

provide rules relating to a new provision of the Code that was enacted as part of EJMMA (Pub. L. 111–226, 124 Stat. 2389 (2010)) which addresses situations in which foreign income taxes have been separated from the related income. The text of those regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the temporary regulations and these proposed regulations. The regulations affect taxpayers claiming foreign tax credits.

### Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f), these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

### Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under **ADDRESSES**. The Treasury Department and the IRS request comments on all aspects of the proposed rules. All comments will be available at [www.regulations.gov](http://www.regulations.gov) or upon request. A public hearing will be scheduled if requested in writing by any person that timely submits comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

### Drafting Information

The principal author of these regulations is Suzanne M. Walsh of the Office of Associate Chief Counsel (International). However, other personnel from the IRS and the Treasury Department participated in their development.

### List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

### Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

#### PART 1—INCOME TAXES

**Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

**Authority:** 26 U.S.C. 7805 \* \* \*

**Par. 2.** Section 1.704–1 is amended as follows:

1. Paragraph (b)(1)(ii)(b)(3) is added.
  2. Paragraph (b)(4)(viii)(d)(3) and paragraph (b)(5) *Example 24* are revised.
- The addition and revisions read as follows:

#### § 1.704–1 Partner's distributive share.

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(ii) \* \* \*

(b) \* \* \*

(3) [The text of the proposed amendments to § 1.704–1(b)(1)(ii)(b)(3) is the same as the text of § 1.704–1T(b)(1)(ii)(b)(3) published elsewhere in this issue of the **Federal Register**.]

\* \* \* \* \*

(4) \* \* \*

(viii) \* \* \*

(d) \* \* \*

(3) [The text of the proposed amendments to § 1.704–1(b)(4)(viii)(d)(3) is the same as the text of § 1.704–1T(b)(4)(viii)(d)(3) published elsewhere in this issue of the **Federal Register**.]

\* \* \* \* \*

(5) \* \* \*

*Example 24.* [The text of the proposed amendments to § 1.704–1(b)(5) *Example 24* is the same as the text of §§ 1.704–1T(b)(5) *Example 24* published elsewhere in this issue of the **Federal Register**.]

\* \* \* \* \*

**Par. 3.** Section 1.909–0 is added to read as follows:

#### § 1.909–0 Outline of regulation provisions for section 909.

[The text of proposed § 1.909–0 is the same as the text of § 1.909–0T published elsewhere in this issue of the **Federal Register**.]

**Par. 4.** Sections 1.909–1 through 1.909–6 are added to read as follows:

#### § 1.909–1 Definitions and special rules.

[The text of proposed § 1.909–1 is the same as the text of § 1.909–1T(a) through (e) published elsewhere in this issue of the **Federal Register**.]

#### § 1.909–2 Splitter arrangements.

[The text of proposed § 1.909–2 is the same as the text of § 1.909–2T(a) through (c) published elsewhere in this issue of the **Federal Register**.]

#### § 1.909–3 Rules regarding related income and split taxes.

[The text of proposed § 1.909–3 is the same as the text of § 1.909–3T(a) through (c) published elsewhere in this issue of the **Federal Register**.]

#### § 1.909–4 Coordination rules.

[The text of proposed § 1.909–4 is the same as the text of § 1.909–4T(a) through (b) published elsewhere in this issue of the **Federal Register**.]

#### § 1.909–5 2011 and 2012 Splitter arrangements.

[The text of proposed § 1.909–5 is the same as the text of § 1.909–5T(a) through (c) published elsewhere in this issue of the **Federal Register**.]

#### § 1.909–6 Pre-2011 foreign tax credit splitting events.

[The text of proposed § 1.909–6 is the same as the text of § 1.909–6T(a) through (h) published elsewhere in this issue of the **Federal Register**.]

Steven T. Miller,

*Deputy Commissioner for Services and Enforcement.*

[FR Doc. 2012–3350 Filed 2–9–12; 4:15 pm]

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## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining Reclamation and Enforcement

#### 30 CFR Part 935

[SATS No. OH–252–FOR; Docket ID OSM 2011–0003]

#### Ohio Regulatory Program

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

**ACTION:** Proposed rule; reopening of the public comment period and opportunity for public hearing on the proposed amendment.

