

DEPARTMENT OF THE INTERIOR**Office of Surface Mining Reclamation and Enforcement****30 CFR Part 906**

[CO-031-FOR]

Colorado Abandoned Mine Land Reclamation Plan**AGENCY:** Office of Surface Mining Reclamation and Enforcement, Interior.**ACTION:** Final rule; approval of amendment.

SUMMARY: We are approving an amendment to the Colorado abandoned mine land reclamation (AMLR) plan (hereinafter referred to as the "Colorado plan") under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act).

DATES: *Effective Date:* September 18, 2006.

FOR FURTHER INFORMATION CONTACT: James F. Fulton, Telephone: 303.844.1400 x1424. E-mail address: jfulton@osmre.gov.

SUPPLEMENTARY INFORMATION:

- I. Background on the Colorado Plan
- II. Submission of the Proposed Amendment
- III. Office of Surface Mining Reclamation and Enforcement's (OSM) Findings
- IV. Summary and Disposition of Comments
- V. OSM's Decision
- VI. Procedural Determinations

I. Background on the Colorado Plan

The Abandoned Mine Land Reclamation Program was established by Title IV of the Act in response to concerns over extensive environmental damage caused by past coal mining activities. The program is funded by a reclamation fee collected on each ton of coal that is produced. The money collected is used to finance the reclamation of abandoned coal mines and for other authorized activities. Section 405 of the Act allows States and Indian tribes to assume exclusive responsibility for reclamation activity within the State or on Indian lands if they develop and submit to the Secretary of the Interior for approval, a program (often referred to as a plan) for the reclamation of abandoned coal mines. On June 11, 1982, the Secretary of the Interior approved the Colorado plan. You can find general background information on the Colorado plan, including the Secretary's findings and the disposition of comments, in the June 11, 1982, **Federal Register** (47 FR 25332). You can also find later actions concerning Colorado's plan and plan amendments at 30 CFR 906.20 and 906.25

II. Submission of the Proposed Amendment

By letter dated October 29, 1996, Colorado sent to us a proposed amendment to its plan (administrative record number CO-AML-24) under SMCRA. Colorado sent the amendment in response to a September 26, 1994, letter (administrative record number CO-AML-19) that we sent to Colorado in accordance with 30 CFR 884.15(b), and at its own initiative.

We announced receipt of the proposed amendment in the November 19, 1996, **Federal Register** (61 FR 58800), provided an opportunity for a public hearing or meeting on its substantive adequacy, and invited public comment on its adequacy (administrative record number CO-AML-26). Because no one requested a public hearing or meeting, none was held. The public comment period ended on December 19, 1996. We received comments from one industry group, four Federal agencies and two citizen or academic groups.

During our review of the amendment, we identified a concern relating to the provisions of Colorado's plan provisions at Section V.B.2. concerning the determination of eligibility for proposed sites. We notified Colorado of our concern by letter dated June 7, 1999 (administrative record number CO-AML-35). Colorado responded by a memo dated June 15, 2005, by submitting a revised amendment (administrative record number CO-AML-36). Colorado also took this opportunity to submit additional revisions at its own initiative.

We announced receipt of the revised amendment in the September 13, 2005, **Federal Register** (70 FR 54490). 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 (Administrative Record No. CO-AML-37). We did not hold a public hearing or meeting because no one requested one. The public comment period ended on October 17, 2005. We did not receive any comments.

III. Office of Surface Mining Reclamation and Enforcement's (OSM) Findings

Following are the findings we made concerning the amendment. OSM's standard for comparison of State AMLR amendments with SMCRA and the Federal regulations is found in Directive STP-1, Appendix 11. This policy provides that "in accordance with 30 CFR 884.14(a), the proposed plan must meet all applicable requirements of the

Federal statute and rules. That is, a State's statutes, rules, policy statements, procedures, and similar materials must compare, all together, with applicable requirements of the Federal statute and rules, to ensure that the State's plan, as a whole, meets all Federal requirements." We are approving the amendment.

A. Minor Revisions to Colorado's Plan Provisions

Colorado proposed numerous minor wording, editorial, punctuation, grammatical, and recodification changes throughout its plan provisions. Because the changes to these previously approved plan provisions are minor, we find that they meet the requirements of the Federal regulations and the Act.

B. Revisions to Colorado's Plan Provisions That Have the Same Meaning as the Corresponding Provisions of the Federal Regulations and Statute

Colorado proposed revisions to the following plan provisions; the revisions contain language that is the same as, or similar to, the corresponding sections of the Federal regulations.

