

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

[PA-151-FOR; Docket ID: OSM-2008-0013]

**Pennsylvania Regulatory Program**

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

**ACTION:** Final rule; disapproval of amendment and reinstatement of a required amendment

**SUMMARY:** We are disapproving two changes to the Pennsylvania regulatory program (the "Pennsylvania program") regulations under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act) which were previously submitted under amendment PA-147-FOR. While we approved the other proposed changes related to PA-147-FOR, we deferred our decision on two changes pertaining to the discontinuation of a \$100 per acre reclamation fee pending the outcome of litigation before the United States Court of Appeals for the Third Circuit in the matter of *Pennsylvania Federation of Sportsmen's Clubs Inc. et al. v. Norton*, (PFSC v. Norton) No. 06-1780. We now have the U.S. Court of Appeals decision before us. The decision sets aside our October 7, 2003, final rule removing a required amendment pertaining to the Pennsylvania alternative bonding system. Therefore, we are now disapproving the two changes pertaining to the discontinuation of the fee. We are also reinstating a required amendment that has been modified to be consistent with the court's decision.

**DATES:** *Effective Date:* July 8, 2008.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:**

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**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.

From 1982 until 2001, Pennsylvania's bonding program for surface coal mines, coal refuse reprocessing operations and coal preparation plants, was funded under an Alternative Bonding System (ABS), which included a central pool of money (Surface Mining Conservation and Reclamation Fund) used for reclamation. This pool was funded in part by a per-acre reclamation fee paid by operators of permitted sites and supplemented by site bonds posted by those operators for each mine site. This is the reclamation fee, established at 25 Pa. Code 86.17(e), that Pennsylvania proposed to eliminate.

In 1991, our oversight activities determined that Pennsylvania's ABS contained unfunded reclamation liabilities for backfilling, grading, and revegetation and we determined that the ABS was financially incapable of abating or treating pollutional discharges from bond forfeiture sites under its purview. As a result, on May 31, 1991, we imposed the required amendment codified at 30 CFR 938.16(h). That amendment required Pennsylvania to demonstrate that the revenues generated by its collection of the reclamation fee would assure that its Surface Mining Conservation and Reclamation Fund (Fund) could be operated in a manner that would meet the ABS requirements contained in 30 CFR 800.11(e). After a decade of trying to address the problems with the ABS, the Pennsylvania Department of Environmental Protection (PADEP) terminated the ABS in 2001 and began converting active surface coal mining permits to a Conventional Bonding System (CBS) or "full-cost" bonding program. This CBS requires a permittee to post a site specific bond in an amount sufficient to cover the estimated costs to complete reclamation in the event of bond forfeiture.

OSM published a final rule on October 7, 2003, removing the required amendment at 30 CFR 938.16(h) on the basis that the conversion from an ABS to a CBS rendered the requirement to comply with 30 CFR 800.11(e) moot. Subsequent to these OSM actions, a lawsuit was filed in the U.S. District Court for the Middle District Court of Pennsylvania, *Pennsylvania Federation*

*of Sportsmen's Clubs Inc. et al. v. Norton No. 1:03-CV-2220*. It was that case, while initially dismissed by the district court, that ultimately leads to the Third Circuit decision that brings us to this action today.

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. Submission of the Original Amendment**

By letter dated May 23, 2006, the PADEP sent us an amendment to revise its program regulations at 25 Pennsylvania Code (Pa. Code) (Administrative Record No. PA 793.11). Pennsylvania sent the amendment in response to five required program amendments. The proposed amendment also included four additional changes which were made at Pennsylvania's own initiative. Two of the four additional changes that Pennsylvania proposed concerned money received from reclamation fees intended to supplement a reclamation bond pool.