**SUMMARY:** We are announcing receipt of a proposed amendment to the Ohio regulatory program (the “Ohio program”) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act) and reopening the public comment period. The comment period is being reopened to incorporate changes that Ohio made to its initial amendment submission of 2007 regarding Ohio’s alternative bonding

system. We did not make a decision on that submission since Ohio planned to submit additional revisions in response to OSM's review of the submission. The comment period is being reopened to incorporate recent amendment submissions, which consist of changes in response to OSM's concerns and other changes that Ohio made at its own initiative. Taken together, the revised amendment includes legislative and regulatory actions regarding subjects such as bond program changes, AML provisions, program funding, permitting standards, valid existing rights, re-mining, blasting, and topsoil handling. It also includes two actuarial reports on Ohio's bonding program and letters to Ohio's Governor from the Reclamation Forfeiture Fund Advisory Board of Ohio with recommendations regarding these reports.

This document gives the times and locations that the Ohio submittal is available for your inspection, the comment period during which you may submit written comments, and the procedures that we will follow for the public hearing, if one is requested.

**DATES:** We will accept written comments until 4 p.m., local time March 15, 2012. If requested, we will hold a public hearing on March 12, 2012. We will accept requests to speak until 4 p.m., local time on February 29, 2012.

**ADDRESSES:** You may submit comments, identified by "OH-252-FOR; Docket ID: OSM-2011-0003 by either of the following two methods:

*Federal eRulemaking Portal:* [www.regulations.gov](http://www.regulations.gov). The proposed rule has been assigned Docket ID: OSM-2011-0003. If you would like to submit comments through the Federal eRulemaking Portal, go to [www.regulations.gov](http://www.regulations.gov) and follow the instructions.

*Mail/Hand Delivery/Courier:* Mr. Ben Owens, Acting Chief, Pittsburgh Field Division, Office of Surface Mining Reclamation and Enforcement, 4605 Morse Rd., Room 102, Columbus, Ohio 43230.

*Instructions:* For detailed instructions on submitting comments and additional information on the rulemaking process, see the "Public Comment Procedures" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

*Docket:* In addition to obtaining a copy of the submission letter at [www.regulations.gov](http://www.regulations.gov), information may also be obtained at the addresses listed below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy

of the amendment by contacting OSM's Pittsburgh Field Division Office.

Ben Owens, Acting Chief, Pittsburgh Field Division, Office of Surface Mining Reclamation and Enforcement, 4605 Morse Rd., Room 102, Columbus, OH 43230, Telephone: (614) 416-2238, Email: [bowens@osmre.gov](mailto:bowens@osmre.gov).

Lanny Erdos, Chief, Division of Mineral Resources Management, Ohio Department of Natural Resources, 2045 Morse Rd., Building H-2, Columbus, OH 43229, Telephone: (614) 265-6888; Email: [Lanny.Erdos@dnr.state.oh.us](mailto:Lanny.Erdos@dnr.state.oh.us).

**FOR FURTHER INFORMATION CONTACT:** Ben Owens, Telephone: (614) 416-2238. Email: [bowens@osmre.gov](mailto:bowens@osmre.gov).

**SUPPLEMENTARY INFORMATION:**

- I. Background on the Ohio Program
- II. Description of the Amendment
- III. Public Comment Procedures
- IV. Procedural Determinations

**I. Background on the Ohio 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 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 approved the Ohio program on August 16, 1982.

You can find background information on the Ohio program, including the Secretary's findings, the disposition of comments, and conditions of approval of the Ohio program in the August 16, 1982, **Federal Register** (41 FR 34688). You can also find later actions concerning the Ohio program and program amendments at 30 CFR 935.11, 935.12, 935.15, and 935.16.

