * * * *	* * * * *
November 21, 2002	July 7, 2003	<i>Standards for Evaluation of Revegetation Success and Recommended Procedures for Pre- and Postmining Vegetation Assessments: Section II—C, D, E, F, G, and H; Section III—C, D, and E</i>

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**DEPARTMENT OF THE INTERIOR**

**Office of Surface Mining Reclamation and Enforcement**

**30 CFR Part 938**

[PA–128–FOR]

**Pennsylvania Regulatory Program**

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

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

**SUMMARY:** We are approving, with certain exceptions, a proposed amendment to the Pennsylvania regulatory program (the “Pennsylvania program”) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Pennsylvania proposed to revise its program regarding rules related to the criteria and procedures for designating areas as unsuitable for surface mining. Pennsylvania modified these rules to be consistent with the corresponding Federal regulations and SMCRA and because under its Regulatory Basics Initiative, Pennsylvania considered its former regulations to be unclear, unnecessary or more stringent than the corresponding Federal regulations.

**EFFECTIVE DATE:** July 7, 2003.

**FOR FURTHER INFORMATION CONTACT:** George Rieger, Acting Director,

Harrisburg Field Office, telephone: (717) 782–4036, e-mail: *grieger@osmre.gov*.

**SUPPLEMENTARY INFORMATION:**

- I. Background on the Pennsylvania Program
- II. Submission of the Proposed Amendment
- III. OSM’s Findings
- IV. Summary and Disposition of Comments
- V. OSM’s Decision
- VI. Procedural Determinations

**I. Background on the Pennsylvania 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 Pennsylvania program on July 30, 1982. You can find background information on the Pennsylvania program, including the Secretary’s findings, the disposition of comments, and conditions of approval in the July 30, 1982, **Federal Register** (47 FR 33050). You can also find later actions concerning Pennsylvania’s program and program amendments at 30 CFR 938.11, 938.12, 938.15 and 938.16.

**II. Submission of the Proposed Amendment**

By letter dated November 22, 1999, Pennsylvania sent us an amendment to its program (Administrative Record No. PA 861.03) under SMCRA (30 U.S.C. 1201 *et seq.*). Pennsylvania sent the amendment to include changes made at its own initiative. The provisions of Title 25 of the Pennsylvania Code (Pa. Code) that Pennsylvania proposed to revise were: 86.1 Definitions; 86.101 Definition of terms; 86.102 Areas where mining is prohibited or limited; 86.103 Procedures; 86.121 Areas designated unsuitable for mining; 86.123 Procedures: petitions; 86.124 Initial processing, record keeping and notification requirements; 86.125 Hearing requirements; 86.126 Decision; 86.127 Data base inventory system requirements; 86.128 Public information; 86.129 Coal exploration; and 86.130 Areas unsuitable for mining.

We announced receipt of the proposed amendment in the December 27, 1999, **Federal Register** (64 FR 72297). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the amendment’s adequacy. We did not hold a public hearing or meeting because no one requested one. The public comment period ended on January 26, 2000. We received comments from three Federal agencies and one State agency. The Federal agencies were the U.S. Department of Labor (Mine Safety and Health Administration), New Stanton and Wilkes-Barre offices and the U.S. Environmental Protection Agency

(EPA), Region III. The State agency was the Pennsylvania Historical and Museum Commission.

**III. OSM's Findings**

Following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. We are approving the amendment with the exception as noted below. Any revisions that we do not specifically discuss below concern nonsubstantive wording or editorial changes.

*A. Minor Revisions to Pennsylvania's Rules*

Pennsylvania proposed minor changes to the following previously approved rules.

Pennsylvania is adding the metric measurement equivalent to the standard measurements found at sections 86.101(8), (8)(ii), (10), (11), and (12); 86.103(c) and throughout various subsections of 86.130(b). We find that adding the metric equivalent will not render these regulations inconsistent with the Federal regulations.

Pennsylvania is deleting the references to the Bureau of Mining and Reclamation at sections 86.123(c) and 86.124(d) and replacing that phrase with the word "Department" which is a

reference to the Pennsylvania Department of Environmental Protection (PADEP). These changes are not inconsistent with the Federal rules because it clarifies the role of PADEP, which is the State regulatory authority that implements the coal mining program in Pennsylvania. We are approving these changes.

*B. Revisions to Pennsylvania's Rules That Have the Same Meaning as the Corresponding Provisions of the Federal Regulations*

Pennsylvania proposed revisions to the following rules containing language that is the same or similar to the corresponding sections of the Federal regulations.

