DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 732

RIN 1029–AC06

Revisions to the State Program Amendment Process

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

ACTION: Proposed rule.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), propose to revise our regulations governing the processing of State program amendments submitted by a State for approval under the Surface Mining Control and Reclamation Act of 1977. When a State with an approved program fails to amend its program as directed, our existing regulations require us to begin proceedings to either enforce that part of the State program that should have been amended, or withdraw approval in whole or in part and implement a Federal program. This rule would provide us with the discretion to consider the entire performance of the State in effectively implementing its program before determining that proceedings leading to Federal enforcement are warranted.

DATES: *Written comments:* We will accept written comments on the proposed rule until 5 p.m., Eastern Time, on February 2, 2004.

Public hearings: Upon request, we will hold a public hearing on the proposed rule at a date, time, and location to be announced in the **Federal Register** before the hearing. We will accept requests for a public hearing until 5 p.m., Eastern Time, on December 24, 2003.

ADDRESSES: If you wish to comment, you may submit your comments on this proposed rule by any one of three methods. You may mail or hand carry comments to the Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 101, 1951 Constitution Avenue NW., Washington, DC 20240. You may also submit your comment via the Internet to OSM's Administrative Record at: *osmrules@osmre.gov.*

You may submit a request for a public hearing orally or in writing to the person specified under **FOR FURTHER INFORMATION CONTACT**. We will announce the address, date, and time for any public hearing before the hearing. Any disabled individual who requires special accommodation to attend a public hearing should also contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT: Andy DeVito, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue NW., MS–210–SIB, Washington, DC 20240; Telephone: (202) 208–2701. E-mail: *adevito@osmre.gov.*

SUPPLEMENTARY INFORMATION:

I. Why Are We Revising Our Regulations?

We propose to revise our regulations governing the processing of State program amendments submitted by a State for approval under the Surface Mining Control and Reclamation Act of 1977 (SMCRA) in order to provide OSM with more discretion in resolving issues affecting approved State programs and the State program amendment process.

What Is an Approved State Program?

In SMCRA, section 503 of Title V grants each State in which there are or may be surface coal mining operations conducted on non-Federal lands the right to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations. To do so, the State must submit to the Secretary of the Interior for approval, a State program that demonstrates that the State has the capability of carrying out the provisions of SMCRA. Since its enactment in 1977, 24 States have chosen to exercise such responsibility and have programs approved by us. The implementing regulations at 30 CFR part 732 provide the criteria and procedures for decisions to approve or disapprove submissions of State programs.

What Is a State Program Amendment?

Although not expressly provided for in SMCRA, OSM also, by regulation at 30 CFR 732.17, provides criteria and processes for amending State programs in anticipation of a need to modify or update them as conditions or national rules change. Occasionally, for various reasons such as legislative changes to the provisions of SMCRA or litigation resulting in adverse court decisions, we revise our regulations. As a result, all 24 States with approved programs may be required to amend their approved State programs in order to be ''no less effective'' than the OSM regulatory program. Also, States may decide to amend their programs on their own initiative.

If we determine that a State program amendment is required, we notify the State regulatory authority of the need to amend its approved program. Within 60 days after notification, the State must submit (1) a proposed written amendment, or (2) a description of an amendment to be proposed that meets the requirements of SMCRA and OSM's implementing regulations, and a timetable for enactment that is consistent with established administrative or legislative procedures in the State. If the State regulatory authority does not submit the proposed amendment or a description and timetable within 60 days from the receipt of the notice, or does not subsequently comply with the submitted timetable, or if the amendment is not approved, then pursuant to 30 CFR 732.17(f)(2), the Director of OSM (Director) must begin proceedings under 30 CFR part 733.

What Is a 733 Proceeding?

