

DEPARTMENT OF THE INTERIOR**Office of Surface Mining Reclamation and Enforcement****30 CFR Part 914**

[Docket No. IN-157-FOR]

Indiana Regulatory Program

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

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are approving an amendment to the Indiana regulatory program (Indiana program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). The Indiana Department of Natural Resources, Division of Reclamation (IDNR, Indiana, or department) made revisions to its rules to allow commercial forestry (trees) to be planted on reclaimed prime farmland provided all remaining reclamation requirements for prime farmland soil reconstruction and restoration are met. Indiana also restructured several of its provisions and made some minor language changes. Indiana intends to revise its program to improve operational efficiency.

EFFECTIVE DATE: May 21, 2007.

FOR FURTHER INFORMATION CONTACT: Andrew R. Gilmore, Chief, Alton Field Division—Indianapolis Area Office. Telephone: (317) 226-6700. E-mail: IFOMAIL@osmre.gov.

SUPPLEMENTARY INFORMATION:

- I. Background on the Indiana Program
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I. Background on the Indiana Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, "a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act." See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior (Secretary) conditionally approved the Indiana program effective July 29, 1982.

You can find background information on the Indiana program, including the Secretary's findings, the disposition of comments, and the conditions of approval, in the July 26, 1982, **Federal Register** (47 FR 32071). You can also find later actions concerning the Indiana program and program amendments at 30 CFR 914.10, 914.15, 914.16, and 914.17.

II. Submission of the Amendment

By letter dated October 23, 2006 (Administrative Record No. IND-1738), Indiana sent us an amendment to its program under SMCRA (30 U.S.C. 1201 *et seq.*) at its own initiative. The provisions of Title 312 Indiana Administrative Code (IAC) that Indiana revised are: 312 IAC 25-4-102, special categories of mining-prime farmland and 312 IAC 25-6-143, prime farmland-special performance standards—revegetation and restoration of soil productivity.

We announced receipt of the proposed amendment in the November 13, 2006, **Federal Register** (71 FR 66148). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the adequacy of the amendment. We did not hold a public hearing or meeting because no one requested one. The public comment period ended on December 13, 2006. We received comments from two Federal agencies.

III. OSM's Findings

Following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. We are approving the amendment as described below. Any revisions that we do not specifically discuss below concern nonsubstantive wording or editorial changes.

A. Minor Revisions to Indiana's Rules

1. Indiana restructured the following provisions with minor changes to the existing language: 312 IAC 25-4-102(a)(1), (a)(3)(A) and (B); (b); (d)(4) and (6); (e)(3); and (f)(5).

For example, at 312 IAC 25-4-102(a)(1), Indiana restructured the sentence, "A map showing the geographical location of the area for which the determination is requested and the area previously affected by surface coal mining and reclamation operation," to:

A map showing the geographical location of:

- (A) The area for which the determination is requested; and
- (B) The area previously affected by surface coal mining and reclamation operation.

2. Indiana restructured the following provisions with minor changes to the existing language: 312 IAC 25-6-143(b)(3) and (b)(8).

For example, at 312 IAC 25-6-143(b)(3), Indiana restructured the sentence, "The sampling techniques contained in section 60 of this rule and the statistical methodology contained in section 61 of this rule shall be used to measure soil productivity," to:

The:

- (A) Sampling techniques contained in section 60 of this rule; and
 - (B) Statistical methodology contained in section 61 of this rule;
- shall be used to measure soil productivity.

Because these changes are minor and do not alter the meaning of the affected regulations, we find that they will not make Indiana's rules less effective than the corresponding Federal regulations.

B. Other Revisions to Indiana's Rules

Indiana revised its prime farmland rules at 312 IAC 25-4-102, which concern application requirements for prime farmland mining and restoration. Indiana also revised 312 IAC 25-6-143, which concerns revegetation and restoration of soil productivity for prime farmland. The purpose of the revisions is to allow commercial trees to be planted on reclaimed prime farmland areas provided soil productivity is demonstrated according to prime farmland soil productivity standards. In other words, the revisions would establish standards for planting trees on those parts of reclaimed prime farmland upon which crops need not be grown to demonstrate restoration of soil productivity and revegetation success.