Section I intro; 30 CFR 884.13(c)(1); goals and objectives.

Section I B intro; 30 CFR 884.13; additional reclamation activities.

Section I B 1; 30 CFR 884.13(e); inactive mine inventory.

Section I B 3; 30 CFR 884.13(f); fish & wildlife habitat.

Section I B 5; 30 CFR 884.13(c)(7); public involvement.

Section I B 6; SMCRA 407(e); reclamation on public lands.

Section I B 7; 30 CFR 873.12, 876.12; future reclamation set-aside.

Section I B 8; 30 CFR 874.12(d)(2); interim program mines and insolvent sureties.

Section I B 9; 30 CFR 887.1; mine subsidence protection program.

Section II intro; 30 CFR 884.13(c)(2); ranking and selection of projects.

Section II B & C; 30 CFR 874.13, 884.13(c)(2); project and design selection criteria.

Section III A & B; 30 CFR 884.14(c)(3); coordination of reclamation work.

Section III C, D, & E; SMCRA 414; coordination with local governments.

Section IV; 30 CFR Part 879; acquisition, management, and disposition of lands & waters.

Section V, intro; 30 CFR Part 882; reclamation on private land.

Section V A; 30 CFR 886.15; grant applications.

Section V B 1; 30 CFR 884.13(c)(5) & Part 882; project feasibility studies.

Section V B 2; 30 CFR 874.12(c) & Chapter 4-01-30, Federal Assistance

Manual; determination of project eligibility.

Section V B 3; 30 CFR Part 887; consent for reclamation activities.

Section V B 6; 30 CFR 884.13(f); environmental assessments.

Section V C; 30 CFR 884.13(c)(5); project implementation.

Section V D; 30 CFR 886.23, 886.24; project evaluation.

Section VI intro; 30 CFR 884.13(c)(7); public participation.

Section VI A & B; 30 CFR 884.13(c)(7) & (d)(1); public participation.

Section VI C deleted (A-95 process); 30 CFR 884.14(c)(3); coordination of reclamation work.

Section VII B; 30 CFR 884.13(d)(2); personnel policies.

Section VII A; 30 CFR 886.22, 886.24; administrative procedures.

Section VII C, intro, 1, 2; 30 CFR 884.13(d)(3); procurement and purchasing.

Section VII C 3; 30 CFR 874.16 & 875.20; contractors eligible for permits.

Section VIII; 30 CFR 884.13(d); organization and management.

C. Revisions to Colorado's Plan Provisions That Are Not the Same as the Corresponding Provisions of the Federal Regulations and Statute

C.1. Section 1 A 6; 30 CFR 875.12(e); Reclamation Priorities for Non-coal Reclamation

Colorado proposed to add a new subsection, providing for reclamation of resources affected by non-coal mining activities. The subsection provides that "the Division may carry out these objectives only after all reclamation goals with respect to inactive [abandoned] coal mined lands have been met, except for non-coal projects relating to the protection of health and safety." We note that "protection of health and safety" encompasses Priority 1 and Priority 2 sites.

The Federal requirement at 30 CFR 875.12(e) allows such non-coal reclamation only if needed to protect against "extreme danger" of adverse effects; that is, it is limited to Priority 1 sites.

Thus it initially appears that Colorado's proposal would allow non-coal reclamation for Priority 2 sites, while the Federal program allows it only for Priority 1 sites. However, we note that a different section of Colorado's proposal, II B 1, specifies that "non-coal hazards must be in the 'extreme hazard' (P1) category." Therefore we find that Colorado's proposal compares with applicable requirements of the Act and Federal rules as a whole, and meets all Federal requirements. We are approving it.

C.2. Sections V B 4 and 5; 30 CFR 882.12 & 882.13; Appraisals and Liens

Colorado proposed at subsection 4 that "a determination of fair market value of the land as adversely affected by past mining will be made before and following reclamation work. This finding will be based on an appraisal or letter of opinion from the [program] realty specialist." Further, Colorado proposed at subsection 5 that for each reclamation project which may significantly increase the fair market value, Colorado will make a written finding on how the proposed project will specifically benefit public health, safety, or environmental values of the greater community or area.

The Federal regulations at 30 CFR 882.12(a) require that appraisals as described in subsection 4 be obtained from independent appraisers. However, it is clear from 30 CFR 882.12 and 882.13 that such appraisals are meant to serve as the basis for filing possible liens against the reclaimed property if its value significantly increases. And, 30 CFR 882.13(a) states that the filing of liens is discretionary.