Under 30 CFR part 733, which is based on sections 504(b)–(d) and 521(b) of SMCRA, if the Director has reason to believe that a State is not effectively implementing, administering, maintaining, or enforcing any part of its approved State program, then the Director must promptly notify the State regulatory authority in writing. The notification must provide sufficient information to allow the State to determine what portions of the program the Director believes are not being effectively implemented, administered, maintained, or enforced; provide the reasons for such belief; and specify the time period for the State to accomplish any necessary remedial actions. If, after certain hearing procedures, the Director finds that (1) the State has failed to implement, administer, maintain, or effectively enforce all or part of its approved State program, and (2) that the State has not demonstrated its capability and intent to administer the State program, then the Director must take one of the following actions. The Director must either (1) initiate direct Federal enforcement of all or part of the State program; or (2) recommend to the Secretary of the Interior that he or she withdraw approval of the State program, in whole or in part, and establish a Federal program for the State.

What Are the Consequences of a 733 Action?

The substitution of Federal enforcement under 30 CFR 733.12 for all or part of an approved State program results in substantial disruption to the

State, the Federal government, and the coal industry. OSM has initiated a 733 action nine times in its history. We initiated action under part 733 in Oklahoma (1981, 1983, and 1993), Kansas (1983), Tennessee (1983), Montana (1993), Utah (1995), West Virginia (2001), and Missouri (2003). In Montana, Utah, Kansas, West Virginia, and the Oklahoma actions in 1981 and 1993, the issues were resolved without Federal takeover of any part of the State program. In three cases, OSM did take over partial enforcement of a State program—Oklahoma (1984), Tennessee (1984), and Missouri (2003). In Oklahoma, the State took action to address the deficiencies, and full authority was later returned to the State. In Tennessee, the State chose instead to terminate its approved program and repealed the Tennessee Coal Surface Mining Act and its implementing regulations. OSM promulgated a Federal program for that State in 1984. After implementing the Federal program, we were required under section 504(d) of SMCRA to review all the permits issued by the State of Tennessee under the standards of the new Federal program. The substitution of Federal enforcement in Tennessee resulted in delays in processing and issuing new coal permits in the State. While the Tennessee situation was an extreme example, disruption always occurs when there is a substitution of Federal enforcement for all or part of an approved State program.

The most recent 733 action in Missouri is still unresolved. On July 21, 2003, the Governor of Missouri notified us that the State of Missouri is experiencing difficult budget and revenue shortfalls. As a result of the situation, the Governor requested assistance with permit reviews, inspection activities, and general oversight of the active coal mining operations in the State. The Governor indicated that he was hopeful his request would be temporary and that he would continue to work with the legislature in an attempt to assure adequate funding for all responsibilities.

On August 4, 2003, we notified the Governor that we were obligated, in accordance with 30 CFR 733.12(e), to substitute Federal enforcement for those portions of the Missouri program that were not fully funded and staffed. We cited problems with the State's implementation of the Missouri program in several areas including inspection, enforcement, permitting, and bonding activities. As a result of substituting Federal enforcement, we became responsible for, among other things, approximately 40 permitting actions, 24 inspectable units, and an unsuitability petition filed on October 20, 2003. For more details on the Missouri 733 action, *see* 68 FR 50944, August 22, 2003.

Why Are We Revising Our Regulations?

As previously mentioned, our regulations at 30 CFR 732.17(f)(2) require us to begin proceedings against a State under 30 CFR part 733 when the State fails to submit and obtain approval of a required program amendment within the time allowed. While there may be circumstances in which the substance of a required State program amendment is such that the State's failure or inability to submit it to OSM and obtain approval warrants action under part 733, in most instances this is not the case. There are far more amendments being processed than originally anticipated when the State program provisions were enacted in 1977, and they typically involve a single issue and/or pertain to minor program revisions. Usually, the substance of the required State program amendment is such that the State's failure or inability to submit it to OSM and obtain approval does not jeopardize the overall effectiveness of the approved State program.

