

DEPARTMENT OF THE INTERIOR**Office of Surface Mining Reclamation and Enforcement****30 CFR Part 707**

RIN 1029-AC07

Abandoned Mine Land (AML) Reclamation Program; Enhancing AML Reclamation

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

ACTION: Final rule.

SUMMARY: We are publishing a final rule in response to the decision by the United States Court of Appeals, District of Columbia Circuit, remanding the February 12, 1999, Enhancing AML Reclamation Rule for further explanation as to the types of government expenses that will qualify as government financing under the rule. This rulemaking provides the requested explanation and represents a clarification and not a substantive change to the Abandoned Mine Land (AML) program authorized by the Surface Mining Control and Reclamation Act of 1977 ("SMCRA" or "the Act"). We are also taking this opportunity to explain what is meant by the prohibition in the rule against "in-kind" payments being counted towards the government financing of a "government-financed" construction.

DATES: Effective November 20, 2003.

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SUPPLEMENTARY INFORMATION:**I. Background**

- A. Why are we publishing this rule?
- B. What is the exemption for "government-financed" construction?
- C. What is the AML Reclamation Program?
- D. How is AML reclamation funded and how do States and Indian Tribes implement their programs?
- E. What types of abandoned sites does the Enhancing AML Reclamation Rule target?

II. Discussion of the Final Rule**III. Procedural Determinations****I. Background***A. Why Are We Publishing This Rule?*

On March 13, 1979, OSM published rules implementing the exemption from

SMCRA provisions provided by section 528 of the Act when the extraction of coal is an incidental part of Federal, State, or local government-financed construction. These regulations, codified at 30 CFR part 707 (44 FR 15322), defined "government-financed construction" as meaning "construction funded 50 percent or more by [government] funds. * * *" 30 CFR 707.5. On February 12, 1999, we published the Enhancing AML Reclamation Rule ("Enhancing AML Rule") which amended this definition of "government-financed construction to allow less than 50 percent government financing when the construction project is an approved AML project. (64 FR 7470). The Kentucky Resources Council (KRC) challenged the rule on several counts. *KRC v. Norton*, No. 99-00892 (D.D.C.). In its September 22, 2000 slip opinion, the district court granted the government summary judgment. The KRC appealed that decision to the United States Court of Appeals for the District of Columbia Circuit.

On May 30, 2002, the court of appeals concluded that the Department had not only reasonably interpreted the term "construction" to include AML reclamation projects that involve the incidental extraction of coal but also reasonably determined that, in some circumstances, AML projects to which the government provides less than 50 percent of the financing may qualify as "government-financed" construction. Notwithstanding these conclusions, the court remanded the rule for further explanation as to which government administrative expenses will qualify as "government financing" for the purposes of the exemption from the provisions of the Act. *KRC v. Norton*, No. 01-5263, 2002 WL 1359455 at *2 (D.C. Cir.).

The court further noted that, even though "in kind" payments do not qualify as government financing under 30 CFR 707.5, our 1999 **Federal Register** notice appeared to accept a commenter's suggestion that qualifying government financing includes "in kind payments such as administrative expenses incurred by the AML agency in reviewing and approving the project." *KRC v. Norton* at *2.

We are publishing this rulemaking to provide the explanation required by the court as to which government administrative expenses qualify as "government financing" under 30 CFR 707.5. In addition, we are taking this opportunity to explain what the agency has historically meant by the prohibition in section 707.5 against "in-kind" payments being counted towards the government financing of a

"government-financed" construction. Further, editorial changes have also been made to the definition for clarity.

The preamble to the February 12, 1999, Enhancing AML Rule should be consulted for additional background information. 64 FR 7470.

B. What Is the Statutory Exemption for "Government-Financed" Construction?

Title V of SMCRA, 30 U.S.C. 1251-1279, has regulated surface coal mining operations since 1977 though stringent standards regarding the permitting, mining, and reclamation of such sites. Title V prescribes that "no person shall engage in or carry out on lands within a State any surface coal mining operations unless such person has first obtained a permit issued by such State pursuant to an approved State program or by the Secretary pursuant to a Federal program." 30 U.S.C. 1256. Applicants for a Title V permit must pay a fee to cover all or some of the costs of reviewing, administering, and enforcing the permit (30 U.S.C. 1257). They must submit a reclamation plan (30 U.S.C. 1258) and, after the permit has been approved but prior to issuance of the permit, must file with the regulatory authority a bond to ensure performance of the reclamation plan (30 U.S.C. 1259). Congress, however, exempted some activities from the Title V requirements by providing:

The provisions of this chapter *shall not apply* to any of the following activities:

- (1) the extraction of coal by a landowner for his own noncommercial use from land owned or leased by him; and
- (2) the extraction of coal as an incidental part of Federal, State or local government-financed highway or other construction under regulations established by the regulatory authority.