The Colorado plan as revised indicates only one use for such appraisals, that proposed at subsection 5 (to document the benefits to the greater community); as revised, the Colorado plan makes no provision for the filing of liens. In other words, Colorado has revised its plan so that no liens will be filed. As noted above, 30 CFR 882.13(a) provides that the filing of liens is discretionary. Since no liens will be filed, the determination of property value need not be obtained from an independent appraiser. For these reasons, we find that Colorado's proposed revisions are in agreement with the applicable requirements of the Federal statute and rules as a whole, and meet all Federal requirements. We are approving them.

IV. Summary and Disposition of Comments

Public Comments

We asked for public comments on the amendment and the revised amendment. We received no comments on the revision, but did receive comments on the initial amendment from one industry group and two citizen or academic groups.

The Colorado School of Mines and the Citizens Coal Council responded that they had no comments.

The Colorado Mining Association expressed concern that, because of the large numbers of non-coal AML sites with water pollution problems, much of

the 10% set-aside funds might be drained by water treatment at such sites.

As discussed above at Finding C.1., the proposed plan at subsection I.A.6. would allow for reclamation of non-coal AML sites; but such work is limited at subsection II.B.1. to extreme hazards to public health and safety. Further, under II.C. 1 & 3, hazard abatement does not include restoration of environmental hazards. We also note that under the set-aside provision of I.B.7., funds set-aside for the acid mine drainage fund will be used to treat only waters affected by coal mining.

These subjects may need to be addressed again if Colorado should in the future certify completion of all coal-mining-related AML problems. For the current situation, we find that Colorado's revised plan alleviates the concerns expressed.

Federal Agency Comments

Under 30 CFR 884.14(a)(2) and 884.15(a), we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Colorado plan.

We received replies but no comments from four Federal agencies. The Mine Safety and Health Administration, the U.S. Forest Service, the U.S. Environmental Protection Agency, and the Bureau of Land Management replied that they had no comments.

OSM's Decision

Based on the above findings, we approve Colorado's October 29, 1996 amendment, as revised on June 15, 2005.

To implement this decision, we are amending the Federal regulations at 30 CFR Part 906, which codify decisions concerning the Colorado plan. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 405(d) of SMCRA requires that the State have a program that is in compliance with the procedures, guidelines, and requirements established under the Act. Making this regulation effectively 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 analysis performed for the counterpart Federal regulation.

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 (Regulatory Planning and Review).

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, to the extent allowable by law, 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 AMLR plans and revisions thereof because each plan is drafted and promulgated by a specific State, not by OSM. Decisions on proposed State AMLR plans and revisions thereof submitted by a State are based on a determination of whether the submittal meets the requirements of Title IV of SMCRA (30 U.S.C. 1231–1243) and the applicable Federal regulations at 30 CFR Part 884.

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. The rule does not involve or affect Indian Tribes in any way.

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

No environmental impact statement is required for this rule since agency decisions on proposed State AMLR plans and revisions thereof are categorically excluded from compliance with the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) by the Manual of the Department of the Interior (516 DM 6, appendix 8, paragraph 8.4B(29)).

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. 3501 *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 the 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), of 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.

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 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 was not considered a major rule.

Unfunded Mandates

This rule will not impose any unfunded mandates 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 906

Abandoned mine reclamation programs, Intergovernmental relations, Surface mining, Underground mining.

Dated: August 18, 2006.

Allen D. Klein,

Director, Western Region.

■ For the reasons set out in the preamble, Title 30, Chapter VII, Subchapter T of the Code of Federal Regulations is amended as set forth below:

PART 906—COLORADO ABANDONED MINE LAND RECLAMATION PROGRAMS

■ 1. The authority citation for part 906 continues to read as follows:

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

■ 2. Section 906.25 is amended in the table by adding a new entry in chronological order by “Date of final publication” to read as follows:

§ 906.25 Approval of Colorado abandoned mine land reclamation plan amendments.

* * * * *

Original amendment submission date	Date of final publication	Citation/description
* * * * * October 29, 1996 and June 15, 2005	* * * * * September 18, 2006	* * * * * Colorado Inactive Mine Reclamation Plan, Chapter VI.

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DEPARTMENT OF THE INTERIOR
Office of Surface Mining Reclamation and Enforcement

30 CFR Part 917
[KY-250-FOR]

Kentucky Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.
ACTION: Final rule; approval of amendment.