For example, in 1999, we required the State of Iowa to submit certain program amendments pertaining to revegetation success standards by May 25, 2000. *See* 64 FR 66385; November 26, 1999. The State submitted the required amendment on August 17, 2001—fifteen months after it was due—and we approved it on December 27, 2001. *See* 66 FR 66743; December 27, 2001. The delay in submitting the program amendment did not jeopardize the overall effectiveness of the approved State program and it did not result in harm to the environment. Iowa had not produced a single ton of coal during the three years prior to receiving our notice of the required amendment. Nevertheless, even in such situations, our existing regulations automatically require us to begin proceedings under part 733—proceedings that are costly and disruptive to both OSM and the affected State, and sometimes completely unnecessary. Because of limited staff and resources, and due to the need to direct our efforts to higher priorities, Iowa was able to complete the amendment process before we could initiate proceedings under part 733.

What Revisions Are We Making?

This proposed rule would provide discretion to the Director by allowing consideration of the State's overall effectiveness in implementing, administering, maintaining, or enforcing its approved program before determining that proceedings under part 733 are warranted because of a delinquent State program amendment. This is the standard currently found in 30 CFR 733.12(b) which applies in most situations. However, the provisions in 30 CFR 732.17(f)(2) by-pass those in 30 CFR 733.12(b) by automatically assuming that the failure to submit or obtain approval of a State program amendment is an indication that the State is *not* effectively implementing, administering, maintaining, or enforcing its approved program. A State's failure to submit an amendment and obtain approval by OSM may be the result of other factors such as the failure of the State legislature to enact required legislation, reluctance to submit an amendment ''no less effective'' than an OSM regulation that is currently being litigated, or timely submission of an amendment that the State thought was ''no less effective'' than the Secretary's regulations, but OSM found to be deficient.

We believe that, in situations where the State has not submitted and obtained approval of a required amendment, a less disruptive and more effective way to obtain the required amendment is to work with the State at the staff level to discuss problems and resolve issues rather than automatically begin formal proceedings under part 733. To automatically begin proceedings under part 733, as currently required by 30 CFR 732.17(f)(2), damages the working relationship we have with a State that has voluntarily agreed to work in partnership with OSM to implement and administer the provisions of Title V of SMCRA. For these reasons, we are proposing the following revisions.

30 CFR 732.17(f)(2)

Under the existing regulation in 30 CFR 732.17(f)(2), the Director is required to begin proceedings to either enforce that part of the State program affected or withdraw approval, in whole or in part, and implement a Federal program under the following situations. The Director is required to begin proceedings if the State regulatory authority does not (1) submit a proposed amendment or a description of an amendment and the timetable for enactment within 60 days from the receipt of the notice from OSM, or (2) does not subsequently comply with the submitted timetable, or if the amendment is not approved by OSM.

We propose to revise this requirement by inserting the words ''if the Director finds that such action is warranted because the State is not effectively implementing, administering,

maintaining or enforcing its approved State program.'' This language is taken in part from 30 CFR 733.12(b) and will provide the discretion necessary to consider the State's overall performance rather than automatically require proceedings under part 733. Our regulations at 30 CFR 733.12(e) provide the standards for substitution of Federal enforcement. The standards are a determination by the Director that: (1) The State has failed to effectively implement, administer, maintain or enforce all or part of its approved State program; and (2) the State has not demonstrated its capability and intent to administer its approved State program.

30 CFR 732.17(h)(1)

Paragraph (h)(1) currently requires that we publish in the **Federal Register** a notice of receipt of a State program amendment within 10 days after receiving it from the State. We propose increasing the time period from 10 days to 30 days because we have found it difficult to meet the 10-day time period. When the regulations were originally written, State program amendments were received and processed at OSM's headquarters office in Washington, DC. The approval of State program amendments has since been decentralized and receipt and approval now takes place in our three regional offices. They in turn transmit the amendments to the OSM headquarters office in Washington, DC for final clearance. After they are cleared for publication, they are sent to the Office of the Federal Register which usually publishes them on the third day after receipt. This can no longer be done in 10 days and so we propose increasing the time from 10 to 30 days.

