

**DEPARTMENT OF THE INTERIOR****Office of Surface Mining Reclamation and Enforcement****30 CFR Part 938**

[PA-146-FOR]

**Pennsylvania Regulatory Program**

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

**ACTION:** Final rule.

**SUMMARY:** We are removing six required amendments to the Pennsylvania regulatory program (the "Pennsylvania program") under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). These required amendments pertain to civil penalties, non-augmentative normal husbandry practices, affected area, access roads, and permit renewal applications. We are removing these required amendments because these changes are no longer necessary for the Pennsylvania program to be consistent with the corresponding Federal regulations.

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

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:**

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

**I. Background on the Pennsylvania Program**

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, "a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of the Act \* \* \*; and rules and regulations consistent with regulations issued by the Secretary pursuant to the Act." See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Pennsylvania program on July 30, 1982. You can find background information on the Pennsylvania program, including the Secretary's findings, the disposition of comments, and conditions of approval in the July 30, 1982, **Federal**

**Register** (47 FR 33050). You can also find later actions concerning Pennsylvania's program and program amendments at 30 CFR 938.11, 938.12, 938.13, 938.15 and 938.16.

**II. The Proposed Rule**

In this rulemaking, we are removing the required amendments codified in the Federal regulations at 30 CFR 938.16(r), (eee), (ggg), (kkk), (lll) and (qqq). We required these amendments in the May 31, 1991 final rule (56 FR 24687). By letters dated February 7, 2006 (Administrative Record No. PA 803.37), and February 28, 2006 (Administrative Record No. PA 803.36), the Pennsylvania Department of Environmental Protection (PADEP) sent OSM its explanation and rationale of why it believes the Pennsylvania program is no less effective than the Federal requirements and that the required amendments codified at 30 CFR 938.16(eee), (ggg), (qqq) and (ttt) should be removed. Our review of PADEP's explanation and rationale results in our removing three of the four required amendments. We are not removing the required amendment at 30 CFR 938.16(ttt) as discussed below under "OSM Findings".

We are also removing required amendments codified at 30 CFR 938.16(r), (kkk), and (lll). The removal of these three required amendments is a result of our review of the required amendments and the reason they were required. We have determined that they are no longer necessary for the Pennsylvania program to be consistent with the corresponding Federal regulations.

We announced receipt of the State's letters and our proposal to remove these amendments in the May 23, 2006, **Federal Register** (71 FR 29597-29604). In the same notice, we opened the public comment period and provided an opportunity for a public hearing or meeting on the proposal to remove the required amendments. The public comment period ended on June 22, 2006. We did not hold a public hearing on the rulemaking because one was not requested. We received written comments from two Federal agencies and one environmental group.

**III. OSM's Findings**

Following are the findings we made concerning removal of the required program amendments under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. We are removing six required amendments codified in the Federal regulations at 30 CFR 938.16(r), (eee), (ggg), (kkk), (lll), (qqq).

*30 CFR 938.16(r). Civil Penalties*

Required Amendment: We required Pennsylvania to amend Chapter 86.193(h) or otherwise amend its program to be no less effective than 30 CFR 846.12(a) by clarifying that an individual civil penalty (ICP) is not a substitute for mandatory civil penalties, and also to clarify when the assessment of an individual civil penalty would be appropriate. (See 56 FR 24696, May 31, 1991).

Our analysis of this required amendment was presented in the May 23, 2006, proposed rule notice (71 FR 29598). The first part of the required amendment was resolved by an amendment PADEP submitted on January 23, 1996 (PA 838.00-Part 1), in which it deleted the portion of 25 Pa. Code 86.195(h) that stated that "The Department may, when appropriate, assess a penalty against corporate officers, directors or agents as an alternative to, or in combination with, other penalty actions." OSM approved this deletion in a final rule issued on November 7, 1997 (62 FR 60169-60177), but did not remove the first portion of this required amendment. We are, therefore, taking the opportunity to remove the first portion in this rulemaking.