Pennsylvania rule citation	Corresponding Federal regulation	Topic
25 Pa. Code 86.1 Definitions "valid existing rights".	30 CFR 761.5 .....	Definition used as part of the criteria and procedures for designating areas unsuitable for surface mining.
25 Pa. Code 86.101 Definitions "fragile lands"	30 CFR 762.5 .....	Definition used as part of the criteria and procedures for designating areas unsuitable for surface mining.
25 Pa. Code 86.101 Definitions "historic lands"	30 CFR 762.5 .....	Definition used as part of the criteria and procedures for designating areas unsuitable for surface mining.
25 Pa. Code 86.101 Definitions "public building".	30 CFR 761.5 .....	Definition used as part of the criteria and procedures for designating areas unsuitable for surface mining.
25 Pa. Code 86.101 Definitions "public park" ...	30 CFR 761.5 .....	Definition used as part of the criteria and procedures for designating areas unsuitable for surface mining.
25 Pa. Code 86.101 Definitions "renewable resource lands".	30 CFR 762.5 .....	Definition used as part of the criteria and procedures for designating areas unsuitable for surface mining.
25 Pa. Code 86.101 Definitions "significant recreational value, timber, economic or other values incompatible with surface mining operations".	30 CFR 761.5 .....	Definition used as part of the criteria and procedures for designating areas unsuitable for surface mining.
25 Pa. Code 86.102(1) .....	30 CFR 761.11(a)(1)–(6) .....	Areas where surface coal mining operations are prohibited or limited.
25 Pa. Code 86.102(3) .....	30 CFR 761.11(c) .....	Areas where surface coal mining operations are prohibited or limited.
25 Pa. Code 86.102(9) through (9)(iii) .....	30 CFR 761.11(e) and 761.15(b), surface coal	Areas where (c) and (d) mining operations are prohibited or limited.
25 Pa. Code 86.103(d) .....	30 CFR 761.15(b) .....	Procedures
25 Pa. Code 86.103(e), (e)(2)(i) and (ii) .....	30 CFR 761.17(d)(1) through (d)(1)(iii) .....	Regulatory authority obligations at the time of permit application review.
25 Pa. Code 86.121(1) through (3) .....	30 CFR 762.13 (a) through (c) .....	Areas exempt from designation as unsuitable for surface mining operations.
25 Pa. Code 86.123(c)(5) .....	30 CFR 764.13(a) .....	Right to petition
25 Pa. Code 86.124(c) .....	30 CFR 764.15(c) .....	Initial processing, record keeping, and notification requirements.
25 Pa. Code 86.125(c) .....	30 CFR 764.17(a) .....	Burden of Persuasion.
25 Pa. Code 86.127(b) .....	30 CFR 764.21(b) .....	Database and inventory system requirements.

Because these proposed rules contain language that is the same as or similar to the corresponding Federal regulations, we find that they are no less effective than the corresponding Federal regulations.

Pennsylvania is also modifying the following definitions found at 25 Pa. Code 86.101 by deleting some existing language and adding language: fragile

lands, historic lands, public building, public park and renewable resource lands and deleting existing 86.121(a) and (b). Since the added language to these definitions or the new sections to 86.121(1) through (3) are substantively identical to the Federal rules, we find that the deletions do not render the Pennsylvania program inconsistent with SMCRA or the Federal regulations.

*25 Pa. Code 86.1 Definition of Valid Existing Rights.* Pennsylvania is deleting its existing definition of "Valid Existing Rights" which stated:

Valid Existing Rights—Includes the following:

- (i) Except for haul roads and activities enumerated in subparagraph (iii), property rights in existence on August 3, 1977, that were created by a legally binding

conveyance, lease, deed, contract or other document which authorizes the applicant to produce minerals by a surface mining operation. The person proposing to conduct surface mining operations on the lands shall hold current State and Federal permits necessary to conduct the operations on those lands and either have held those permits on August 3, 1977, or had made by that date a complete application for the permits, variances and approvals required by the Department.

(ii) For haul roads, the term includes:

(a) A recorded right-of-way, recorded easement, or a permit for a haul road recorded as of August 3, 1977.

(b) Another road in existence as of August 3, 1977.

(iii) Coal preparation activities, and their associated haul roads, which were not subject to this chapter and Chapters 87-90 prior to August 25, 1989, were in existence on or before July 6, 1984, and were operating in compliance with applicable laws prior to that date.

(iv) Interpretation of the terms of the document relied upon to establish valid existing rights shall be based upon the usage and custom at the time and place where it came into existence, and upon a showing by the applicant that the parties to the document actually contemplated a right to conduct the same underground or surface mining activities for which the applicant claims a valid existing right and that the document has been signed by the surface owner.

(v) The term does not include the mere expectation of a right to conduct surface mining operations or the right to conduct underground coal mining.