30 CFR 732.17(h)(2)(v)

Paragraph (h)(2)(v) currently requires that we publish a schedule for review and action on a State program amendment. Experience has shown that schedules usually change because of extensions of the comment period and delays in obtaining comments from other government agencies. Because these schedules are variable and unreliable, we propose removing the requirement that we publish a schedule for review and action on a State program amendment.

30 CFR 732.17(h)(8)

Paragraph (h)(8) currently allows the State regulatory authority 30 days to resubmit a revised amendment for consideration if its original submission is not approved. Experience has shown that the 30 days is insufficient for the State to accomplish the submission. We propose to increase the time frame from 30 days to either 60 days or a time frame consistent with the established administrative or legislative procedures in the State, whichever is later. This will provide the State with a more realistic time frame within which to act.

30 CFR 732.17(h)(9)

Paragraph (h)(9) would be shortened and simplified by cross referencing the processing provisions in paragraph (h) rather than specifying the same procedures in paragraph (h)(9).

30 CFR 732.17(h)(12)

Paragraph (h)(12) currently requires that within 10 days after approving or not approving a State program amendment, the decision must be published in the **Federal Register**. We propose increasing the time period from 10 days to 30 days for the same reasons as discussed for the revisions of paragraph (h)(1) above.

30 CFR 732.17(h)(13)

We propose to revise paragraph (h)(13) by deleting the cross reference to the schedule in paragraph (h)(2)(v) because, as previously discussed, we propose to delete that paragraph. We also propose to revise the time frame for our final decision on a State program amendment by increasing the time allowed from six months to seven months to allow for the increase in time from 10 to 30 days to publish documents in the **Federal Register**.

II. How Do I Submit Comments on the Proposed Rule?

Written Comments: If you submit written comments on the proposed rule during the 60-day comment period, they should be specific, should be confined to issues pertinent to the notice, and should explain the reason for any recommended change(s). Where practicable, you should submit three copies of your comments. We will not give consideration to anonymous comments. Although every effort will be made to consider all other comments submitted, OSM cannot assure that comments sent to an address other than those listed above (*see* **ADDRESSES**) will be included in the Administrative Record and available for our review.

Availability of Comments: Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours at the OSM Administrative Record Room (see **ADDRESSES**). Individual respondents may request that we withhold their home address from the rulemaking record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, to the extent allowed by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

Public hearings: We will hold a public hearing on the proposed rule upon request only. The time, date, and address for any hearing will be announced in the **Federal Register** at least 7 days prior to the hearing.

Any person interested in participating in a hearing should inform Andy DeVito (*see* **FOR FURTHER INFORMATION CONTACT**), either orally or in writing by 5 p.m., Eastern time, on December 24, 2003. If no one has contacted Mr. DeVito to express an interest in participating in a hearing by that date, a hearing will not be held. If only one person expresses an interest, a public meeting rather than a hearing may be held, with the results included in the Administrative Record.

The public hearing will continue on the specified date until all persons scheduled to speak have been heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after all persons scheduled to speak and persons present in the audience who wish to speak have been heard. To assist the transcriber and ensure an accurate record, we request that, if possible, each person who testifies at a public hearing provide us with a written copy of his or her testimony.

III. What Are the Procedural Matters and Required Determinations for This Proposed Rule?

Executive Order 12866—Regulatory Planning and Review

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

a. This rule will not have an effect of $100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities. The revisions to the provisions governing the processing of State program amendments and the time

frames for their publication will not have an adverse economic impact on States. It may in fact reduce administrative expenses for the States by allowing for the informal resolution of issues at staff level rather than requiring a part 733 action.

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

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

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

Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). As previously stated, the revision to the provisions governing the processing of State program amendments and the time frames for their publication will not have an adverse economic impact. Further, the rule produces no adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States enterprises to compete with foreign-based enterprises in domestic or export markets.

Small Business Regulatory Enforcement Fairness Act

For the reasons previously stated, this rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

a. Does not have an annual effect on the economy of $100 million or more.

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

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises for the reasons stated above.