The second part of the requirement stated that Pennsylvania must clarify when the assessment of an ICP would be appropriate. While subsection (h) does not contain this clarification, subsection (a) does. Specifically, 25 Pa. Code 86.195(a) provides for the assessment of ICPs against corporate officers who either participate in or intentionally allow violations to occur. We have previously determined that Pennsylvania's culpability standard for ICPs is actually broader than the standard contained in 30 CFR 846.12(a), since the State provision does not require "knowing" or "willful" participation. We further recognized that the term "participates" is defined to be consistent with the Federal terms "authorized, ordered or carried out." See 25 Pa. Code 86.1 ("Participates" means "to take part in an action or to instruct another person or entity to conduct or not to conduct an activity."). Therefore, we approved the culpability standard in subsection 86.195(a). 58 FR 18149 and 18153, April 8, 1993. (In two other respects, we found subsections 86.195(a) and (b) to be inconsistent with Federal requirements, and imposed a required amendment at 30 CFR 938.16(eee). 58 FR at 18160. The

disposition of that required amendment is discussed in the next finding.). We note that subsection 86.195(a) was promulgated after the imposition of 30 CFR 938.16(r), was approved in part in 1993, and is being approved in this rulemaking. This subsection sufficiently sets forth the circumstances that will result in the assessment of an ICP; therefore, we find that the second portion of the required amendment at 30 CFR 938.16(r) is satisfied, and it will be removed.

### 30 CFR 938.16(eee). Civil Penalties

**Required Amendment:** We required Pennsylvania to submit a proposed amendment to 25 Pa. Code 86.195(a) and (b) to specify that ICPs may be assessed against corporate directors or agents of the corporate permittee and to include provisions for the assessment of an ICP for a failure or refusal to comply with any orders issued by the Secretary. (See 58 FR 18149 and 18160, April 8, 1993).

For a discussion of PADEP's explanation and rationale for requesting removal of this required amendment, see the May 23, 2006, proposed rule notice (71 FR 29598). Pennsylvania has explained, by letter dated February 7, 2006 (Administrative Record No. PA 803.37), that Section 18.4 of the Pennsylvania Surface Mining Conservation and Reclamation Act (PASMCRRA) states that "the Department may assess a civil penalty upon a person or municipality \* \* \*" 52 P.S. (Pennsylvania Statute) 1396.18d. PASMCRRA provides that the term "person", with respect to "any clause prescribing or imposing a penalty shall not exclude members of an association and the directors, officers or agents of a corporation." 52 P.S. 1396.3. Given this information, we can now find that the Pennsylvania program authorizes the issuance of ICPs, which are "penalties", to corporate directors and agents, as well as corporate officers. Therefore, the first portion of the required amendment at 30 CFR 938.16(eee) is unnecessary, and it will be removed.

OSM imposed the second element of the required amendment because it believed that the State lacked the authority to issue ICPs for a "failure or refusal to comply with an order issued by the Secretary under the Act (such as an order to revise a permit)." (58 FR 18153). However, Pennsylvania has informed us, by letter dated February 7, 2006 (Administrative Record No. PA 803.37), that the term "violation", contained in subsection 86.195(a), includes an individual's failure to comply with an order to modify a permit. In support of its contention, the

State cited 25 Pa. Code 86.213, which authorizes the PADEP to issue orders to modify, suspend or revoke permits. Failure to comply with a permit-based order, according to PADEP, constitutes a "violation", as that term is commonly understood. See, e.g., Black's Law Dictionary 1564 (7th ed. 1999) ("violation" is defined as "an infraction or breach of the law" or, the "act of breaking or dishonoring the law.") (Emphasis added) For these reasons, Pennsylvania contends that 25 Pa. Code 86.195(a) provides for the issuance of ICPs for failure to comply with any order issued by the PADEP, including orders with respect to permits. Our analysis of PADEP's explanation and rationale concludes that the Pennsylvania program includes the necessary authority to assess ICPs and provides for the assessment of ICPs for failure to comply with any orders issued by the Secretary. We find that the second portion of the required amendment at 30 CFR 938.16(eee) is unnecessary, and it will be removed.