Pennsylvania is proposing the following language as its new definition: "Rights which exist under the definition of "valid existing rights" in 30 CFR Section 761.5 (relating to areas unsuitable for mining)." Pennsylvania stated in the Pennsylvania Bulletin (Pa. Bull.) that this "change will conform the Commonwealth's regulations to the [Pennsylvania] statutes [52 P.S. 1396.4e, 52 P.S. 30.56a, and 35 P.S. 691.315] and will make it unnecessary for the Commonwealth to change its definition if the Federal definition is changed." 29 Pa. Bull. 5289, 5292 (October 9, 1999). Accordingly, we find that since Pennsylvania is effectively incorporating OSM's definition of valid existing rights and will change its implementation of its definition if the Federal definition should change, the Pennsylvania definition is no less effective than the Federal regulation at 30 CFR 761.5.

25 Pa. Code 86.124(a)(2).

Pennsylvania amended this section by adding the sentence, "A frivolous petition is one in which the allegations of harm lack serious merit." This language is identical to the language describing a frivolous petition in the Federal regulations at 30 CFR

764.15(a)(3). Because the language is the same as in the Federal regulations, we find it no less effective and we are approving it.

25 Pa. Code 86.129. This section provides the requirements for conducting coal exploration on areas designated as unsuitable for surface mining operations. The section will allow coal exploration on areas designated as unsuitable for surface mining operations if the following provisions of subsections (b)(1) and (2) are met:

\* \* \* \* \*

(b) Coal exploration may be conducted on an area designated as unsuitable for surface mining operations in accordance with this chapter if the following apply:

(1) The exploration is consistent with the designation.

(2) The exploration will be conducted to preserve and protect the applicable values and uses of the area under Subchapter E (relating to coal exploration) and the Department has issued written approval for the exploration.

\* \* \* \* \*

In amending this section, Pennsylvania dropped a requirement in subsection (b)(2) that it would not grant approval for coal exploration unless the person seeking the approval has described the nature and extent of the proposed operation, and has described in detail the measures to be employed to prevent adverse effects. Even though Pennsylvania dropped this requirement, 25 Pa. Code 86.129 remains no less effective than the corresponding Federal regulation at 30 CFR 762.15 because of its reference to 25 Pa. Code Subchapter E. Under Subchapter E, 25 Pa. Code 86.133(f) provides that:

\* \* \* \* \*

(f) Coal exploration on lands where a petition to declare an area unsuitable for mining has been received by the Department or on lands designated unsuitable for mining shall be conducted only after written approval is granted by the Department. The Department may prescribe conditions and requirements necessary to preserve the values sought to be protected in the petition before approving coal exploration in these areas. The exploration activities shall be conducted in accordance with § 86.129 (relating to coal exploration) to insure that the exploration activity does not interfere with a value for which the area has been designated unsuitable for mining.

\* \* \* \* \*

Taken together, the provisions of 25 Pa. Code 86.133(f) and 25 Pa. Code 86.129 provide the same level of protection as the Federal regulations at 30 CFR 762.15 regarding coal exploration on lands unsuitable for surface coal mining. The Federal

regulations require approval under the State's equivalent to the Federal coal exploration regulations at 30 CFR part 772 to ensure that the exploration does not interfere with any value for which the area has been designated unsuitable for surface coal mining. We find it no less effective than the Federal rule and we are approving the change to this section.

*C. Revisions to Pennsylvania's Rules That Are Not the Same as the Corresponding Provision of the Federal Regulations*

25 Pa. Code 86.101 Definitions. The definition of "surface mining operations" has been modified by deleting the following phrase at the end of the definition: "\* \* \* and activities involved in or related to underground coal mining which are conducted on the surface of the land, produce changes in the land surface, or disturbs the surface, air or water resources of the area." The definition now reads:

The extraction of coal from the earth or from waste or stock piles or from pits or banks by removing the strata or material which overlies or is above or between them or otherwise exposing and retrieving them from the surface, including, but not limited to, strip and auger mining, dredging, quarrying and leaching and surface activity connected with surface or underground coal mining, including, but not limited to, exploration, site preparation, entry, tunnel, slope, drift, shaft and borehole drilling and construction and activities related thereto, coal refuse disposal, coal processing and preparation facilities.