Because PADEP revised its bonding requirements and is now requiring all mine permits to post a full cost reclamation bond, the PADEP contended that there was no longer a basis for maintaining the reclamation fee. Pennsylvania submitted a request to discontinue the collection of the \$100 per acre reclamation fee authorized under 25 Pa. Code 86.17(e) under Amendment No. PA-147-FOR by adding the following sentence "This fee shall not be required after (effective date of this rulemaking)."

Pennsylvania also amended 25 Pa. Code by removing section 86.283(c) since it referenced the reclamation fee in relation to remaining areas for mine operators approved to participate in the financial guarantees program. PADEP submitted the amendment to create consistency with the proposed amendment to 86.17(e) that would delete the reclamation fee.

While we approved the other requested changes related to PA-147-FOR, we deferred our decision on the two changes pertaining to the discontinuation of a \$100 per acre reclamation fee. We deferred our decision because Pennsylvania's decision to eliminate its ABS in favor of a CBS had been challenged, and the matter was pending before the United States Court of Appeals for the Third

Circuit in *Pennsylvania Federation of Sportsmen's Clubs v. Kempthorne*, No. 06–1780. (*PFSC v. Kempthorne*).

Specifically, if the Third Circuit were to rule that Pennsylvania could not discontinue funding for surface coal mining sites where operators defaulted on their reclamation obligations before the conversion to a CBS, and for sites with operators who subsequently default due to failure to obtain adequate full-cost bonds, then OSM could not approve the proposed elimination of the reclamation fee. Therefore, in the interest of judicial economy, we deferred our decision on this proposed change until final disposition of the *PFSC v. Kempthorne* matter.

### III. Court Decision

On August 2, 2007, the United States Court of Appeals for the Third Circuit decided *PFSC v. Kempthorne*, 497 F.3d 337 (3rd Cir. 2007). At issue, relevant to this notice, was whether OSM properly terminated the requirement that Pennsylvania demonstrate that its Surface Mining Conservation and Reclamation Fund was in compliance with 30 CFR 800.11(e).

The Third Circuit concluded: “while it is true that the ‘ABS Fund’ continues to exist in name, it no longer operates as an ABS, that is, as a bond pool, to provide liability coverage for new and existing mining sites.” 497 F.3d at 349. However, the Court went on to “conclude that 800.11(e) continues to apply to sites forfeited prior to the CBS conversion.” *Id.* at 353. In commenting further on 30 CFR 800.11(e), the Court stated “The plain language of this provision requires that Pennsylvania demonstrate adequate funding for mine discharge abatement and treatment at all ABS forfeiture sites.” *Id.* at 354.

### IV. OSM's Findings

PADEP had proposed elimination of the \$100 per acre fee given that the ABS had been terminated and active mine sites permitted under the ABS had been converted to full-cost bonding. However, elimination of the \$100 per acre fee would essentially eliminate income to the Fund, thus reducing the amount of funds available for the reclamation of the forfeited sites bonded under the Fund. Therefore, an approval of the proposed change at 25 Pa Code 86.17(e) or the deletion of 25 Pa Code 86.283(c) would be in conflict with the Court's decision.

Also, because the Third Circuit decision set aside our 2003 removal of the required amendment at 30 CFR 938.16(h), we are now reinstating an amendment “(h),” which has been

modified to be consistent with the Court's decision.

### V. Summary and Disposition of Comments

#### Public Comments

We asked for public comments on the original amendment (Administrative Record No. PA 793.17). We received comments from one organization, the Citizens for Pennsylvania's Future (PennFUTURE) (Administrative Record No. PA 793.18). PennFUTURE objected to the portion of the program amendment that would discontinue the collection of Pennsylvania's reclamation fee at 25 Pa. Code 86.17(e), and requested that we defer our decision on this proposed change until such time as the matter of *PFSC v. Kempthorne* is decided.

As we noted above, we deferred our decision with respect to the proposed amendment to 86.17(e), as well as on an ancillary proposed change at 86.283(c). With the recent Court decision, we have now concluded that we cannot approve the requested changes.