30 U.S.C. 1278. (Emphasis added).

C. What Is the AML Reclamation Program?

Title IV of SMCRA (30 U.S.C. 1231-1243) established the AML Reclamation Program in response to concern about extensive environmental damage caused by past coal mining activities. The program is funded primarily from a fee collected on each ton of coal mined in the country. This fee is deposited into a special fund, the Abandoned Mine Land Fund (Fund), and is appropriated annually to address abandoned and inadequately reclaimed mining areas where there is no continuing reclamation responsibility by any person under State or Federal law. Under Title IV, the financing of reclamation projects is subject to a priority schedule with emphasis on sites

affecting public health, safety, general welfare and property.

In most cases, the implementation of Title IV authority has been delegated to States. Currently, 23 States and 3 Indian Tribes (the Hopi, the Navajo and the Crow) have authority to receive grants from the Fund. They are implementing Title IV reclamation programs in accordance with 30 CFR Subchapter R, and through implementing guidelines published in the **Federal Register** on March 6, 1980 (45 FR 27123), and revised on December 30, 1996 (45 FR 68777). In States and on Indian lands that do not have a Title IV program, reclamation is carried out by OSM.

D. How Is AML Reclamation Funded and How Do States and Indian Tribes Implement Their Programs?

State and Indian Tribal AML programs are funded at 100 percent by OSM from money appropriated annually from the AML Fund. The States and Indian Tribes must submit grant applications in accordance with procedures established by OSM and existing grant regulations found at 30 CFR part 886. They may undertake only projects that are eligible for financing as described in either section 404 or section 411 of SMCRA and that meet the priorities established in section 403 of SMCRA. OSM requires that the State Attorney General or other chief legal officer certify that each reclamation project to be undertaken is an eligible site. Certain environmental, fiscal, administrative, and legal requirements must be in place in order for a program to receive grants for reclamation. An extensive description of these requirements can be found at 30 CFR part 884.

E. What Types of Abandoned Sites Does the Enhancing AML Rule Target?

As discussed in substantial detail in the February 12, 1999, **Federal Register** notice, the Enhancing AML Rule will facilitate the reclamation of certain abandoned mine lands that have little likelihood of being mined by the private sector or being reclaimed under the current Title IV program because of severely limited program funds. 64 FR 7471.

II. Discussion of the Final Rule

We are publishing this rulemaking in response to the D.C. Circuit's remand of our Enhancing AML Reclamation Rule for further explanation as to which government expenses will qualify as government-financing under the rule. We are doing this to address the concern expressed by the court regarding our preamble discussion interpreting the

statutory term "government-financed construction." In our preamble discussion we stated that all expenses incurred by the AML agency such as project design, project solicitation, project management, and project oversight qualify as government financing under the rule. 64 FR 7474. The court found that it was "counter-intuitive" to suggest that Congress intended traditional government functions "such as "oversight" to ensure that a contractor complies with the law, or reviewing and approving proposed Title IV projects—would qualify as government financing. The court continued that even though § 707.5 clearly states that "in kind" payments do not qualify as government-financed construction, our **Federal Register** notice appeared to accept a commenter's suggestion that an agency's administrative expenses were a form of "in kind" payments.

Finally, the court posited a permissible interpretation of the rule under which the traditional oversight and compliance-review functions of an AML agency would not be counted as government financing. The court concluded with two scenarios in which agency expenses would reasonably count as government financing. *KRC v. Norton* at *2. It is our intent to interpret the rule consistently with this interpretation and these two scenarios. Therefore, agency administrative expenses that are traditionally attributed to a particular type of government construction project will not count towards the "government financing" of that project. In other words, the only administrative expenses incurred by a government agency that can count as part of the "government financing" of a project are those expenses that are outside the normal scope of that agency's cost of doing business.

As an example, most AML agencies accomplish reclamation work through contractors. Depending upon an agency's internal procedures, some agencies regularly require the contractor to perform all engineering and design work. Other agencies may regularly hire an outside engineering firm or do the work themselves. Should a government agency that regularly requires the contractor to perform project engineering and design work decide to do such work itself on a specific project, the expense of that project's engineering and design work would qualify towards the "government financing" of that project. This expense qualifies as "government financing" because it is a government expense not regularly attributable to such projects. In contrast, a government agency that regularly does

its own engineering and design work cannot consider those expenses towards qualifying the project as being "government-financed" for they are expenses that the agency regularly attributes to such projects.