**II. Description of the Amendment**

*Initial Submission:* By letter dated March 6, 2007, Ohio sent us an amendment to its program (Administrative Record Number OH-2185-28), known by Ohio as Program Amendment No. 82. The amendment was intended primarily to satisfy a program condition codified in the Federal regulations at 30 CFR 935.11(h). It was in response to our letter of May 4, 2005, issued under provisions of 30 CFR 733.12(b). The program condition

and the 733 letter provided that Ohio submit a program amendment that demonstrates how the alternative bonding system will assure timely reclamation at the site of all operations for which bond has been forfeited. We announced the receipt of this amendment in the April 30, 2007, **Federal Register** (72 FR 21176).

The submission was a result of the adoption of Ohio House Bill 443 in 2007, which was intended to address many of the issues of concern to OSM relative to Ohio's alternative bonding system. The submission involved legislative action resulting in changes to the Ohio Revised Code (ORC) regarding the state's alternative bonding system, funding for its regulatory and abandoned mine land programs, permitting procedures for determining the potential for acid mine drainage, and rulemaking if Ohio becomes covered by a state programmatic general permit issued by the U.S. Army Corps of Engineers for the discharge of dredged or fill material into waters of the United States by coal mining operations. The submission included: Ohio House Bill 443 as signed into law; a Summary of Coal Mining Provisions of House Bill 443 prepared by the Ohio Division of Mineral Resources Management (DMRM); Program Amendment No. 82 request; revisions to the Ohio Bonding Program; Explanation of Proposed Bond Pool Revisions; and an Analysis of the impacts of House Bill 443 upon DMRM revenues.

OSM conducted a review of the submission and documented its findings in a letter to Ohio dated July 26, 2007 (Administrative Record No. OH-2185-36). In that letter, OSM identified 24 issues that required additional clarification or a description of necessary rulemaking before OSM could provide the analysis necessary to make a decision on the adequacy of the amendment provisions in meeting SMCRA requirements. These issues would require additional legislative changes, rulemaking, procedure development, and completion of an actuarial study, followed by a revised program amendment. For these reasons, OSM deferred deciding on the submission until Ohio submitted additional information. The following actions occurred subsequent to the initial submission:

*Establishment of Workgroups:*

Ohio acknowledged that significant amendments to the Ohio Administrative Code (OAC) would be needed to ensure that the final program amendment, in whole, was consistent with the relevant Federal regulations. Ohio chartered several workgroups made up of internal

and external stakeholders to develop final procedures that would be issued as a basis for writing new and revising existing regulations under the Ohio Administrative Code (OAC) to implement the provisions of HB 443. The workgroups' efforts resulted in development of procedures affecting such matters as acid-base accounting, reclamation cost estimates, performance security release/approval, tax credits, and others as described in some of the following paragraphs.

*OSM/State Communications:*

OSM met with Ohio on August 22, 2007 (Administrative Record No. OH-2185-37), and on August 27, 2007 (Administrative Record No. OH-2185-38), to discuss the issues and Ohio's plans to address them. Ohio responded to OSM's July 26, 2007, letter on October 15, 2007 (Administrative Record No. OH-2185-39) requesting an extension of time until January 18, 2008, to respond to OSM's issues. OSM responded on November 6, 2007 (Administrative Record No. OH-2185-40), granting Ohio's request for an extension. Ohio provided a detailed response to OSM's issues on January 18, 2008 (Administrative Record No. OH-2185-41). Their response included Ohio's expectation that discussion with the mining industry regarding needed statutory changes would continue and regulations would be adopted by December 2009. By letter dated July 3, 2008 (Administrative Record No. OH-2185-42), Ohio responded to concerns that OSM identified regarding changes to program funding and described a new revenue source. By letter dated January 9, 2009, OSM responded (Administrative Record No. OH-2185-44) to Ohio's letter of January 18, 2008. In this letter OSM reiterated some of the major concerns with the amendment and acknowledged Ohio's letter of July 3, 2008, regarding program funding concerns. OSM met with Ohio on January 29, 2009 (Administrative Record No. OH-2185-45), to discuss OSM's January 9, 2009, letter and Ohio's progress with additional program changes in response to OSM's issues. Ohio responded to OSM's letter of January 9, 2009, by letter dated April 17, 2009 (Administrative Record No. OH-2185-46), that described statutory changes that had occurred or would occur to address the major concerns OSM identified.

