

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

proceeding, how the proceeding will be conducted, the establishment of the record in such a proceeding, and the grounds for a default judgment or a dismissal.

(a) The hearings examiner, on the timely written motion of a party or on the examiner's own motion and with the consent of all parties to a protested proceeding, may conduct all or part of a prehearing conference or hearing by telephone.

(b) A party may request to appear at a prehearing conference or a hearing by telephone.

(1) All motions requesting a telephonic appearance or proceeding shall be in writing, shall be filed at the commission and served on all parties not less than 20 days prior to the proceeding, and shall include the pertinent telephone number(s).

(2) If the request is to conduct only a portion of the proceeding by telephonic means, the requesting party shall specify the part of the proceeding to be conducted telephonically.

(3) If the proceeding involves testimony, the requesting party shall identify the witnesses and, for expert witnesses, their qualifications to testify as experts.

(4) Responses to a request for telephonic appearance shall be made in accordance with § 1.28 of this title (relating to Responsive Pleadings and Emergency Action).

(5) Upon agreement of the parties or a finding of good cause, the examiner may modify the times for filing a request for telephonic appearance and/or responses to such a request, and for filing witness information.

(c) In considering whether conducting all or part of a prehearing conference or hearing by telephone is feasible, the hearings examiner shall ensure that the telephonic hearing will provide due process and will be fair, and shall take into account the following factors:

(1) whether a party's request for such is timely;

(2) whether all parties to a protested proceeding have agreed in writing, filed no later than ten days prior to the proceeding, to conducting all or part of the proceeding via telephone;

(3) whether the parties have demonstrated:

(A) how witnesses will be separated;

(B) how coaching of witnesses will be prevented;

(C) why observing a witness's oral demeanor is adequate to make a reliable determination of the truth of the witness's testimony; and

(D) how the witnesses' and parties' identities will be established;

(4) the number of parties;

(5) the number of witnesses;

(6) the number and type of exhibits;

(7) the distance of the parties or witnesses from Austin;

(8) the nature of the hearing; and

(9) any other pertinent factors which the examiner believes may affect the proceeding.

(d) The hearings examiner shall issue a ruling not less than ten days prior to the proceeding stating whether the proceeding will be conducted, in whole or in part,

telephonically. In addition, the examiner shall notify all parties by telephone or by facsimile transmission of the ruling. The parties may waive this notice deadline.

(e) Unless otherwise directed by the hearings examiner, the proponent of any documentary evidence other than prefiled written testimony filed pursuant to the provisions of § 1.105 of this title (relating to Written Testimony) shall serve copies of that evidence on all parties and the hearings examiner no later than five business days prior to the telephonic proceeding. All documentary evidence shall be clearly labeled with the name of the sponsoring party and a unique document number. With the consent of the hearings examiner, a party may supplement or amend evidence less than three days prior to the proceeding or during the proceeding.

(f) All substantive and procedural rights apply to telephonic proceedings, subject only to the limitations of the physical arrangement.

(g) The time and location of telephonic proceedings shall be properly posted, and any person may, by advance request, be present in the room with the hearings examiner.

(h) The hearings examiner shall conduct telephonic proceedings using a speaker telephone. The hearings examiner shall make a tape recording of the telephonic proceeding, or the proceeding may be recorded by a court reporter by prior arrangement, pursuant to § 1.129 of this title (relating to Reporters and Transcripts).

(i) The telephonic proceeding, including arranging the conference call, shall be initiated by the hearings examiner. When all parties appearing telephonically are connected, the hearings examiner shall affirm the parties' consent to the telephonic proceeding.

(1) The hearings examiner shall then call the proceeding to order and ask for all parties to identify themselves, their locations, and their witnesses.

(2) The hearings examiner shall affirm on the record the prior written agreement from all parties consenting to the telephonic appearance or proceeding and shall state whether the proceeding is being memorialized by means of a tape recording or transcription of the proceeding.

(3) The hearings examiner shall administer the oath to each witness individually, prior to his or her testimony.