### 30 CFR 938.16(ggg). Non-augmentative Normal Husbandry Practices

**Required Amendment:** We required Pennsylvania to submit a proposed amendment to 25 Pa. Code 86.151(d) to define the point at which seeding, fertilization, irrigation, or rill and gully repairs cease to be augmentative and may be considered non-augmentative normal husbandry practices. Moreover, Pennsylvania was required to submit a proposed amendment to require that such practices be evaluated and approved in accordance with the State program amendment process and 30 CFR 732.17 (58 FR 18160).

For a full discussion of PADEP's explanation and rationale for requesting removal of this required amendment, see the May 23, 2006, proposed rule notice (71 FR 29600). Pennsylvania has explained, by letter dated February 28, 2006 (Administrative Record No. PA 803.36), that its regulations define the point at which practices cease to be selective husbandry and become subject to liability extension in a manner that is consistent with the Federal regulations at 30 CFR 816/817.116(c)(4). Specifically, Pennsylvania cited other portions of 25 Pa. Code 86.151(d), which declare that normal husbandry practices, such as "pest and vermin control, pruning, repair of rills and gullies or reseeding or transplanting or both", will not require restarting the revegetation responsibility period so long as they "constitute normal conservation practices within the region for other land with similar uses." We note that the quoted language is

consistent with, and therefore no less effective than, its Federal counterparts at 30 CFR 816/817.116(c)(4) ("Approved practices shall be normal husbandry practices within the region for unmined lands having land uses similar to the approved postmining land use of the disturbed area, including such practices as disease, pest, and vermin control; and any pruning, reseeding, and transplanting specifically necessitated by such actions"). Finally, we note that our 1993 disapproval of the word "augmented", in the last sentence of subsection 86.151(d), remains in place. We disapproved this word because its presence created the inference that there could be instances when "augmented" seeding would not necessitate restarting of the revegetation liability period. See 58 FR 18154. However, we neglected to codify the disapproval on April 8, 1993, and are therefore taking the opportunity to correct this oversight. The information provided by Pennsylvania, coupled with the disapproval of the word "augmented", persuaded us that the State program adequately defines the point at which seeding, fertilization, irrigation, or rill and gully repairs cease to be augmentative and may be considered non-augmentative normal husbandry practices. Therefore, we find that the first portion of the required amendment at 30 CFR 938.16(ggg) is unnecessary, and it will be removed.

With respect to the second portion of the required amendment, Pennsylvania informed us, by letter dated February 28, 2006 (Administrative Record No. PA 803.36), that it has not approved any alternative selective husbandry practices beyond those already approved in 25 Pa. Code 86.151(d). If such additional "non-augmentative normal husbandry practices" are proposed, Pennsylvania will submit them to OSM in accordance with the State program amendment process before these practices are approved in Pennsylvania. Based upon this assurance, we find that the second portion of 30 CFR 938.16(ggg) has been satisfied and will be removed. However, we will continue to monitor the Pennsylvania program through Federal oversight and may in the future take action if we find that the State is not implementing its program in accordance with this finding.

### 30 CFR 938.16(kkk). Affected Area

**Required Amendment:** We codified a required amendment at 30 CFR 938.16(kkk) requiring PADEP to submit a proposed amendment to 25 Pa. Code 88.1 requiring that the definition of affected area include all roads that receive substantial use and are

substantially impacted by the mining activity (58 FR 18160). After further review, OSM has determined that the required program amendment at 30 CFR 938.16(kkk) was mistakenly imposed, because the Pennsylvania program includes a “road rule” consistent with OSM’s 1988 regulation. A full explanation of our rationale can be reviewed in the May 23, 2006 proposed rule notice (71 FR 29600–29601).

