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VII. Effective Date and Congressional Notification

81. The Supplemental Final Rule is effective April 23, 2009. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB, that this rule is not a "major rule" as defined in section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996.

List of Subjects in 18 CFR Part 40

Electric power, Electric utilities, Reporting and recordkeeping requirements.

By the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix A—NOPR Commenters ⁴⁹

Alcoa Inc. (Alcoa)*
Constellation Energy Commodities Group, Inc. (Constellation)*
Independent Electricity System Operator of Ontario (IESO)*
ISO/RTO Council*
ITC Transmission; Michigan Electric Transmission Company, LLC; and ITC Midwest LLC
Lafayette Utilities and the Louisiana Energy and Power Authority (Lafayette and LEPA)*
North American Electric Reliability Corp. (NERC)*
NRG Companies (NRG)*
Southern Company Services, Inc. (Southern)

⁴⁹ An asterisk (*) indicates that the commenter addressed Reliability Standard IRO-006-4.

Appendix B—Comments in Response to NERC's September 11, 2008 Filing ⁵⁰

ISO/RTO Council
NRG
Southern

[FR Doc. E9-6416 Filed 3-23-09; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 938

[PA-152-FOR; Docket ID: OSM-2008-0019]

Pennsylvania Regulatory Program

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

ACTION: Final rule; required amendment.

SUMMARY: We are reinstating a requirement for the Pennsylvania regulatory program (the "Pennsylvania program") under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). The requirement deals with documentation for the bonding provisions of the Pennsylvania program.

DATES: *Effective Date:* March 24, 2009.

FOR FURTHER INFORMATION CONTACT: George Rieger, Chief, Pittsburgh Field Division, Telephone: (717) 782-4036, e-mail: grieger@osmre.gov.

SUPPLEMENTARY INFORMATION:

- I. Background on the Pennsylvania Program
- II. The Modified Required Amendment
- III. OSM's Decision
- IV. 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

⁵⁰ M-S-R Public Power Agency filed a motion to intervene without comments.

on the Pennsylvania program, including the Secretary's findings, the disposition of comments, and conditions of approval in the July 30, 1982, **Federal Register** notice (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.

Pennsylvania's Bonding Program

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, to supplement site-specific bonds posted by operators for each mine site. This pool was funded by a per-acre reclamation fee paid by operators of permitted sites.

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 pollution 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), 56 FR 24687. 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. (PFSC) et. al. v. Norton No. 1:03-CV-2220*. The Plaintiffs claimed, in relevant part, that

reclamation obligations already incurred under an ABS remain, even after the ABS is prospectively converted to a CBS. Thus, the Plaintiffs contended, the requirement to comply with the Federal ABS provision at 30 CFR 800.11(e) was not mooted by the conversion to a CBS. As noted above, the Defendants' position was that the conversion to the CBS eliminated the obligations imposed by 30 CFR 800.11(e), and that, as a result, the requirements contained in the required amendment at 30 CFR 938.16(h) were no longer applicable. The district court ruled in OSM's (i.e., the Defendants') favor, but was reversed by the United States Court of Appeals for the Third Circuit. Subsequently, on November 1, 2007, the District court set aside our October 7, 2003, termination of the 1991 required amendment. The appellate court's decision is discussed in the section below.

II. The Modified Required Amendment

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.

Because the Third Circuit in *PFSC v. Kempthorne, Id.*, reversed the District Court, which had upheld our termination of the 1991 required amendment at 30 CFR 938.16(h), we decided to impose a modified version of amendment (h), which we believed was fully consistent with the rationale of the Third Circuit's decision while accounting for circumstances which had changed since 1991. Issuance of this modified required amendment was announced in the July 8, 2008, **Federal Register** at 73 FR 38918. After we published the modified version of 30 CFR 938.16(h), the Pennsylvania Federation of Sportsmen's Clubs, along with the other plaintiffs, filed a Motion

to Reopen, to Substitute Party, and for Contempt in the matter of *PFSC v. Kempthorne, No. 1:03-CV-2220 (M.D. Pa.)*. The plaintiffs alleged that the Federal defendants were in contempt of the district court's November 1, 2007, order on remand from the Third Circuit decision in *PFSC v. Kempthorne*, 497 F.3d 337 (3rd Cir. 2007), because they revised 30 CFR 938.16(h) from its 1991 form. The plaintiffs contend that the Federal defendants disobeyed the district court's order, which the plaintiffs claim did not authorize any modification to the required amendment. *PFSC v. Kempthorne, No. 1:03-CV-2220 (M.D. Pa.)* (Motion to Reopen, to Substitute Party, and for Contempt filed July 16, 2008)

In order to resolve the matter of the contempt proceeding, and without admitting any liability with respect to the plaintiffs' allegations put forth in said proceeding, we announced the rescission of the revised version of the required amendment at 30 CFR 938.16(h) in an October 15, 2008, **Federal Register** notice 73 FR 60944. Nevertheless, the plaintiffs subsequently raised a concern that the October 15, 2008 rescission notice did not clearly provide for reinsertion of the original 1991 version of 30 CFR 938.16(h). Therefore, again in order to resolve plaintiffs' latest concerns, but without admitting any liability with respect to the plaintiffs' latest allegations, we have decided to take the action set forth in Section III, below.