Critics of the 1999 Enhancing AML Rule were concerned that if the expenses of traditional government functions such as oversight and project review counted towards "government financing," there might be a large number of government-financed construction projects where the government would do no actual financing towards the physical reclamation of the site. In light of that concern, we reviewed the instances where the 1999 rule has been used to allow for less than 50 percent government financing of approved AML construction projects. Thus far, four projects have been completed in three different states. In each case, a tremendous savings was realized at relatively little cost to the government reclamation authority through the sale of coal whose extraction was an incidental part of the required reclamation. Reclamation that would have otherwise cost the Title IV authorities an estimated \$1.5 million was accomplished at a total cost to those authorities of somewhat less than \$200,000. It is significant that in each case, the AML authority paid substantial monies to the contractor to physically reclaim the site. While OSM anticipates that other projects will be conducted under the Enhancing AML rule, the agency does not expect the number of such projects to be large.

We would next like to take this opportunity to explain what OSM has always intended by the regulatory prohibition in 30 CFR 707.5 against "in kind" payments being counted towards the government financing of "government-financed" construction. This prohibition first appeared in the March 13, 1979, rulemaking and continued substantially unchanged in the 1999 Enhancing AML Reclamation Rule. As discussed above, the 2002 Circuit Court decision noted that the 1999 preamble appeared to accept a commenter's suggestion that qualifying government financing includes "in kind" payments such as administrative expenses incurred by the AML agency in reviewing and approving the project. *Id.* at *2. The cited preamble language response was not, however, intended to address the commenter's suggestion that administrative expenses incurred by the agency in reviewing and approving a project were "in kind" payments. Rather, it was OSM's intent to address commenter's concern that these

administrative expenses would not qualify as government financing under § 707.5. OSM has never considered the administrative expenses attributed by the government to a particular project to be a form of “in kind” payments. Instead, OSM has always considered “in kind” payments to be contributions to the government by third parties of labor, materials, equipment or services that are used by the government to accomplish required reclamation. As an example of such “in kind” payments to the government, a not-for-profit watershed group might volunteer to plant trees as part of a reclamation project and a local nursery might contribute the trees. Pursuant to OSM’s longstanding interpretation of the “in-kind” payment prohibition of § 707.5, neither the value of the contributed planting services nor trees could ever count towards the government financing of the project.

Finally, for clarity, we are also making non-substantive revisions to the definition of “government-financed construction” at 30 CFR 707.5. We have substituted the words “Government financing” for the word “Funding.” The definition will then read in pertinent part, as follows: “*Government financing* at less than 50 percent may qualify if the construction is undertaken as an approved reclamation project under Title IV of the Act.” (Revision in italics.) The limitation of the provision to government financing is already implicit in the definition but now is made explicit.

III. Procedural Determinations

1. Executive Order 12866—Regulatory Planning and Review

This document is a significant rule and has been reviewed 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.

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 or entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients.

d. This rule does raise legal or policy issues.

These determinations are based on the analysis performed for the Enhancing AML Reclamation Rule (RIN 1029–

AB89) published on February 12, 1999, at 64 FR 7470.

2. 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 on the analysis performed for the Enhancing AML Reclamation Rule (RIN 1029–AB89) published on February 12, 1999, at 64 FR 7470. At that time it was determined that the rule, when implemented, would slightly improve business opportunities for all entities, small and large, by increasing the likelihood that additional reclamation projects would be undertaken each year. Further, the economic impact of the rule on small businesses was determined to be minimal. This determination was based on the facts that:

- the rule would not increase the cost or burden on businesses reclaiming sites eligible under the existing regulations;
- the rule makes it possible for businesses to undertake the reclamation of areas not previously reclaimed under existing regulations;
- the undertaking of the reclamation projects opened up by the rule is entirely voluntary; and
- the only increase in cost due to these new projects will be that for documentation related to the removal and sale of coal as an incidental part of the reclamation project. This incremental cost will be factored into the cost of the project bid submitted to the Title IV governmental authority and should prove to be an insignificant percentage of the total bid. Those who do participate and bid on reclamation projects resulting from the rule will do so to reap an economic benefit in the form of a profit on the sale of coal incidentally mined during the reclamation of the site. The total amount of Federal money that will be available each year for AML projects will neither increase nor decrease as a result of this rule.