Unfunded Mandates

This rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, Tribal, or local governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*) is not required.

Executive Order 12630—Takings

In accordance with Executive Order 12630, the rule does not have significant takings implications. The revisions being proposed are procedural in nature and do not affect private property.

Executive Order 12988—Civil Justice Reform

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

Executive Order 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.

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 proposed revisions pertaining to actions under part 733 would not have substantial direct effects 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.

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 revisions to the provisions governing the processing of State program amendments and the time frames for their publication will not have a significant effect on the supply, distribution, or use of energy.

Paperwork Reduction Act

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

National Environmental Policy Act

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

How Will This Rule Affect State and Indian Programs?

Following publication of a final rule, we will evaluate the State and Indian programs approved under section 503 of SMCRA to determine any changes in those programs that may be necessary. When we determine that a particular State program provision should be amended, the particular State will be notified in accordance with the provisions of 30 CFR 732.17. On the basis of the proposed rule, we have made a preliminary determination that no program revisions will be required.

Clarity of This Regulation

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this proposed rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the proposed rule clearly stated? (2) Does the proposed rule contain technical language or jargon that interferes with its clarity? (3) Does the format of the proposed rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Would the rule be easier to understand if it were divided into more (but shorter) sections (a ''section'' appears in bold type and is preceded by the symbol ''§ '' and a numbered heading; for example, § 732.17)? (5) Is the description of the proposed rule in the **SUPPLEMENTARY INFORMATION** section of this preamble helpful in understanding the proposed rule? (6) What else could we do to make the proposed rule easier to understand? Send a copy of any comments that concern how we could make this proposed rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street NW., Washington, DC 20240. You may also e-mail the comments to this address: *Exsec@ios.doi.gov.*

List of Subjects in 30 CFR Part 732

Intergovernmental relations, Reporting and recordkeeping requirements, Surface mining, Underground mining.

Dated: November 19, 2003.

Rebecca W. Watson,

Assistant Secretary, Land and Minerals Management.

Accordingly, we propose revising 30 CFR part 732 as set forth below.

PART 732—PROCEDURES AND CRITERIA FOR APPROVAL OR DISAPPROVAL OF STATE PROGRAM AMENDMENTS

1. The authority citation for part 732 is revised to read as follows:

Authority: 30 U.S.C. 1201 *et seq.* and 16 U.S.C. 470 *et seq.*

2. Section 732.17 is amended by revising paragraphs (f)(2), (h)(1), (h)(8), (h)(9), (h)(12), and (h)(13); and removing paragraph (h)(2)(v) to read as follows:

§ 732.17 State program amendments.

* * * * *

(f) * * *

(2) If the State regulatory authority does not submit the information required by paragraph (f)(1), or does not subsequently comply with the submitted timetable, or if the amendment or submission under paragraph (h)(8) is not approved under this section, then the Director must begin proceedings under 30 CFR part 733 if the Director has reason to believe that such action is warranted because the State is not effectively implementing, administering, maintaining or enforcing its approved State program.

* * * * *

(h) * * *

(1) Within 30 days after receipt of a State program amendment from a State regulatory authority, the Director will publish a notice of receipt of the amendment in the **Federal Register**.

* * * * *

(8) If the Director does not approve the amendment request, the State regulatory authority will have 60 days after publication of the Director's decision or a time frame consistent with the established administrative or legislative procedures in the State, whichever is later, to submit a revised amendment request for consideration by the Director. If no submission is made, then the Director must follow the procedures specified in paragraph (f)(2) of this section.

(9) The Director will approve or not approve revised amendment submissions in accordance with the provisions under paragraph (h) of this section.

* * * * *

(12) All decisions approving or not approving program amendments must be published in the **Federal Register** and be effective upon publication unless the notice specifies a different effective date. The decision approving or not approving program amendments will be published in the **Federal Register** within 30 days after the date of the Director's decision.

(13) Final action on all amendment requests must be completed within seven months after receipt of the proposed amendments from the State.

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