There are no direct Federal counterparts to most of the revisions. However, all revisions affecting prime farmland restoration must be consistent with the Federal prime farmland regulations at 30 CFR 785.17 and Part 823.

1. 312 IAC 25-4-102 Special Categories of Mining—Prime Farmland

Indiana added new subdivision (d)(8) to read as follows:

(8) If the applicant proposes to establish commercial forest resources on the prime farmland, the plan must also include the following:

- (A) A commercial forest planting plan that shall include the following:
 - (i) A stocking rate.
 - (ii) A plan for replanting as needed.
- (B) A commercial forest management plan.
- (C) Documentation of landowner consent.

Subsection (d) of this section concerns land within the proposed permit area that is identified as prime farmland. Once prime farmland is

identified, the applicant must submit a plan for mining and restoring that land. The requirements in subsection (d) were previously approved as no less effective than the Federal regulation at 30 CFR 785.17(c). Newly added subdivision (8) contains additional application requirements for establishing commercial forestry (trees) on those portions of prime farmland upon which crops need not be grown to demonstrate restoration of soil productivity and revegetation success.

2. 312 IAC 25-6-143 Prime Farmland—Special Performance Standards—Revegetation and Restoration of Soil Productivity

Indiana added new subsection (c) to read as follows:

(c) Commercial forest resources may be established on reclaimed prime farmland provided that productivity is demonstrated by subsection (b) and as follows:

(1) The director has approved a forest planting plan and forest management plan in consultation with the division of forestry.

(2) Landowner consent has been obtained.

(3) Forest compatible, permanent ground cover sufficient to control erosion is established and all erosion areas must be repaired or otherwise stabilized.

(4) The required soil replacement depth is verified and approved before trees are planted.

(5) Soil productivity shall be demonstrated under subsection (b).

Subsection (b) of this section contains Indiana's requirements for revegetation and restoration of soil productivity for prime farmland. These requirements were previously approved as no less effective than the Federal regulation at 30 CFR 823.15(b). Newly added subsection (c) contains the additional requirements needed for planting commercial trees on those portions of reclaimed prime farmland upon which crops need not be grown to demonstrate restoration of soil productivity and revegetation success.

The Federal regulation at 30 CFR 785.17(e)(1) provides that the regulatory authority may approve mining and reclamation of prime farmland only if it first finds that the approved postmining land use of those prime farmlands is cropland. Originally designated as 30 CFR 785.17(d)(1) when first adopted on March 13, 1979, the preamble explains this provision as meaning that “* * * at the time the bond is released, the land must both be capable of supporting prime farmland use and must actually be in use as prime farmland.” See 44 FR 15086, March 13, 1979. (That portion of the preamble uses the term “prime farmland” as a synonym for cropland.) Consistent with this preamble discussion, the 1979 version of the

prime farmland revegetation success standards at 30 CFR 823.15(b) required that crops be planted on “* * * any portion of the permit area which is prime farmland * * *”

Illinois challenged 30 CFR 785.17(d)(1) as being inconsistent with section 515(b)(2) of SMCRA, which requires that surface coal mining and reclamation operations “* * * restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or to higher or better uses * * *” The court rejected this challenge, citing what it characterized as “clear congressional intent to restore prime farmland to cropland” and noting that section 519(c)(2) of the Act prohibits release of bond “* * * until soil productivity for prime farm lands has returned to equivalent levels of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices * * *.” The court stated that “[t]his equivalency standard could not be achieved absent the postmining employment of prime farmland as cropland.” See *In Re: Permanent Surface Mining Regulation Litigation, Round II (PSMRL, Round II)*, 19 ERC 1480, 1482 (D.D.C. May 16, 1980).

The rationale set forth in that decision is arguably inconsistent with the court's earlier decision on a similar challenge to the revegetation success standards for prime farmland—in 30 CFR 823.11(c) and 823.15(b) and (c)—by the National Coal Association (NCA). As originally adopted on March 13, 1979, paragraph (b) of 30 CFR 823.15 provided that “* * * any portion of the permit area which is prime farmland must be used for crops commonly grown, such as corn, soybeans, cotton, grain, hay, sorghum, wheat, oats, barley, or other crops on surrounding prime farmland.” In the NCA case, the court upheld the challenge, finding that “* * * the Act fails to provide statutory support for requiring coal operators to engage in farming.” See *In Re: Permanent Surface Mining Regulation Litigation, Round I (PSMRL, Round I)*, 14 ERC 1083, 1106 (D.D.C. February 26, 1980). Referring to a number of statutory provisions, including those the court later cited as a basis for its conflicting decision on 30 CFR 785.17(d)(1) in *PSMRL, Round II*, the court stated that—

These statutory enactments do not command a coal operator to actually farm the land. Instead, they direct the operator to demonstrate capability of prime farmlands to support pre-mining productivity.