Specifically, Pennsylvania’s anthracite mining regulations define “road” to include “access and haul roads constructed, used, reconstructed, improved or maintained for use in coal exploration or surface coal mining activities.” 25 Pa. Code 88.1. This portion is substantively identical to its Federal counterpart at 30 CFR 701.5. The Federal definition of “road”, promulgated in 1988, contains no reference to the “affected area”, since OSM concluded that its new “road” definition was “clear on its own terms as to which roads are included.” (See 53 FR 45190 and 45192, November 8, 1988). OSM also determined that the definition of “affected area”, as partially suspended, “no longer provides additional guidance as to which roads are included in the definition of ‘surface coal mining operations.’” (See 53 FR 45193). In other words, as of December 8, 1988 (the effective date of the final rule promulgated on November 8, 1988), a “road” meeting the criteria of the definition at 30 CFR 701.5 would be regulated as a surface coal mining operation, without regard to the suspended portion of the “affected area” definition. Moreover, the definition of “road” is broad enough to be capable of including some public roads. In fact, OSM expressly declined to exclude public roads from the definition, because “[j]urisdiction under the Act and applicability of the performance standards are best determined on a case-by-case basis by the regulatory authority.” See 53 FR 45193. Indeed, the 1988 “road” definition focuses on the use of the road by the mining operation, rather than use by the public, thereby alleviating the concern that resulted in the partial invalidation of the “public roads” exclusion within the definition of “affected area” in 1985. (See *In Re: Permanent Surface Mining Regulation Litigation*, 620 F. Supp. 1519, 1581–2 (D.D.C. 1985). Since Pennsylvania’s regulations contain a substantively identical counterpart to the Federal definition of “road”, an amendment to the State’s “affected area” definition is unnecessary and should not have been required in 1993. Therefore, the

required amendment at 30 CFR 938.16(kkk) will be removed.

### 30 CFR 938.16(III). Access Roads

Required Amendment: We required that Pennsylvania submit a proposed amendment to Section 88.1 to require that the definition of access road include all roads that are improved or maintained for minimal and infrequent use and that the area of the road is comprised of the entire area within the right-of-way, including roadbeds, shoulders, parking and side areas, approaches, structures, and ditches. (58 FR 18160) After further review, OSM has determined that the required program amendment at 30 CFR 938.16(III) was mistakenly imposed since the Pennsylvania program contains a definition consistent with OSM’s regulation. For a full explanation of our review of the Pennsylvania program which led to our determination that this amendment is satisfied without any further action by Pennsylvania, please review the May 23, 2006, proposed rule notice (71 FR 29601).

Specifically, Pennsylvania’s anthracite mining regulations define “road” to include “access and haul roads constructed, used, reconstructed, improved or maintained for use in coal exploration or surface coal mining activities.” 25 Pa. Code 88.1. Moreover, Pennsylvania defines “access road” to include roads “located \* \* \* for minimal or infrequent use.” *Id.* Finally, the Pennsylvania definition of “road” contains the following language required by 30 CFR 938.16(III): “A road consists of the entire area within the right-of-way, including the roadbed shoulders, parking and side areas, approaches, structures, [and] ditches.” *Id.* Read together, Pennsylvania’s definitions of “access road” and “road” satisfy the required amendment. Indeed, OSM would not have imposed the requirement in 1993 if it had first examined these two definitions. Therefore, we will remove this required amendment.

### 30 CFR 938.16(qqq). Permit Renewals

Required Amendment: We required Pennsylvania to submit a proposed amendment to § 86.55(j), or otherwise amend its program, to require that any applications for permit renewal be submitted at least 120 days before the permit expiration date. (62 FR 60169 and 60171, November 7, 1997.)