This definition only applies to subchapter D of 25 Pa. Code Chapter 86 and was revised to eliminate the inconsistency between Pennsylvania's definition and our interpretative rulemaking on activities applicable to section 522(e) of SMCRA, 29 Pa. Bull. 5289, 5290 (October 9, 1999). Our interpretative rule found at 30 CFR 761.200(a) states "[s]ubsidence due to underground coal mining is not included in the definition of surface coal mining operations under section 701(28) of the Act and 700.5 of this chapter and therefore is not prohibited in areas protected under section 522(e) of the Act." In the preamble to the interpretative rule we noted that "we interpret the definition of "surface coal mining operations" at SMCRA section 701(28)(A) and in the analogous portion of the existing rules at 30 CFR 700.5 not to include subsidence, and to include only: (1) Activities on the surface of lands in connection with a surface coal mine; and (2) Activities subject to section 516, conducted on the surface of lands in connection with surface

operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce.” (64 FR 70838, 70844 (12/17/99)).

Even though Pennsylvania’s revised definition of surface mining operations removes the inclusion of activities involved in or related to underground mining it still includes surface activity connected with underground mining. In the Pennsylvania Bulletin, Pennsylvania states “[i]n the definition of “surface mining operations,” the reference to activities related to underground coal mining that affect the land surface has been deleted to clarify that surface mining operations do not include any surface effects of underground mining resulting from activities that were conducted beneath the land surface.” 29 Pa. Bull. 5292. Pennsylvania maintains that its rulemaking “is consistent with Federal requirements and that it addresses the difference between the physical characteristics of mining activities conducted on the surface as opposed to underground.” Id. Accordingly, we are approving the deletion of this language with the understanding that Pennsylvania will implement the definition of “surface mining operations” in the same manner as contemplated by 30 CFR 761.200(a) and find the deletion not inconsistent with the Federal regulations.

*25 Pa. Code 86.102(11).* This section provides that surface mining operations are not permitted within 100 feet of a cemetery unless there is valid existing rights. In addition to this existing restriction, Pennsylvania is adding that cemeteries may be relocated under 9 P.S. 41–52. The Federal counterpart at 30 CFR 761.11(g), also states that mining cannot occur within 100 feet of a cemetery unless there is valid existing rights and unless the cemetery is relocated in accordance with all applicable laws and regulations. Pennsylvania’s added language is consistent with the Federal regulation because it allows for the relocation of a cemetery and we are approving the change.

*25 Pa. Code 86.124(f) Procedures: Hearing requirements.* This section provides that the Department will prepare a recommendation on each complete petition received under this section and submit it to the Environmental Quality Board (EQB) within 12 months of receipt of the complete petition. This section could be viewed as less effective than the Federal regulations at 30 CFR 764.19(b) which require that, “a final written decision shall be issued by the regulatory

authority, including a statement of the reasons, within 60 days of completion of the public hearing, or, if no public hearing is held, then within 12 months after receipt of the complete petition. However, the enabling legislation for this section of the Pennsylvania regulations is located within Pennsylvania’s SMCRA, at 52 P.S. section 1396.4e(f) which states, “Within ten (10) months after receipt of the petition, the Department shall hold a public hearing \* \* \* within sixty (60) days after such hearing, the Department shall issue and furnish the petitioners and any other party to the hearing, a written decision regarding the petition and the reasons therefore.” This language has been previously determined to be consistent with, and no less effective than, SMCRA and the Federal regulations. With the Pennsylvania statutory language consistent with Federal law and regulations, we are not approving the revision in regulations to the extent that it could be interpreted as inconsistent with the enabling Pennsylvania statute and less stringent than SMCRA and the implementing regulations. We expect that Pennsylvania will continue to process unsuitability petitions in a manner consistent with State law.

*25 Pa. Code 86.125 Procedures: Hearing requirements.* Pennsylvania deleted the requirement at subsection (b) for a verbatim transcript of the petition hearing and moved the requirement to subsection (d). These changes are consistent with the Federal rule at 30 CFR 764.17(a) which requires a record of the petition hearing to be made and preserved according to State law.

Pennsylvania revised subsection (e) [renumbered from (b) to (e)] to provide that PADEP will give notice of the hearing by first class mail and also revised subsection (e)(3) to indicate the notice is to be sent to persons known to PADEP to have an ownership or other interest in the area covered by the petition. This is no less effective than the Federal regulations at 30 CFR 764.17(b)(2) which requires notice of the hearing to property owners by first class mail. Pennsylvania deleted the first class mail notification requirement of (e)(4) to the petitioner and intervenors and added subsection (f), which requires that notice of the hearing by certified mail shall be given to the petitioner and intervenors. These changes are no less effective than the Federal rules.

At subsections (g) and (h), Pennsylvania is changing some of the hearing responsibilities from the EQB to PADEP. Pennsylvania is also making

editorial changes at subsections (i) and (k). All of these changes do not render the Pennsylvania regulations inconsistent with the Federal regulations and we approving the changes.

Subsection (j) was revised to read as follows:

\* \* \* \* \*

(j) Within 60 days of the close of the public comment period, the Department will prepare a recommendation to the EQB, including a statement of the reasons for the recommendation and provide written notice of its recommendation to the petitioners and intervenors.