See *PSMRL, Round I*, 14 ERC 1083, 1106.

In a subsequent rulemaking, we incorporated aspects of both decisions. First, the revised rules at 30 CFR 823.15(b) retain the requirement that crops be grown to demonstrate the restoration of soil productivity for prime farmland. The preamble explains that we “* * * determined that cropping is the only method currently available to test the restoration of the productivity of prime farmland soils because insufficient research has been published that demonstrates the reliability of any other method.” See 48 FR 21458, May 12, 1983.

Second, we did not adopt the proposed rule to the extent that it, like the 1979 rule, would have required crops to be grown on any portion of the disturbed area that is prime farmland historically used as cropland. Instead, revised section 823.15(b)(2) requires that soil productivity “* * * be measured on a representative sample or on all of the mined and reclaimed prime farmland area using the reference crop determined under paragraph (b)(6) of this section.” As explained in the preamble, the revised rule reflects an agreement between OSM and the Soil Conservation Service [since renamed the Natural Resources Conservation Service] “* * * that the amount of prime farmland area used to grow crops for proof of soil productivity could include the entire mined and reclaimed prime farmland area or a portion of the mined and reclaimed prime farmland area which would result in a statistically valid sample at a 90 percent confidence level.” See 48 FR 21459, May 12, 1983. The courts upheld the revised rules. See *In Re: Permanent Surface Mining Regulation Litigation II, Round II*, 21 ERC 1724, 1732-34 (D.D.C. October 1, 1984) and *NWF v. Hodel*, 839 F.2d 694, 716-718 (D.C. Cir. 1988). Consequently, the 1979 preamble discussion of 30 CFR 785.17(d)(1) [since redesignated as paragraph (e)(1)] is no longer valid to the extent that it required all prime farmland to be planted with crops. That requirement now applies only to those portions of the reclaimed prime farmland that are to be used to demonstrate restoration of soil productivity and revegetation success.

Therefore, based on the foregoing discussion, we find that Indiana's proposed amendment is not inconsistent with and is no less effective than the Federal rules at 30 CFR 785.17(e)(1) and 823.15. First, like the Federal rules at 30 CFR 785.17(e)(1), the Indiana rules require that the postmining land use of all prime farmland be cropland, which means that, consistent with 30 CFR 816.133(a), 817.133(a), and 823.14, all disturbed

prime farmland must be restored to conditions that are capable of supporting cropland. Second, like the Federal rules at 30 CFR 823.15(b), the Indiana rules require, among other things, that measurement of soil productivity be initiated within 10 years after completion of soil replacement and that revegetation success be determined on the basis of crops grown on all or a representative sample of the mined and reclaimed prime farmland. Indiana's proposed amendment at 312 IAC 25-6-143(c) would not alter any of these requirements. Instead, it addresses revegetation of those portions of the reclaimed prime farmland on which crops will not be grown. Consistent with 30 CFR 823.15(a), which requires that the soil surface be stabilized with a vegetation cover or other means that effectively controls soil loss by wind and water erosion, proposed 312 IAC 25-6-143(c)(3) requires establishment of a permanent ground cover sufficient to control erosion.

Based on the discussion above, we are approving Indiana's revisions at 312 IAC 25-4-102(d)(8) and 25-6-143(c) as no less effective than the Federal regulations.

IV. Summary and Disposition of Comments

Public Comments

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

Federal Agency Comments

On October 27, 2006, under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Indiana program (Administrative Record No. IND-1740). We received two comments; one from the U.S. Fish and Wildlife Service and one from the U.S. Department of Agriculture's Forest Service. The U.S. Fish and Wildlife Service responded on November 8, 2006 (Administrative Record No. IND-1742), stating that it supports Indiana's proposed program amendment. The Forest Service responded on December 4, 2006 (Administrative Record No. IND-1743), that it too supports this amendment.