For a full discussion of PADEP’s explanation and rationale for requesting removal of this required amendment, see the May 23, 2006, proposed rule notice (71 FR 29601). Pennsylvania explained to us, by letter dated February

7, 2006 (Administrative Record No. PA 803.37), that its program provides sufficient safeguards to assure that renewals filed under § 86.55(j) are required to meet the public notice and participation requirements, and that coal mining will not continue after the permit expiration date. Nevertheless, § 86.55(j) appears to allow permittees to submit renewal applications within 120 days of permit expiration. This provision is silent, however, with respect to the consequences that flow from an untimely filing. In 1997, we concluded that this allowance rendered the Pennsylvania program less stringent, *per se*, than subsection 506(d)(3) of SMCRA and less effective, *per se*, than the Federal regulations at 30 CFR 774.15(b). Both Federal provisions require that renewal applications be filed at least 120 days prior to permit expiration. Since our 1997 decision, we have had the opportunity to reexamine our position. In a May 10, 2000, rulemaking, we partially disapproved a Kentucky statute that would have allowed coal mining operations to continue on an expired permit, so long as the permittee had submitted a renewal application, even where that application was not filed in a timely fashion. 65 FR 29949 and 29953. In response to a commenter who asserted that the filing of an untimely renewal application (*i.e.*, an application filed within 120 days of expiration) violates subsection 506(d)(3) of SMCRA, we stated that:

(W)e agree with the commenter that the untimely filing of a renewal application can constitute a violation of Section 506(d)(3) \* \* \* We do not agree, however, that allowing the filing of a late renewal application violates Section 506(d)(3). Instead, we believe this provision is sufficiently flexible to allow consideration of untimely application, so long as the permit renewal procedures, which include public participation, are properly followed.

65 FR 29951 (Emphasis in original)

We believe this rationale applies with equal force here. Pennsylvania’s program already contains an advance filing requirement at 25 Pa. Code 86.55(c). Failure to comply with this provision can constitute a violation, just as failure to comply with the 120 day filing requirement can constitute a violation of SMCRA under a Federal program. Moreover, this requirement is more stringent than the Federal one since it requires renewal applications to be filed at least 180 days prior to expiration. Therefore, we conclude that it is unnecessary for Pennsylvania to incorporate a 120 day advance filing requirement. Neither the Federal nor the

State provision expressly bars the renewal of a permit if the application was not timely filed. We find that subsection 86.55(j) is not inconsistent with subsection 506(d)(3) of SMCRA or with 30 CFR 774.15(b). Finally, Pennsylvania's program requires that all renewal applications be subject to the public notice and participation requirements of 25 Pa. Code 86.31. See 25 Pa. Code 86.55(d).

For the above-stated reasons, we find that the required amendment at 30 CFR 938.16(qqq) is no longer necessary and the Pennsylvania program is consistent with SMCRA and the Federal regulations, and it will be removed.

#### *30 CFR 938.16(ttt). Noncoal Waste In Refuse Piles*

Required Amendment: OSM required Pennsylvania to submit a proposed amendment to 25 Pa. Code 88.321 and 90.133, or otherwise amend its program, to require that no noncoal waste be deposited in a coal refuse pile or impounding structure. (See 62 FR 60177). PADEP requested the removal of 30 CFR 938.16(ttt), by letter dated February 7, 2006 (Administrative Record No. PA 803.37), on the fact that the Pennsylvania program does not allow for noncoal waste to be deposited in a coal refuse pile or impounding structure.

First, as we noted in the proposed rule for this rulemaking, the requirement to amend Section 88.321 was improperly imposed, because anthracite mining performance standards, including 25 Pa. Code 88.321, are exempt from the obligation to comply with SMCRA's performance standards, by virtue of section 529 of SMCRA. See 71 FR 29602. Therefore, we are removing that portion of the required amendment codified at 30 CFR 938.16(ttt).

With respect to the requirement to amend 25 Pa. Code 90.133, PADEP explains in their letter of February 7, 2006, that protections are provided throughout the Pennsylvania program prohibiting noncoal materials from being deposited on a coal refuse site or impounding structure. For a full explanation of Pennsylvania's explanation and rationale for requesting removal of this required amendment, see the May 23, 2006, proposed rule notice (71 FR 29602).

In our November 7, 1997, final rule, we were concerned that § 90.133 appears to prohibit placement of the listed materials, and other materials with low ignition points, in refuse piles or impoundment structures. The Federal regulation at 30 CFR 816.89(c), on the other hand, expressly prohibits the

placement of any noncoal mine waste in these two areas. See 62 FR 60274.