\* \* \* \* \*

For a full discussion of our finding on the time frames for providing a written notice to petitioners and intervenors, see the discussion under 25 Pa. Code 86.124(f) above. Section 86.125(j) is not approved to the same extent that 25 Pa. Code 86.124(f) is not approved.

*25 Pa. Code 86.126 Procedures: Decision.* Subsections (b) and (b)(1) were revised and subsection (b)(2) was added. These sections now read:

(b) The EQB will promptly send the decision by certified mail to the petitioner, intervenors and to the Office of Surface Mining Reclamation and Enforcement.

(1) If the decision is to designate an area as unsuitable for surface mining operations, the EQB will deposit and publish its decision as a regulation in the manner required by the Regulatory Review Act (71 P. S. sections 745.1–745.15); the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. sections 1102, 1201–1208 and 1602) known as the Commonwealth Documents Law and 45 Pa.C.S. Part I (relating to publication and effectiveness of Commonwealth documents).

(2) If the decision is not to designate an area as unsuitable for surface mining operations, the EQB will publish its decision in the Pennsylvania Bulletin within 30 days.

In 25 Pa. Code 86.126(b), Pennsylvania deleted the following provision: “A final written decision in the form of a regulation will be issued by the EQB within 60 days following the public hearing, including a statement of reasons for the decision.” We are approving this deletion because of the finding we made with regard to issuance of final decisions in 25 Pa. Code 86.124(f) above. As we noted in 25 Pa. Code 86.124(f), we expect that Pennsylvania will continue to process unsuitability petitions in a manner consistent with State law.

The changes to these subsections specify who will be sent the decision, the appropriate documents where EQB’s decisions are to be published and under what authority. The Federal rule at 764.19(b) requires that the final written decision shall be sent by certified mail

to the petitioner, intervenors and by regular mail to all other persons involved in the proceeding. OSM was concerned that Pennsylvania's regulation failed to provide notification of the decision by regular mail to all other persons involved in the proceeding. In a letter dated February 13, 2002 (Administrative Record No. PA 861.10), Pennsylvania noted that the Pennsylvania Regulatory Review Act (71 P.S. 745.1 *et seq.*) required notification to all interested parties. *See*, 71 P.S. 745.5a. Accordingly, we find that the inclusion of this information does not make Pennsylvania's program inconsistent with the Federal regulations at 30 CFR 764.19(b) and we are approving it.

#### *D. Revisions to Pennsylvania's Rules With No Corresponding Federal Regulations*

25 Pa. Code 86.102(4). Subsection (4) was modified by inserting the phrase, "the Department of Conservation and Natural Resources and" before the words, "the Department." The section now reads: "On lands within the State park system. Surface mining activities may be permitted if the Department of Conservation and Natural Resources and the Department find that significant land and water conservation benefits will result when remining of previously mined land is proposed."

The Department of Conservation and Natural Resources is now included in the decision on whether mining will be prohibited on certain State lands. There is no Federal counterpart to this subsection. We find that this addition does not make this rule inconsistent with the Federal regulations.

25 Pa. Code 86.102(5) was modified by inserting the, " \* \* \* Department of Conservation and Natural Resources and the \* \* \* " before the word, "Department." This section now reads:

\* \* \* \* \*

(5) On lands within State forest picnic areas, State forest natural areas and State forest wild areas. Surface mining operations may be permitted on State forestlands other than picnic areas, natural areas and wild areas, if the Department of Conservation and Natural Resources and the Department find that one or more of the following apply:

(i) There will be no significant adverse impact to natural resources, including timber, water, wildlife, recreational and aesthetic values.

(ii) Significant land and water conservation benefits will result when remining of previously mined lands is proposed.

\* \* \* \* \*

The Department of Conservation and Natural Resources is now included in the decision on whether mining will be

prohibited on certain State lands. There is no Federal counterpart to this subsection. We find that this addition does not make this rule inconsistent with the Federal regulations.

25 Pa. Code 86.130 *Areas designated as unsuitable for mining.* Pennsylvania corrected two regulatory references in this section by adding the description of that reference.

Section 86.130 is the section where Pennsylvania publishes the results of EQB's decisions designating areas as unsuitable for all or certain types of surface mining operations. There are no comparable provisions in the Federal regulations requiring publication of the designations. Publication will insure that the designations are available for all interested persons to review. As a result, we find that this section is not inconsistent with the Federal regulations and we are approving it.

#### **IV. Summary and Disposition of Comments**

##### *Public Comments*

We asked for public comments on the amendment (Administrative Record No. PA 861.03), but we did not receive any.