(j) If the hearings examiner is prevented from establishing the telephonic connection for the proceeding through circumstances which are beyond the control of any party or the examiner; which cannot be attributed to any party's intentional or negligent conduct; and which continue for at least 30 minutes past the time for beginning the hearing, the hearings examiner may postpone, continue, or recess the proceeding, as the hearings examiner deems appropriate, until the earliest possible date and time for the proceeding to be reconvened. The hearings examiner shall state on the record or in writing to all parties the date, time, and location of the reconvened proceeding.

(k) If the hearings examiner decides or any party requests not to proceed with the

telephonic proceeding at any time, or asserts that the presence of one or more of the parties or witnesses in the hearing room is necessary for full disclosure of the facts and states the reasons for such an assertion, the hearings examiner may postpone, continue, or recess the proceeding, as the hearings examiner deems appropriate, until the earliest possible date and time for the proceeding to be reconvened with all participants present in person. The examiner shall state on the record and in writing to all parties the reasons for terminating the telephonic proceeding and the date, time, and location of the reconvened proceeding.

(l) The commission may consider the following events to constitute a failure to appear and grounds for default or dismissal:

(1) failure to answer the telephone for more than 10 minutes after the scheduled time for the proceeding;

(2) failure to free the telephone for the proceeding for more than 10 minutes after the scheduled time for the proceeding;

(3) failure to be ready to proceed with the proceeding within 10 minutes of the scheduled time; and

(4) a party's intentional disconnection from the call.

(m) In the event of accidental disconnection of one or more parties to the proceeding, the hearings examiner shall immediately recess the hearing and attempt to re-establish the connection or connections.

(1) If reconnection is achieved within 30 minutes, the hearings examiner may resume the telephonic hearing, or may postpone, continue, or recess the proceeding, as the hearings examiner deems appropriate, until the earliest possible date and time for the proceeding to be reconvened. The examiner shall state on the record or in writing to all parties the date, time, and location of the reconvened proceeding.

(2) If reconnection cannot be achieved within 30 minutes, then the hearings examiner shall recess the telephonic proceeding until a date and time certain and at a location specified in a written notice of reconvened hearing.

There are no Federal counterparts to the Commission's proposal to conduct all or part of a prehearing conference or administrative hearing by telephone. Neither SMCRA at section 525 nor the Federal regulations at 30 CFR 775.11 and 43 CFR part 4 address telephonic proceedings. However, nothing in the Commission's proposed rule supersedes or replaces its previously approved general rules of practice and procedures for hearings. The Commission is merely offering another method by which parties may appear at prehearing conferences or hearings. The proposed procedures for telephonic proceedings will provide due process for all parties involved in a prehearing conference or hearing. As stated in 16 TAC 1.130(c), the hearings examiner must ensure that the telephonic hearing will provide due process and will be fair. Black's Law Dictionary, Seventh Edition, defines due

process as the conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case. Also, as provided in 16 TAC 1.130(f), all substantive and procedural rights apply to telephonic proceedings. While there are no Federal counterpart provisions concerning telephonic proceedings, we find that the provisions of the proposed rule at 16 TAC 1.130 are not inconsistent with the Federal general rules relating to procedure and practice for administrative hearings found at 30 CFR 775.11(b)(3), 43 CFR 4.20–4.24, and 43 CFR 4.1104–4.1115. Therefore, we are approving them.

#### IV. Summary and Disposition of Comments

##### *Public Comments*

We asked for public comments on the amendment, but did not receive any.

##### *Federal Agency Comments*

On February 26, 2003, 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 Texas program (Administrative Record No. TX–654.01). We did not receive any comments.

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

Under 30 CFR 732.17(h)(11)(ii), we are required to get a written concurrence from 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 Texas proposed to make in this amendment pertain to air or water quality standards. Therefore, we did not ask EPA to concur on the amendment.

On February 26, 2003, under 30 CFR 732.17(h)(11)(i), we requested comments on the amendment from the EPA (Administrative Record No. TX–654.01). 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 on amendments that may have an effect on historic properties. On February 26, 2003, we requested comments on Texas' amendment (Administrative Record No.