PADEP contends that the reference to listed materials, and others with low ignition points, does not imply that other noncoal waste are acceptable for disposal at coal refuse sites. Rather, PADEP asserts that the inclusion of this language was "meant to emphasize the need to restrict the presence of combustible materials that could cause the coal refuse to ignite." (Id). Furthermore, PADEP asserts that § 90.133 does require that all noncoal wastes be disposed of in accordance with the State's Solid Waste Management Act. That statute, found at 35 P.S. 6018.101 *et seq.*, however, does not expressly prohibit noncoal wastes from being placed in coal refuse piles or impounding structures.

Based on the above-stated analysis, OSM has reviewed this proposed amendment and determined that the Pennsylvania program does not include any express prohibitions against placement of any noncoal waste materials in a coal refuse pile or impoundment similar to those found at 30 CFR 816.89(c). Because of this we cannot remove the required amendment at 30 CFR 938.16(ttt) at this time.

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

##### *Public Comments*

We asked for public comments on the amendment in a **Federal Register** Notice dated May 23, 2006 (71 FR 29597–29604).

We received specific comments from the Citizens for Pennsylvania's Future (Pennfuture) stating that OSM ignored its duty, which they assert was in existence until a regulatory change effective October 20, 2005, to initiate action under 30 CFR part 733 (part 733) after Pennsylvania failed to submit amendments, or at least descriptions thereof, within 60 days of the promulgation of the requirements to submit program amendments to address deficiencies. In support of its contention, Pennfuture cited 30 CFR 732.17(f)(2), State program amendments, which states that: "If the State regulatory authority does not submit the proposed amendment or description and the timetable for enactment 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 under this section, the Director shall begin proceedings under 30 CFR part 733 to either enforce that part of the State program affected or withdraw approval,

in whole or in part, of the State program and implement a Federal program."

In response, we note that the issue of whether OSM should have initiated part 733 proceedings against Pennsylvania for its failure to timely comply with the requirements at 30 CFR 938.16(r), (eee), (ggg), (kkk), (lll), (qqq), and (ttt) is simply not germane to this rulemaking. Rather, the questions presented to OSM are whether the various rationales put forth by OSM, or the PADEP, to support removal of these requirements are sufficient to justify findings that the Pennsylvania program is consistent with SMCRA and the Federal regulations in the areas addressed by the required amendments intent and language. We make determinations to remove these required amendments where we find that the answer to this question is yes. This finding makes the issue of whether part 733 action should have been taken moot. Where we find that the rationales are not sufficient to justify findings that the Pennsylvania program is consistent with SMCRA and the Federal regulations, we will act in accordance with 30 CFR 732.17, which now allows us some discretion as to whether to initiate action under part 733. Under either outcome, the former provision at 30 CFR 732.17(f)(2) would be inapplicable.

Pennfuture also stated that neither Pennsylvania's rationale for removal of some of the requirements, or OSM's rationale supplied on its own initiative to justify the removal of the remaining requirements, were submitted in a timely manner. In support of this argument, Pennfuture cited section 526(a)(1) of SMCRA, 30 U.S.C. 1276(a)(1), which requires that any petition for review of an OSM rulemaking decision with respect to a State program must be filed within 60 days, unless "the petition is based solely on grounds arising after the sixtieth day." Pennfuture contends that OSM is violating this provision because the rationale provided herein by OSM and the PADEP existed, in each instance, at the time OSM imposed the required amendments. Thus, Pennfuture argues, section 526(a)(1) bars both OSM and the PADEP from reconsideration of the rationale that led to the imposition of those required amendments. It asserts that to allow the State "a second bite at the apple" would ignore the doctrine of administrative finality and create a slippery slope. According to Pennfuture, OSM would then be obligated to entertain a request by any party for the "rescission of, or the addition of conditions to, OSM's approval of program amendments, even where those requests are not based solely on grounds

that arose after the 60-day deadline for filing a petition for review expired.”