III. OSM's Decision

Based on the above discussion we hereby reinstate, with one exception, the required amendment at 30 CFR 938.16(h), as it was published in the May 31, 1991 **Federal Register**, at 56 FR 24687. The last sentence of the May 31, 1991 required amendment is not being reinstated because the plaintiffs did not contest our 2003 decision to remove this portion of the required amendment before the United States Court of Appeals for the Third Circuit in *PFSC v. Kempthorne, supra*. The sentence that will not be reinstated provided as follows: In addition, Pennsylvania shall clarify the procedures to be used for bonding the surface impacts of underground mines and the procedures to reclaim underground mining permits where the operator has defaulted on the obligation to reclaim.

IV. Procedural Determinations

Administrative Procedure Act

This rule is being issued without prior public notice or opportunity for public comment. The Administrative

Procedure Act (APA) (5 U.S.C. 553) provides an exception to the notice and comment procedures when an agency finds there is good cause for dispensing with such procedures on the basis that they are impracticable, unnecessary or contrary to the public interest. In view of the litigation and court order, we have determined that under 5 U.S.C. 553(b)(3)(B), good cause exists for dispensing with the notice of proposed rulemaking and public comment procedures for this rule. For the same reason, we believe there is good cause under 5 U.S.C. 553(d)(3) of the APA to have the rule become effective on a date that is less than 30 days after the date of publication in the **Federal Register**. Also, the final rule is being made effective immediately in order to encourage Pennsylvania to bring its program into conformity with the Federal standards without undue delay. Consistency of State and Federal standards is required by SMCRA.

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 possible, this rule meets the applicable standards of Subsections (a) and (b) of that Section.

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 the fact that our decision affects the Pennsylvania regulatory program and will have no effect on 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 13.5A(2)).

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.*). This certification is based on the fact that the required amendment simply requires the State of Pennsylvania to submit information sufficient to demonstrate that the revenues generated by the collection of

the reclamation fee will assure that the Surface Mining Conservation and Reclamation Fund can be operated in a manner that will meet the requirements of 30 CFR 800.11(e).

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 on the fact that the required amendment simply requires the State of Pennsylvania to submit information sufficient to demonstrate that the revenues generated by the collection of the reclamation fee will assure that the Surface Mining Conservation and Reclamation Fund can be operated in a manner that will meet the requirements of 30 CFR 800.11(e).

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: February 3, 2009.

Michael K. Robinson,
Acting 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.*

§ 938.16 [Amended]

■ 2. In § 938.16, add paragraph (h) to read as follows:

* * * * *

(h) By November 1, 1991, Pennsylvania shall submit information, sufficient to demonstrate that the revenues generated by the collection of the reclamation fee, as amended in § 86.17(e), will assure that the Surface Mining Conservation and Reclamation

Fund can be operated in a manner that will meet the requirements of 30 CFR 800.11(e). Pennsylvania could provide such a demonstration through an actuarial study showing the Fund's soundness or financial solvency.

* * * * *

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA-HQ-SFUND-1986-0005; FRL-8784-7]

National Oil and Hazardous Substance Pollution Contingency Plan; National Priorities List

AGENCY: Environmental Protection Agency.

ACTION: Direct final Notice of Partial Deletion of the Mouat Industries Superfund Site from the National Priorities List.

SUMMARY: The Environmental Protection Agency (EPA) Region 8 is publishing a direct final Notice of Partial Deletion of the surface and subsurface soil components of the Mouat Industries Superfund Site (Site), located in the Town of Columbus, Stillwater County, Montana, from the National Priorities List (NPL). The NPL, promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended, is an appendix of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). This direct final partial deletion is being published by EPA with the concurrence of the State of Montana (State), through the Montana Department of Environmental Quality (MDEQ) because EPA has determined that all appropriate response actions at these identified parcels under CERCLA, other than five year reviews and operation and maintenance, have been completed. However, this partial deletion does not preclude future actions under Superfund.

This partial deletion pertains to the surface and subsurface soils component of the Mouat Industries Superfund Site. The groundwater component will remain on the NPL and is not being considered for deletion as part of this action.

DATES: This direct final partial deletion will be effective May 26, 2009 unless EPA receives adverse comments by April 23, 2009. If adverse comments are