TX–654.01), but neither responded to our request.

#### V. OSM's Decision

Based on the above findings, we approve the amendment Texas sent us on February 12, 2003.

To implement this decision, we are amending the Federal regulations at 30 CFR part 943, which codify decisions concerning the Texas 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 rule effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

#### VI. Procedural Determinations

##### *Executive Order 12630—Takings*

This rule does not have takings implications. This determination is based on the fact that the telephonic hearing provisions proposed by Texas are administrative and procedural in nature and are not expected to have a substantive effect on the regulated industry.

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

This rule is exempted from review by the Office of Management and Budget (OMB) 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. 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. This determination is based on the fact that the Texas program does not regulate coal exploration and surface coal mining and reclamation operations on Indian lands. Therefore, the Texas program has no effect on Federally-recognized Indian tribes.

##### *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*

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.*). This determination is based upon the fact that the telephonic hearing provisions proposed by Texas are administrative and procedural in nature and are not expected to have a substantive effect on the regulated industry.

**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 governmental 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 telephonic hearing provisions proposed by Texas are administrative and procedural in nature and are not expected to have a substantive effect on the regulated industry.

**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 telephonic hearing provisions proposed by Texas are administrative and procedural in nature

and are not expected to have a substantive effect on the regulated industry.

**List of Subjects in 30 CFR Part 943**

Intergovernmental relations, Surface mining, Underground mining.

Dated: June 5, 2003.

**Charles E. Sandberg,**

*Acting Regional Director, Mid-Continent Regional Coordinating Center.*

■ For the reasons set out in the preamble, 30 CFR part 943 is amended as set forth below:

**PART 943—TEXAS**

■ 1. The authority citation for part 943 continues to read as follows:

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

■ 2. Section 943.15 is amended in the table by adding a new entry in chronological order by “Date of final publication” to read as follows:

**§ 943.15 Approval of Texas regulatory program amendments.**

\* \* \* \* \*

| Original amendment submission date | Date of final publication | Citation/description |
|------------------------------------|---------------------------|----------------------|
| * * * * *                          | * * * * *                 | * * * * *            |
| February 12, 2003                  | July 7, 2003              | 16 TAC § 1.130       |

[FR Doc. 03-17082 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 948**

[WV-098-FOR]

**West Virginia Regulatory Program**

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

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

**SUMMARY:** We are approving, with one exception, a proposed amendment to the West Virginia surface coal mining regulatory program (the West Virginia program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). The program amendment consists of changes to the Code of West Virginia (W. Va. Code) as contained in House Bills 2881 and 2882, and changes to the State’s Coal Related Dam Safety Rules at Code of State Regulations (CSR) 38-4, and West

Virginia’s Surface Mining Reclamation Regulations at CSR 38-2 as contained in House Bill 2603. The amendment concerns a variety of topics including bond release, dam safety, permit application requirements, drainage and sediment control systems, fish and wildlife considerations, revegetation, performance standards, inspection and enforcement, coal refuse, and performance standards applicable to reining operations. The amendment is intended to improve the effectiveness of the West Virginia program and to render the West Virginia program no less effective than the Federal regulations.

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

**FOR FURTHER INFORMATION CONTACT:** Mr. Roger W. Calhoun, Director, Charleston Field Office, 1027 Virginia Street East, Charleston, West Virginia 25301. Telephone: (304) 347-7158; Internet address: *chfo@osmre.gov*.

**SUPPLEMENTARY INFORMATION:**

- I. Background on the West Virginia 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 West Virginia 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 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 West Virginia program on January 21, 1981. You can find background information on the West Virginia program, including the Secretary’s findings, the disposition of comments, and conditions of approval of the West Virginia program in the January 21, 1981, **Federal Register** (46 FR 5915). You can also find later actions concerning West Virginia’s program and program amendments at 30 CFR 948.10, 948.12, 948.13, 948.15, and 948.16.