We disagree with Pennfuture’s interpretation because its argument fails to recognize the distinction between the judicial review opportunity mandated by SMCRA and OSM’s discretion to reconsider its previously held position. Section 526(a)(1) prescribes the conditions that must be met in order for an entity to obtain judicial review of a State program amendment decision. If the party meets the criteria of this section, judicial review is mandatory; i.e., OSM has no discretion to prevent review of its decision in this instance. It simply does not follow, however, that this statutory mandate also prevents OSM from electing to reconsider a decision, and its underlying rationale, even where that reconsideration is based on information or argument that existed when the original decision is made.

It is a long established precedent that an agency may reverse its position, so long as it provides sufficient rationale for the change. See, e.g., *Pennsylvania Dept. of Public Welfare v. United States*, 781 F.2d 334, 339 (3rd Cir. 1986) (“An agency may change course, as long as it supplies a reasoned explanation for the shift; the same ‘arbitrary and capricious’ standard is applied on review of the new action.”). We believe that sufficient rationale is set forth in this rulemaking to justify our removal of each of the subject required amendments.

We agree with Pennfuture that our action today may encourage parties to demand rescission of, or additional conditions placed upon, previous State program amendment approvals. Nevertheless, persons have always been free to ask OSM to reconsider a decision. Where OSM receives such a request it will review the information and arguments in support thereof then exercise its discretion to grant or deny it. Such discretion must be employed reasonably, of course, just as it was in each of the instant matters.

Pennfuture argues that Pennsylvania’s clarification of the approved program required by 30 CFR 938.16(r) must be incorporated into the State’s approved program, perhaps in the form of a technical guidance document or written policy explaining how the State assesses ICPs. We disagree, because Pennsylvania’s clarifications, and our rationale for removing the required amendment, are based on statutory and regulatory provisions contained in the State’s approved program.

Pennfuture also asserts that OSM is wrong to state that the required amendment at 938.16(kkk) was rendered moot by the earlier promulgation of

OSM’s “road rule” in 1988. A matter is generally rendered moot, Pennfuture contends, by subsequent, rather than previous, events. Thus, the 1993 required amendment cannot have been mooted by the 1988 rulemaking.

In response, we agree that we could have selected a more appropriate adjective to describe the vitality, or lack thereof, imbued within 30 CFR 938.16(kkk), pertaining to the anthracite regulatory definition of “affected area.” Instead, we might have said that this required amendment was mistakenly imposed, since the Pennsylvania program contains a “road rule” consistent with OSM’s 1988 regulation. Indeed, we have set forth this precise rationale in the finding, contained herein, that the required amendment can be removed.

Pennfuture contends that OSM correctly imposed the required amendment at 30 CFR 938.16(III) because Pennsylvania made a deliberate choice to define “access road” differently in its anthracite regulations, since the program also contains “access road” definitions for surface mining and coal refuse disposal operations. Thus, Pennfuture argues, Pennsylvania intended that its anthracite definition of “access road” be different in scope than its counterpart definition for other types of mining. Finally, Pennfuture states that there is no indication that the definition of “road” in § 88.1, which we now rely upon to support removal of the required amendment, differed in any respect when the required amendment was imposed in 1993. At most, the definition of “road” creates an ambiguity about the scope of “access roads” so OSM acted reasonably in 1993 to remove that ambiguity.

In response, we note that had we taken the definition of “road” into account in 1993, we would not have imposed the required amendment. That definition, which has no counterpart in Chapter 87 (surface mining) or in Chapter 90 (coal refuse disposal), explicitly includes “access roads”, and expressly includes all roads that are “improved or maintained” for use in coal exploration or surface coal mining activities. Thus, we believe there is no ambiguity with respect to the scope of regulated access roads in Pennsylvania, and have consequently determined that the required amendment at 30 CFR 938.16(III) is unnecessary.