Ohio provided OSM with a copy of a letter from Pinnacle Actuarial Resources to the Chair of the Ohio Reclamation Forfeiture Advisory Board dated June 22, 2009, that included a report entitled "Analysis of the Ohio Reclamation Forfeiture Fund." This actuarial

analysis provided information and recommendations regarding the fiscal condition of Ohio's performance security pool (Administrative Record No. OH-2185-47). The Board forwarded this report, along with recommendations resulting from the report, to the Governor of Ohio by letter dated June 29, 2009 (Administrative Record No. OH-2185-48).

On July 28, 2009, Ohio provided OSM with an update (Administrative Record No. OH-2185-49) to Ohio's Program Amendment No. 82, which was intended to address several of the issues OSM had identified with Ohio's original program amendment submittal. This document included three legislative actions (portions of House Bill 119, Senate Bill 73, and Senate Bill 386); changes to OAC effective April 30, 2009; an opinion from DMRM's Chief legal counsel regarding the cap on liability of Ohio's alternative bonding system, and the 2009 actuarial report. Since additional changes were forthcoming, OSM did not process this update as a formal program amendment.

On July 27, 2010, OSM sent a letter to Ohio (Administrative Record No. OH-2185-52), providing the issues that OSM believed to remain unresolved and asked for an update on the status of addressing the issues since Ohio's projected completion date of December 2009 had passed. Ohio replied on October 18, 2010 (Administrative Record No. OH-2185-53), providing a status report on negotiations with the Ohio Coal Association regarding additional legislative issues, the status of a second actuarial analysis, and a number of rules that had been adopted.

*April Submission:* By letter dated April 1, 2011, Ohio sent us an amendment to its program (a continuation of the original 2007 submission), Administrative Record No. OH-2185-54, under SMCRA (30 U.S.C. 1201 *et seq.*). Ohio changed its program by adding and changing statutory provisions (Ohio Revised Code—ORC) and rules (Ohio Administrative Code—OAC) regarding performance bond on coal mining operations in response to OSM's concerns and in order to codify regulatory language resulting from House Bill 443 (which had been announced previously). In addition to these changes, Ohio subsequently added or changed statutory provisions and regulations regarding topics such as valid existing rights, re-mining, abandoned mine lands, blasting, and topsoil handling, among others.

The submission includes statutory changes to Chapters 1513 and 5749 of the ORC that resulted from four different legislative actions (House Bill

119, Senate Bill 73, Senate Bill 181, and Senate Bill 386); regulatory changes to Chapter 1501 of the OAC; a 2009 actuarial report analysis of Ohio's reclamation forfeiture fund; and procedure directives. In addition to the documents mentioned above, the state has included procedure directives for the purposes of clarity and support and they are not considered part of this amendment.

*July Submission:* By letter dated July 26, 2011 (Administrative Record No. OH-2185-61), Ohio provided additional statutory changes adopted under House Bill 163 on June 30, 2011; a recently completed 2011 actuarial report on the reclamation forfeiture fund; and a letter to the Governor from the Reclamation Forfeiture Fund Advisory Board regarding the actuarial report.

We are combining the April 1, 2011, and the July 26, 2011, submissions with the original submission and reopening the comment period. When taken together, the March 8, 2007, the April 1, 2011, and the July 26, 2011, submissions include changes to the following provisions of the ORC and OAC.

*Legislative Actions:*

As mentioned above, we announced the provisions of the April 6, 2007, submission that included House Bill 443 in the April 30, 2007, **Federal Register** (72 FR 21176). Since that publication, five additional legislative actions have occurred: House Bill 119 dated September 28, 2007; Senate Bill 386 dated April 7, 2009; Senate Bill 73 dated June 15, 2009; Senate Bill 181 dated September 13, 2010; and House Bill 163 dated June 30, 2011. As legislative activity progressed throughout these years, many of the provisions of the more recent bills modified previously enacted bills. We did not announce these legislative actions as they occurred, but rather aggregately included them with this notice. To simplify our description of the outcome of the legislative activity that occurred subsequent to House Bill 443, we have summarized pertinent changes based on the ORC language that currently exists. While we had already announced the submission involving ORC changes resulting from the enacted provisions of House Bill 443, we have chosen to include them here to provide a comprehensive summary of all of the changes requested for approval. The summary of the changes follows:

*1513.01: Coal Surface Mining Definitions (Revised by House Bill 443 and Senate Bill 73)*

This section was revised to define the new term "performance security" and to

clarify that the state is the primary beneficiary of any trust fund.