##### *Federal Agency Comments*

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Pennsylvania program (Administrative Record No. PA 861.04). The Department of Labor, Mine Safety and Health Administration (MSHA), New Stanton Office, provided comments by letter dated December 17, 1999 (Administrative Record No. PA 861.07). The comments included one substantive comment that requested changing the reference in the Federal regulations to the definition of "Valid Existing Rights" (VER) to actually insert the language redefining VER.

We have considered this comment and believe that requiring Pennsylvania to delete the reference to 30 CFR and inserting the language does not have any effect on the proposed revision to the Pennsylvania program. Therefore, we will not request Pennsylvania to change this reference.

By letter dated December 6, 1999, (Administrative Record No. PA 861.05) MSHA's Wilkes-Barre office, stated that nothing conflicted with existing MSHA regulations.

##### *Environmental Protection Agency (EPA) Comments*

Under 30 CFR 732.17(h)(11)(i) we requested comments on the amendment from EPA (Administrative Record No.

PA 861.04). EPA responded on December 15, 1999, that the amendments appeared to comply with the Clean Water Act (Administrative Record No. PA 861.06).

##### *The Pennsylvania Historical and Museum Commission (PHMC)*

PHMC submitted comments by letter dated February 26, 1999 (Administrative Record No. PA 861.01) with a follow up letter dated December 7, 1999 (Administrative Record No. PA 861.09) resubmitting their earlier comments. The comments submitted include:

1. The proposed change in the definition of a completed application at 25 Pa. Code 86.1 weakens Pennsylvania's requirements by only requiring an applicant for a permit application to complete forms addressing each requirement of the application instead of "demonstrating compliance with applicable statutes and regulations."

We have determined that the comment addresses an issue that is not in this program amendment. Since it is outside the scope of the amendment, we are not required to address this comment.

2. The revision to the definition of valid existing rights in 25 Pa. Code 86.1 deletes nearly all descriptions of what are valid rights for people and agencies and replaces them with a line indicating that valid existing rights are rights which exist under the definition of valid existing rights in 30 CFR 761.5. PHMC wants to retain the old definition, or repeat verbatim, the Federal definition so the rights of the people or agencies are clear.

PHMC is correct in noting the change. However, OSM's standard for review of amendments to State program regulations are whether the regulations are no less effective than the corresponding Federal regulations in meeting the requirements of SMCRA (see 30 CFR 730.5). Pennsylvania's inclusion of the reference to the Federal regulations in the definition of valid existing rights makes it no less effective than the Federal regulations because it now includes all rights as protected by Federal regulation.

3. The change to the definition of fragile lands in 25 Pa. Code 86.101 adds the stipulation that the damage to these properties be significant. This is inconsistent with Federal Section 106 statutes, which applies when there is an impact to cultural resources. Also the deletion of language that provides protection to buffer areas surrounding fragile lands is unacceptable.

As with Pennsylvania's change to the definition of valid existing rights, the

change in definition to fragile lands is based on the Federal definition of fragile lands at 30 CFR 762.5. The Federal definition also describes areas that could be significantly damaged by surface coal mining operations. We have found that Pennsylvania's definition of fragile lands is no less effective than the Federal definition. As for the deletion of the buffer zone provisions of Pennsylvania's definition, there is no such similar provision in the Federal regulations. As a result, we cannot require Pennsylvania to retain the buffer zone protections because its deletion will not make Pennsylvania's program less effective than Federal regulations.

4. The revision to the definition of historic lands should include additional examples of what constitutes historic lands to include "historic or cultural districts and paleontological sites" at 25 Pa. Code 86.101.

We have considered this comment and find that the definition is substantively identical to, and no less effective than, the Federal definition of "historic lands" found at 30 CFR 762.5.

5. The proposed revision to the definition of surface mining operation at 25 Pa. Code 86.101 deletes references to surface impacts by underground mining, which is not consistent with SMCRA or the Federal regulations.

As stated in our findings, we promulgated a rule on December 17, 1999, at 30 CFR 761.200(a), concerning our interpretation of the definition of surface coal mining operations. Please refer to that finding for further discussion of the interpretative rule and its application. As previously discussed, we are approving the deletion of the language with the understanding that Pennsylvania will implement the definition of "surface mining operations" in the same manner as contemplated by 30 CFR 761.200(a).

6. The deletion of the words "on or eligible for inclusion" to the National Register of Historic Places at 25 Pa. Code 86.102(3), so that only sites included on the National Register are protected from mining, conflicts with Section 106 of the National Historic Preservation Act and 36 CFR 800.2.

The Federal rule at 30 CFR 761.11(c) does not prohibit mining that may affect places eligible for listing on the National Register of Historic Places. The Federal rule only prohibits mining that will affect places listed on the National Register of Historic Places. Therefore, we find the proposed revision consistent with Federal law.