#### Federal Agency Comments

Under Federal regulations at 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the original amendment from various Federal agencies with an actual or potential interest in the Pennsylvania program (Administrative Record No. PA 793.12). The Mine Safety and Health Administration (MSHA), District 1, responded (Administrative Record No. PA 793.13) and stated that it did not have any comments or concerns. The Natural Resources Conservation Service responded (Administrative Record No. PA 793.14) and stated that it did not have any comments.

#### Environmental Protection Agency (EPA) Concurrence and Comments

Under Federal regulations at 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 Pennsylvania proposed to make in this amendment pertain to air or water quality standards. Therefore, we did not ask EPA to concur on the amendment.

On June 6, 2006, we requested comments on the amendment from EPA (Administrative Record No. PA 793.15). The EPA, Region III, responded and stated that it did not identify any

inconsistencies with the Clean Water Act or any other statutes or regulations under its jurisdiction.

### VI. OSM's Decision

Based on the above findings, we disapprove the amendment Pennsylvania sent to us on May 23, 2006, pertaining to the termination of the collection of the reclamation fee at 25 Pa. Code 86.17(e) and 86.283(c). Because we are disapproving the elimination of the fee, Pennsylvania must continue to collect this fee in accordance with 25 Pa. Code 86.17(e). For the reasons stated above, we are also disapproving the proposed deletion of 25 Pa Code 86.283(c).

We are also reinstating a required amendment formerly codified at 30 CFR 938.16(h), and modifying it to be consistent with the court's decision.

As reinstated, 30 CFR 938.16(h) will provide as follows:

By September 8, 2008, Pennsylvania must either submit information sufficient to demonstrate that revenues to the Surface Mining Conservation and Reclamation Fund (Fund) are adequate to fulfill outstanding reclamation obligations at forfeited sites for which the Fund provides partial bond coverage under 30 CFR 800.11(e), or amend its program to otherwise meet those outstanding financial obligations at these forfeited sites.

This final rule is being made effective immediately to expedite the State program amendment process and to encourage States to bring their programs into conformity with the Federal standards without undue delay. Consistency of State and Federal standards is required by SMCRA.

### VII. 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 regulations.

#### 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, 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 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. 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. The basis for this determination is that our decision is on a State regulatory program and does not involve a Federal program involving Indian 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*

Section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that a decision on a proposed State regulatory program provision does not constitute a major Federal action within the meaning of section 102(2)(C) of the National Environmental Policy Act (NEPA) (42 U.S.C. 4332(2)(c)). A determination has been made that such decisions are categorically excluded from the NEPA process (516 DM 8.4.A).

#### *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 amendment that is the subject of this rule is based on 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. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. 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), 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, geographic regions, or Federal, State, or local government agencies; 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 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 a cost of \$100 million or more in any given year on any governmental entity or the private sector.

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

Intergovernmental relations, Surface mining, Underground mining.

Dated: June 23, 2008.

**Thomas D. Shope,**

*Regional Director, Appalachian Region.*

■ 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 paragraph (e) to read as follows:

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

\* \* \* \* \*

(e) We are not approving the following amendments that Pennsylvania submitted on May 23, 2006:

(1) At 25 Pa. Code 86.17(e), the sentence “This fee shall not be required after (effective date of this rulemaking).”

(2) At 25 Pa. Code 86.283(c), the proposed deletion of the entire subsection.

■ 3. Section 938.16 is amended by adding paragraph (h) to read as follows:

#### **§ 938.16 Required regulatory program amendments.**

\* \* \* \* \*

(h) By September 8, 2008, Pennsylvania must either submit information sufficient to demonstrate that revenues to the Surface Mining Conservation and Reclamation Fund (Fund) are adequate to fulfill outstanding reclamation obligations at forfeited sites for which the Fund provides partial bond coverage under 30 CFR 800.11(e), or amend its program to otherwise meet those outstanding financial obligations at these forfeited sites.

\* \* \* \* \*

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