*1513.02: Chief of Division of Mineral Resources Management—Powers and Duties (Revised by House Bill 443)*

With regard to the power and duties of the Chief concerning violations and penalty assessments, this section was revised to direct that all funds collected from civil penalties be deposited in the reclamation forfeiture fund, instead of the coal mining administration and reclamation reserve fund. With regard to the power and duties of the Chief, this section was revised to add the provision that if the state becomes covered by a state programmatic general permit issued by the U.S. Army Corps of Engineers for the discharge of dredged or fill material into the waters of the U.S. by operations that conduct surface and underground coal mining and reclamation operations and the restoration of abandoned mine lands, the Chief may establish programs and adopt rules and procedures designed to implement the terms, limitations, and conditions of the permit.

*1513.07: Coal Mining and Reclamation Permit—Application or Renewal—Reclamation Plan (Revised by House Bill 443, Senate Bill 386, Senate Bill 73, and House Bill 163)*

With regard to the permit application, this section was revised to delete the permit application and renewal fee. The loss of program operation funding previously generated by the fees was addressed through changes to the excise tax on coal production. With regard to the results of test borings or core samplings from the application area, the section was revised to add that if test borings or core samplings from the application area indicate the existence of potentially acid forming or toxic forming quantities of sulfur in the coal or overburden to be disturbed by mining, the application also shall include a statement of the acid generating potential and the acid neutralizing potential of the rock strata to be disturbed. With regard to the reclamation plan, this section was revised to clarify that it is the applicant's responsibility to provide adequate information in the application to enable the Chief to determine the estimated cost to reclaim the site in the event of forfeiture and eliminate the requirement that the permittee provide the estimated cost of reclamation per acre in a permit application. With regard to post-application processing, this section was revised to establish that the state must make a decision on completeness on coal mining permit

applications and notify the applicant of a decision within 14 days of submission. This section was also revised to add a permit provision that addresses the situation involving a conflict of results between various methods of calculating potential acidity and neutralization potential. The change is for purposes of assessing the potential for acid mine drainage to occur at a mine site. It requires that the permit include provisions for monitoring and recordkeeping to identify the creation of unanticipated acid water at the mine site. If the monitoring detects the creation of acid water at the site, the permit shall impose additional requirements regarding mining practices and site reclamation to prevent the discharge of acid mine drainage from the mine site. With regard to right-of-entry documents, this section was revised to provide that right-of-entry documents must be provided in cases where the private mineral estate has been severed from the private surface estate only in cases where surface disturbance will result from the extraction of coal by the applicant's proposed strip mining method.

*1513.073: Designating Areas as Unsuitable for Coal Mining Operations (Revised by House Bill 163)*

With regard to the designation criteria, this section was revised to clarify that prohibitive distances for mining close to public roads, occupied dwellings, public buildings, schools, churches, community or institutional buildings, public parks, and cemeteries are measured horizontally.

*1513.075: Potential Acidity and Neutralization of Disturbed Strata (Created by House Bill 443 and Revised by House Bill 163)*

This is a new section that defines certain terms relative to potential acidity and neutralization potential of strata overlying the coal to be mined. The provision also provides for calculation of a proposed mining operation's potential to create acid or toxic drainage. The section provides specific criteria and the conditions under which proposed mining areas not meeting certain numeric criteria "may" not be considered as potential acid/toxic producers.