SUMMARY: We are approving an amendment, with one exception, to the Kentucky regulatory program (the “Kentucky program”) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Kentucky submitted three separate items with revisions pertaining to prepayment of civil penalties, easements of necessity for reclamation on bankruptcy sites, and various statutes to eliminate outdated language.

DATES: *Effective Date:* September 18, 2006.

FOR FURTHER INFORMATION CONTACT: William J. Kovacic, Telephone: (859) 260-8400. Telefax number: (859) 260-8410.

SUPPLEMENTARY INFORMATION:

- I. Background on the Kentucky 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 Kentucky 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 Kentucky program on May 18, 1982. You can find background information on the Kentucky program, including the Secretary’s findings, the disposition of comments, and conditions of approval in the May 18, 1982, **Federal Register** (47 FR 21434). You can also find later actions concerning Kentucky’s program and program amendments at 30 CFR 917.11, 917.12, 917.13, 917.15, 917.16 and 917.17.

II. Submission of the Proposed Amendment

By letter dated March 28, 2006, Kentucky sent us a proposed amendment to its program under SMCRA (30 U.S.C. 1201 *et seq.*) at its own initiative ([KY-250-FOR], Administrative Record No. KY-1642). The full text of the program amendment is available for you to read at the location listed above under **ADDRESSES**.

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. Any revisions that we do not specifically discuss below concern nonsubstantive wording or editorial changes.

The first change was mandated by the Supreme Court of Kentucky (Court) in the case of *Commonwealth of Kentucky, Natural Resources and Environmental Protection Cabinet v. Kentec Coal Co., Inc.*, No. 2003-SC-000622-DG. The Court issued an opinion on September 22, 2005, in which it found that the provisions of 405 KAR [Kentucky Administrative Regulations] 7:092 that required a corporate permittee to prepay an assessed civil penalty to get a due process hearing on the penalty amount was an unconstitutional violation of equal protection provisions of the State and Federal constitutions. The court also held that the assessment of the penalty against Kentec without prepayment and without consideration of the permittee’s inability to pay was a violation of Section 2 of the Kentucky Constitution and an unreasonable and arbitrary exercise of the Kentucky Environmental and Public Protection Cabinet’s (Cabinet) authority.

The Department for Natural Resources’ Division of Mine Reclamation and Enforcement, in response to this ruling, has altered the provisions on its notices of assessment of civil penalties to comply with the ruling. The Division uses the following statement of appeal rights on the assessment notices:

Should you decide not to negotiate, you have three (3) options remaining to resolve the proposed assessment. You may (1) choose not to contest the amount of the proposed assessment or the violation in which case a final Order [order] of the Secretary will be entered.

Note: If an administrative hearing as to the fact of the violation was properly requested under 405 KAR 7:092, the final order will only determine the amount of the penalty and *not* the fact of the violation; (2) request an assessment conference to contest the proposed assessment; **Note:** The Kentucky Bar Association has determined that the appearance of individual who is not a licensed attorney, on behalf of a third person, corporation or another entity, at a penalty assessment conference constitutes the unauthorized practice of law. Corporations or other entities must be represented by counsel at penalty assessment conferences. Individuals may represent themselves; or (3) request an administrative hearing instead of an assessment conference. See 405 KAR 7:092, Section 6. Prepayment of the proposed assessment is no longer required. [emphasis added]

The Office of Administrative Hearings has also altered language on the Penalty Assessment Conference Officer’s Report that advises permittees of their rights to an administrative hearing. That language reads as follows:

Any person issued a proposed penalty assessment may request an administrative hearing to contest the Conference Officer’s recommended penalty or the fact of the violation or both by filing with the Office of Administrative Hearings, 35-36 Fountain Place, Frankfort, Kentucky 40601, a petition under Section 6 of 405 KAR 7:092. The Cabinet may also request under Section 5 of 405 KAR 7:092 an administrative hearing to contest the Conference Officer’s recommended penalty. [Permittee] should take notice that given the decision by the Supreme Court of Kentucky in *Environmental and Public Protection Cabinet v. Kentec*, 2005 WL 2316191, ___ S.W. 3d ___, (2005), the provisions of 405 KAR 7:092, Section 6 (2)(b) requiring prepayment of the proposed penalty ARE NO LONGER IN EFFECT and [Permittee] DOES NOT need to prepay the recommended penalty amount in the event it decides to request a Formal Administrative Hearing.