7. Revising the regulations at 25 Pa. Code 86.103(e) that require the Department to notify Federal, State, or Local Agencies with jurisdiction over a

publicly owned park or place on the National Register of Historic Places when it is determined that the adverse effects will adversely affect the park or place.

The revision by Pennsylvania is to delete "may" and insert "will" with respect to adversely affect. The Federal regulation at 30 CFR 761.11(d) does not require procedures for joint approval when the publicly owned park or the historic place may be adversely affected by coal mining operations. The Federal rules only require such approval when it will affect such properties.

Accordingly, as we have determined in the findings, the proposed revision is no less effective than 30 CFR 761.11(d).

The PHMC also wants the old language of "historic" retained in this section. However, the deletion of the word "historic" is consistent with the Federal language at 30 CFR 761.11(d). Additionally, Pennsylvania has retained the reference to the National Register of Historic Places.

8. The changes to 25 Pa. Code 86.121 regarding criteria and procedures for designating areas unsuitable for mining does not adequately protect cultural resources because of its emphasis from areas designated as unsuitable for surface mining operations to areas exempt from designation as unsuitable for mining.

Pennsylvania's changes to 25 Pa. Code 86.121 make that section mean the same as the corresponding Federal regulation at 30 CFR 762.13. Because the meaning of that section is the same as the Federal regulation, we have found it to be no less effective than the Federal regulation and we approved it. We did not find that Pennsylvania's change provides less protection to cultural resources.

9. The revisions at 25 Pa. Code 86.123(c)(5) that give the right to petition only to people who can demonstrate an "injury in fact" was objected to because the PHMC believes such a test makes it so that only individuals who own property can petition to have land designated as unsuitable for mining.

Pennsylvania's "injury in fact" test is substantively identical to the Federal "injury in fact" test at 30 CFR 764.13(a). In its submission, Pennsylvania indicated that the purpose for adding this language is to make the section consistent with the Federal rules. We have determined that the proposed revision is one of the criteria for the right to petition for lands unsuitable. Therefore, we are finding that this proposed change is no less effective than the Federal regulations.

10. The PHMC objects to all the changes where the EQB was replaced by PADEP. PHMC objects to making

PADEP responsible for hearing lands unsuitable petitions as would be required in 25 Pa. Code 86.124(c) and 86.125(a) instead of EQB as formerly required.

The Federal regulations at 30 CFR 764.17 require the regulatory authority to conduct hearings. In Pennsylvania, the regulatory authority is PADEP. As a result, Pennsylvania's change does not make it less effective than the corresponding Federal regulations.

11. The PHMC objects to coal exploration within areas designated unsuitable for mining at 25 Pa. Code 86.129(b) and believes it would directly impact cultural resources. The Federal regulations at 30 CFR 762.15 allow coal exploration operations within areas designated unsuitable for mining if such operations are conducted in accordance with the regulatory program. Pennsylvania's regulations at 25 Pa. Code 86.129 and 86.133 require that the exploration will be conducted to preserve and protect the applicable values and uses of the area. Therefore, there will be no impact to such cultural resources. We find that the proposed revisions are no less effective than 30 CFR 762.15.

## V. OSM's Decision

Based on the above findings, we approve, with the exceptions noted below, the amendment Pennsylvania sent us on November 22, 1999, that was clarified by letter dated February 13, 2002.

We do not approve 25 Pa. Code 86.124(f) and 25 Pa. Code 86.125(j) to the extent that these sections would allow Pennsylvania more time to complete a final written decision on a lands unsuitable for surface mining activities petition than is allowed by the provisions of the Federal regulations at 30 CFR 764.19(b).

To implement this decision, we are amending the Federal regulations at 30 CFR part 938, which codify decisions concerning the Pennsylvania 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 demonstrate that the State has the capability of carrying out the provisions of the Act and meeting its purposes. Making this regulation effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

### *Effect of OSM'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 change 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 the oversight of the Pennsylvania program, we will recognize only the statutes, regulations, and other materials we have approved, together with any consistent implementing policies, directives, and other materials. We will require Pennsylvania to enforce only approved provisions.

## VI. Procedural Determinations

### *Executive Order 12630—Takings*

In this rule, the State is adopting valid existing rights standards that are similar to the standards in the Federal definition at 30 CFR 761.5. Therefore, these provisions have the same takings implications as the Federal valid existing rights rule. The takings implications assessment for the Federal valid existing rights rule appears in Part XXIX.E of the preamble to that rule. See 64 FR 70766, 70822–27, December 17, 1999. The provisions in the rule based on other counterpart Federal regulations do not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulations.