*1513.076: Agency Coordination and Cooperation Respecting Permits (Created by Senate Bill 386)*

This is a new section that requires coordination, cooperation, and communication between the Ohio Department of Natural Resources and the Ohio Environmental Protection

Agency regarding processing of coal mining permit applications. It requires establishment of a joint-agency task force to ensure that procedures are established and implemented.

*1513.08: Filing Performance Bond or Deposit of Cash or Securities (Revised by House Bill 443, House Bill 119, and Senate Bill 73)*

With regard to an applicant's obligations after a coal mining and reclamation permit application has been approved, this section was revised to provide that the applicant shall file a performance security that is payable to the state and conditioned on the faithful performance of the requirements and rules and conditions of the permit. The section had previously provided that after the permit application was approved and before the permit was issued, the applicant must file such a security.

With regard to estimated cost of reclamation for performance security calculations, changes require the state to provide: (1) Reclamation cost estimates on all permits according to the basic criteria provided followed by a written notice of the estimate to the applicant; and (2) an option for some applicants/permittees to provide: (a) performance security in the full amount of the estimated cost to reclaim the site; or (b) performance security of \$2,500 per acre with reliance on the reclamation forfeiture fund by paying an excise tax on coal production. With regard to the first option, the section was revised to establish that the amount of performance security will be based on the state's estimated cost to reclaim the site. With regard to the second option, this section was revised to: define the terms "affiliate of the applicant" and "owner and controller of the applicant;" clarify that the applicant includes the owner or controller and/or any affiliate of the applicant; clarify eligibility for applicants to participate in the performance security pool; establish that if forfeiture occurs, the difference between the amount of performance security provided by the permittee and the estimated cost to reclaim the site will be provided from the reclamation forfeiture fund; and, establish the methods of providing performance security for permits held prior to the effective date of House Bill 443.

With regard to the permittee's liability under the performance security, this section was revised to add that a permittee's liability under the performance security is limited to the obligation established under the permit. That includes completion of the reclamation plan to return the land to a

condition capable of supporting the postmining land use that was approved in the permit.

With regard to the estimated cost to reclaim, this section was changed to require the state to adjust the estimate under certain conditions, provide notice to the permittee and other interested parties, and provide an opportunity for an informal conference regarding the adjustment. Changes also provide that the permittee may request a reduction in the amount of performance security. The state will make a determination on such requests based on the documentation provided and other information and will notify the permittee of the findings.

With regard to performance security, this section was revised to provide that, upon approval by the Chief, performance security may be held in trust, provided that the state is the primary beneficiary of the trust, and the custodian of the performance security held in trust is a bank, trust company, or other financial institution that is licensed and operating in the state. With regard to surety insolvency, this section was revised to add provisions that require the operator to submit a plan for replacement of performance security if a surety, bank, savings and loan association, trust company, or other financial institution that holds the performance security becomes insolvent.

With regard to the permittee's responsibility for addressing subsidence damage, this section was revised to clarify that liability insurance may be used in lieu of performance security for subsidence damage under the full-cost performance security option. It also specifies that performance security must be adjusted to cover the cost of subsidence repair or water supply replacement if repairs/replacement/compensation does not occur within 90 days, with allowance for more time, up to one year, if the permittee shows that subsidence is not yet completed.

The section regarding the amount of security was revised to add the provision that, if the performance security provided exceeds the estimated cost of reclamation, the Chief may authorize the amount of security that exceeds the estimated cost of reclamation, together with any interest or other earnings on the performance security, to be paid to the permittee.

*1513.081: Priority Lien Where Operator Becomes Insolvent (Created by House Bill 443 and Revised by House Bill 163)*

This is a new section that provides the lien provisions and conditions when an operator becomes insolvent. It

includes a provision that the state shall have a priority lien superior to all interested creditors against the assets of that operator for the amount of any reclamation that is required, including the cost of long-term water treatment and replacement of alternative water supplies, as a result of the operator's mining activities. This section describes the procedures the Chief will use in such cases. It also describes the conditions under which the Chief shall issue a certificate of release, modify the amount of the lien, and authorize a closing agent to hold a certificate of release in escrow for a period not to exceed 180 days for the purpose of facilitating the transfer of unreclaimed mine land. This section also adds the provision that all money from the collection of liens shall be deposited in the state treasury to the credit of the reclamation forfeiture fund.