Environmental Protection Agency (EPA) Concurrence and Comments

Under 30 CFR 732.17(h)(11)(ii), we are required to get a written concurrence from EPA for those provisions of the program amendment that relate to air or water quality standards issued under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act

(42 U.S.C. 7401 *et seq.*). None of the revisions that Indiana proposed to make in this amendment pertain to air or water quality standards. Therefore, we did not ask EPA to concur on the amendment. However, on October 27, 2006, under 30 CFR 732.17(h)(11)(i), we requested comments on the amendment from EPA (Administrative Record No. IND-1740). EPA did not respond to our request.

State Historical Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP)

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and ACHP on amendments that may have an effect on historic properties. On October 27, 2006, we requested comments on Indiana's amendment (Administrative Record No. IND-1740), but neither responded to our request.

V. OSM's Decision

Based on the above findings, we approve the amendment Indiana sent us on October 23, 2006.

To implement this decision, we are amending the Federal regulations at 30 CFR part 914, which codify decisions concerning the Indiana program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that the State's program demonstrate that the State has the capability of carrying out the provisions of the Act and meeting its purposes. Making this rule effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

Effect of OSM's Decision

Section 503 of SMCRA provides that a State may not exercise jurisdiction under SMCRA unless the State program is approved by the Secretary. Similarly, 30 CFR 732.17(a) requires that any change to an approved State program be submitted to OSM for review as a program amendment. The Federal regulations at 30 CFR 732.17(g) prohibit any changes to approved State programs that are not approved by OSM. In the oversight of the Indiana program, we will recognize only the statutes, rules and other materials we have approved, together with any consistent implementing policies, directives and other materials. We will require Indiana to enforce only approved provisions.

VI. Procedural Determinations

Executive Order 12630—Takings

The provisions in the rule based on counterpart Federal regulations do not

have takings implications. This determination is based on the analysis performed for the counterpart Federal regulations. The revisions made at the initiative of the State that do not have Federal counterparts have also been reviewed and a determination made that they do not have takings implications. This determination is based on the fact that this rulemaking has no takings implications.

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866.

Executive Order 12988—Civil Justice Reform

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

Executive Order 13132—Federalism

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be "in accordance with" the requirements of SMCRA, 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. This determination is based on the fact that the Indiana program does not regulate coal exploration and surface coal mining and reclamation operations on Indian lands. Therefore, the Indiana program has no effect on Federally-recognized Indian tribes.

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

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

National Environmental Policy Act

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 a portion of the provisions in 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.*) because they are 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 part of the rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations. The Department of the Interior also certifies that the provisions in this rule that are not based upon counterpart Federal regulations will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This determination is based upon the fact that the provisions are voluntary and as such are not expected to have a substantive effect on the regulated industry.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of \$100 million; (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local 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 a portion of the State provisions are 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. For the portion of the State provisions that is not based upon counterpart Federal regulations, this determination is based upon the fact that the State provisions are voluntary and as such are not expected to have a substantive effect on the regulated industry.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of \$100 million or more in any given year. This determination is based upon the fact that a portion of 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. For the portion of the State provisions that is not based upon counterpart Federal regulations, this determination is based upon the fact that the State provisions are voluntary and as such are not expected to have a substantive effect on the regulated industry.

List of Subjects in 30 CFR Part 914

Intergovernmental relations, Surface mining, Underground mining.

Dated: April 19, 2007.

Ervin J. Barchenger,

Acting Regional Director, Mid-Continent Region.

- For the reasons set out in the preamble, 30 CFR part 914 is amended as set forth below:

PART 914—INDIANA

- 1. The authority citation for part 914 continues to read as follows:

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

- 2. Section 914.15 is amended in the table by adding a new entry in chronological order by “Date of final publication” to read as follows:

§ 914.15 Approval of Indiana regulatory program amendments.

* * * * *

Original amendment submission date	Date of final publication	Citation/description
October 23, 2006	May 21, 2007	312 IAC 25–4–102(a)(1) and (3); (b); (d)(4), (6), and (8); (e)(3); (f)(5); 25–6–143(b)(3) and (8), (c).