3. 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. It would allow AML agencies to work in partnership with contractors to leverage finite AML Reclamation Fund dollars to

accomplish more reclamation. To offset the reduction in government financing, the contractor would be allowed to sell coal found incidental to the project and recovered as part of the reclamation. Participation under the rule change is strictly voluntary and those participating are expected to do so because of the economic benefit.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions because the rule does not impose any new requirements on the coal mining industry or consumers, and State and Indian AML program administration is funded at 100 percent by the Federal government.

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.

These determinations are based on the analysis performed for the Enhancing AML Reclamation Rule (RIN 1029–AB89) published on February 12, 1999, at 64 FR 7470.

4. 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, local or Tribal governments or the private sector. The administration of the AML program by a State or Indian Tribe is funded at 100 percent by the Federal Government and the decision by a State or Indian Tribe to participate is voluntary. A statement containing the information required by the Unfunded Mandates Reform Act (1 U.S.C. 1531, *et seq.*) is not required.

5. Executive Order 12630—Takings

In accordance with Executive Order 12630, the rule does not have significant takings implications. The rule would allow AML agencies to work in partnership with contractors to leverage finite AML Reclamation Fund dollars to accomplish more reclamation. To offset the reduction in government financing, the contractor would be allowed to sell coal found incidental to the project and recovered as part of the reclamation.

6. Executive Order 13132—Federalism

In accordance with Executive Order 13132, the rule does not have significant Federalism implications to warrant the preparation of a Federalism Assessment for the reasons discussed above.

7. 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.

8. 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, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. As previously stated, three tribes will be affected by the rule, the Hopi, the Navajo and the Crow. The administration of the AML program by a State or Indian Tribe is funded at 100 percent by the Federal Government and the decision by a State or Indian Tribe to participate is voluntary.

9. 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 administration of the AML program will not have a significant effect on the supply, distribution, or use of energy.

10. Paperwork Reduction Act

This rule does not contain a collection of information requiring clearance under the Paperwork Reduction Act by the Office of Management and Budget.

11. National Environmental Policy Act

OSM prepared an environmental assessment (EA) for the Enhancing AML Reclamation Rule (RIN 1029-AB89) published on February 12, 1999, at 64 FR 7470 and made a Finding of No Significant Impact (FONSI) on the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C). The EA and FONSI are on file in the OSM Administrative Record for the rule. That determination is valid for the publication of this rule.

12. Administrative Procedure Act

This final rule has been issued without prior public notice or opportunity for public comment. The Administrative Procedure Act (APA) (5 U.S.C. 553) provides an exception to the notice and comment procedures when an agency finds there is good cause for dispensing with such procedures on the basis that they are impracticable, unnecessary or contrary to the public interest. OSM has determined that under 5 U.S.C. 553(b)(3)(B) good cause exists for dispensing with the notice of proposed rulemaking and public comment procedures for this rule. Specifically, this rulemaking clarifies the implementation of existing regulatory language and does not add or remove any substantive requirements. For the same reasons, OSM has good cause under 5 U.S.C. 553(d) of the APA to have the regulation become effective on a date that is less than 30 days after the date of publication in the **Federal Register**.

List of Subjects in 30 CFR Part 707

Highways and roads, Incidental mining, Reporting and recordkeeping

requirements, Surface mining, Underground mining.

Dated: November 3, 2003.

Rebecca W. Watson,

Assistant Secretary, Land and Minerals Management.

For the reasons given in the preamble, 30 CFR part 707 is amended as set forth below:

PART 707—EXEMPTION FOR COAL EXTRACTION INCIDENT TO GOVERNMENT-FINANCED HIGHWAY OR OTHER CONSTRUCTION

■ 1. The authority citation for part 707 continues to read as follows:

Authority: Secs. 102, 201, 501, and 528 of Pub. L. 95-87, 91 Stat. 448, 449, 467, and 514 (30 U.S.C. 1202, 1211, 1251, 1278).

■ 2. In § 707.5, the definition of *Government-financed construction* is revised to read as follows:

§ 707.5 Definitions.

* * * * *

Government-financed construction means construction funded at 50 percent or more by funds appropriated from a government financing agency's budget or obtained from general revenue bonds. Government financing at less than 50 percent may qualify if the construction is undertaken as an approved reclamation project under Title IV of the Act. Construction funded through government financing agency guarantees, insurance, loans, funds obtained through industrial revenue bonds or their equivalent, or in-kind payments does not qualify as government-financed construction.

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