### *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 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 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 the Federal regulations at 30 CFR §§ 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

### *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 pursuant to SMCRA.

### *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. Pennsylvania does not regulate any Native Tribal lands.

### *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*

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

### *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.*).

### *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.*). 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. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon 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 Pennsylvania 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 an unfunded mandate on State, local, or tribal governments or the private sector of \$100 million or more in any given year. This determination is based upon the fact that the Pennsylvania 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 did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 938

Intergovernmental relations, Surface mining, Underground mining.

Dated: June 9, 2003.

Brent Wahlquist,

Regional Director, Appalachian Regional Coordinating Center.

For the reasons set out in the preamble, 30 CFR part 938 is amended as set forth below:

PART 938—PENNSYLVANIA

1. The authority citation for part 938 continues to read as follows:

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

2. Section 938.12 is amended by adding paragraph (b) as follows:

§ 938.12 [Amended]

\* \* \* \* \*

(b) We are not approving the following portions of provisions of the proposed program amendment that Pennsylvania submitted on November 22, 1999:

(1) Sections 25 Pa. Code 86.124(f) and 25 Pa. Code 86.125(j) are not approved to the extent that these sections would allow Pennsylvania more time to

complete a final written decision on a lands unsuitable for surface mining activities petition than is allowed by the provisions of the Federal regulations at 30 CFR 764.19(b).

3. Section 938.15 is amended in the table by adding a new entry in chronological order by "DATE OF FINAL PUBLICATION" to read as follows:

§ 938.15 Approval of Pennsylvania regulatory program amendments.

\* \* \* \* \*

Table with 3 columns: Original amendment submission date, Date of final publication, Citation/description. Row 1: November 22, 1999, July 7, 2003, 25 Pa. Code 86.1 definition of "valid existing rights;" 86.101 definitions of "fragile lands," "historic lands," "public building," "public park," "renewable resource lands," "significant recreational value, timber, economic or other values incompatible with surface mining operations," and "surface mining operations;" 86.102(1), (3) through (5), and (7) through (12); 86.103(c), (d), and (e); 86.121, 86.123(c) and (c)(5); 86.124(a), (c), (d) and (f); 86.125; 86.126; 86.127; 86.128; 86.129; and 86.130(b).

[FR Doc. 03-17078 Filed 7-3-03; 8:45 am] BILLING CODE 4310-05-P

DEPARTMENT OF THE INTERIOR Office of Surface Mining Reclamation and Enforcement

30 CFR Part 943

[TX-043-FOR]

Texas Regulatory Program

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

ACTION: Final rule; approval of amendment.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are approving an amendment to the Texas regulatory program (Texas program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). The Railroad Commission of Texas, Surface Mining and Reclamation Division (Texas or Commission) proposed to add a new rule to its administrative hearing procedures concerning telephonic hearing proceedings. Texas intends to revise its program to improve operational efficiency.

EFFECTIVE DATE: July 7, 2003.

FOR FURTHER INFORMATION CONTACT: Michael C. Wolfrom, Director, Tulsa Field Office. Telephone: (918) 581-

6430. Internet address: mwolfrom@osmre.gov.

SUPPLEMENTARY INFORMATION:

- I. Background on the Texas Program
II. Submission of the Amendment
III. OSM's Findings
IV. Summary and Disposition of Comments
V. OSM's Decision
VI. Procedural Determinations

I. Background on the Texas 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 this Act \* \* \*; and rules and regulations consistent with regulations issued by the Secretary pursuant to this 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 Texas program effective February 16, 1980. You can find background information on the Texas program, including the Secretary's findings, the disposition of comments, and the conditions of approval, in the February 27, 1980, Federal Register (45 FR 12998). You can find later actions on the Texas program at 30 CFR 943.10, 943.15, and 943.16.

II. Submission of the Amendment

By letter dated February 12, 2003 (Administrative Record No. TX-654), Texas sent us an amendment to its program under SMCRA (30 U.S.C. 1201 et seq.). Texas sent the amendment at its own initiative. Texas proposed to add Texas Administrative Code (TAC) 1.130 to Title 16, Subchapter G, of its General Rules of Practice and Procedure. This new rule contains the procedures for conducting all or part of a prehearing conference or hearing by telephone.

We announced receipt of the proposed amendment in the April 10, 2003, Federal Register (69 FR 17566). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the adequacy of the amendment. We did not hold a public hearing or meeting because no one requested one. The public comment period ended on May 12, 2003. We did not receive any public comments.

III. OSM's Findings

Following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. We are approving the amendment as described below.

16 TAC 1.130 Telephonic Proceedings

As shown below, the Commission's rule at 16 TAC 1.130 outlines the method to request a telephonic