Pennfuture also contends that OSM cannot rely on the rationale from the May 10, 2000, Kentucky program rulemaking (65 FR 29949) to justify removal of the required amendment at 30 CFR 938.16(qqq). We disagree, for the reasons set forth in our finding above.

Both Kentucky’s and Pennsylvania’s programs contain advance filing requirements for permit renewal applications. In Kentucky, we concluded that failure to adhere to its requirement did not bar the issuance of permit renewals. Because we reach the same conclusion today with respect to Pennsylvania, we further conclude that the required amendment creates a superfluous, and therefore unnecessary, obligation.

Finally, Pennfuture asserts that the technical guidance document referred to in the proposed rule as a rationale to remove 30 CFR 938.16(qqq), must be made part of the approved program. We disagree with this perspective. Although the document is not part of the Pennsylvania program, it is an extension of how the program is implemented. Moreover, our finding above does not rely upon the technical guidance document, but on the regulation itself.

#### *Federal Agency Comments*

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies (Administrative Record No. PA 803.40). The Mine Safety and Health Administration (MSHA), District 1 and 2 responded (Administrative Record Nos. PA 803.42 and PA 803.41) with no specific comments to the removal of these required amendments.

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

Under 30 CFR 732.17(h)(11)(i), we requested comments on the amendment from EPA (Administrative Record No. PA 802.31). The EPA, Region III, responded that they had determined that OSM’s removal of the required amendments would not be inconsistent with the Clean Water Act (Administrative Record No. PA 803.44).

#### **V. OSM’s Decision**

Based on the above findings, we are removing the required amendments at 30 CFR 938.16 (r), (eee), (ggg), (kkk), (lll), and (qqq). We are also codifying a disapproval of the word “augmented”, which is contained in the last sentence of 25 Pa. Code 86.151(d).

To implement this decision, we are amending the Federal regulations at 30 CFR 938.12, 938.15 and 938.16 which codify decisions concerning the Pennsylvania program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that the State’s program demonstrate that the State has the capability of carrying out the

provisions of the Act and meeting its purposes. Making this regulation effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

## 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 under Executive Order 12866.

### *Executive Order 12988—Civil Justice Reform*

The Department of the Interior has conducted the reviews required by Section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of Subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR parts 730, 731, and 732 have been met.

### *Executive Order 13132—Federalism*

This rule does not have federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to “establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.” Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be “in accordance with” the requirements of SMCRA, and Section 503(a)(7) requires that State programs contain rules and regulations “consistent with” regulations issued by the Secretary pursuant to SMCRA.

### *Executive Order 13175—Consultation and Coordination With Indian Tribal Government*

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally-recognized Indian tribes and have determined that the rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. Pennsylvania does not regulate any Native Tribal lands.

### *Executive Order 13211—Regulations That Significantly Affect the Supply, Distribution, or Use of Energy*

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

### *National Environmental Policy Act*

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

### *Paperwork Reduction Act*

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

### *Regulatory Flexibility Act*

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether

this rule would have a significant economic impact, the Department relied upon data and assumptions for the counterpart Federal regulations.

### *Small Business Regulatory Enforcement Fairness Act*

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of \$100 million; (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that the Pennsylvania submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

### *Unfunded Mandates*

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of \$100 million or more in any given year. This determination is based upon the fact that the Pennsylvania submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

### **List of Subjects in 30 CFR Part 938**

Intergovernmental relations, Surface mining, Underground mining.

Dated: August 11, 2006.

**Hugh Vann Weaver,**

*Acting Regional Director, Appalachian Regional Office.*

■ 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 new paragraph (d) to read as follows:

**§ 938.12 State statutory, regulatory and proposed program amendment provisions not approved.**

\* \* \* \* \*

(d) We are not approving the word “augmented” in the last sentence of subsection 86.151(d) that we found to be

less effective on April 8, 1993 (58 FR 18154).

**§ 938.16 [Amended]**

■ 3. Section 938.16 is amended by removing and reserving paragraphs (r), (eee), (ggg), (kkk), (lll), and (qqq).

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