*1513.10: Refund of Permit Fees (Repealed by House Bill 443)*

This section was repealed. It provided conditions in which the operator would be entitled to a permit fee refund and described the manner in which the reclamation fee fund and coal mining administration and reclamation reserve fund were used and maintained for such use.

*1513.13: Public Adjudicatory Hearings (Revised by House Bill 443)*

With regard to appeals made to the reclamation commission, this section was revised to clarify that only the petitioning party may be awarded costs and expenses, including attorney's fees that were necessary and reasonably incurred for, or in connection with participating in the proceeding before the commission.

*1513.16: Performance Standards (Revised by House Bill 443 and House Bill 163)*

With regard to general performance standards that apply to all coal mining and reclamation operations and performance security, this section was revised to provide that alternative financial security is required when the Chief determines that a permittee is responsible for mine drainage that requires water treatment after reclamation is completed under the terms of the permit or when the permittee must provide an alternative water supply after reclamation is completed. The revision also provides the amount and form of the security. It also provides permittees under performance security with reliance on the reclamation forfeiture fund with the option of funding an alternative

financial security over time, up to five years, with reliance for the balance on the reclamation forfeiture fund until the alternative financial security is fully funded. Permittees taking this option must pay the state a fee of 7.5 percent of the average balance of the alternative financial security that is being provided by reliance on the reclamation forfeiture fund. The fee will be credited to the fund. In addition, the revision provides that rules must be developed to address how contracts/trusts/annuities for water treatment will be developed. With regard to final release of the performance security, this section was revised to add that the final release of the performance security terminates the jurisdiction of the Chief over the reclaimed site of a surface coal mining and reclamation operation or applicable portion of an operation. It provides the conditions under which the Chief may reassert jurisdiction over such a site and the appeal procedures regarding such a determination.

*1513.171: Tax Credit for Reclamation Outside Permit Area (Created by House Bill 443)*

This is a new section that provides the procedures for claiming a credit and the authority for approving and determining the amount of such a credit. It provides that rules shall be adopted to establish procedures for determining the amount; when the chief may obtain consent of the owners of land or water resources to allow reclamation work; and delivery of notice to the owners of land or water resources on which the reclamation work is to be performed.

*1513.18: Reclamation Forfeiture Fund (Revised by House Bill 443, House Bill 119, Senate Bill 73, and House Bill 163)*

With regard to the fund, this section was revised to delete a phrase describing the reclamation forfeiture fund and its contents. The fund was comprised of any monies transferred to it from the unreclaimed lands fund and monies collected and credited to it. The section now provides that the fund is comprised of all money from the collection of liens, any monies transferred to it from the coal mining and reclamation reserve fund, fines collected, and monies collected and credited to it. Since the fund is no longer responsible for non-coal sites, the Chief's priority for designating funding was eliminated. Thus, this section was further revised to delete the requirement that the Chief's priority for management of the fund, including the selection of projects and transfer of monies, shall be to ensure that sufficient funds are

available for the reclamation of areas affected by mining under a coal mining and reclamation permit. It now provides that the Chief may expend monies from the fund to pay necessary administrative costs of the reclamation forfeiture fund advisory board.

This section was revised to authorize the Chief to enter into a contract with a contractor hired by the trust administrator to provide long-term water treatment or a long-term alternative water supply on areas on which a permittee defaulted or has not fully funded an alternative financial security without advertising for bids. It clarifies that the money from forfeited performance security credited to the reclamation forfeiture fund will pay the cost of completing reclamation to the standards established by the law and rules. It also authorizes use of any alternative financial security in addition to forfeited performance security to complete the reclamation of sites. It clarifies that for permits covered by performance security with reliance on the reclamation forfeiture fund, if the forfeited performance security and any alternative financial security are not sufficient to complete reclamation to the standards of the law and rule, the Chief may expend any other monies transferred to the fund to complete the reclamation. It also provides an exception to the prohibition that the reclamation forfeiture fund cannot be used for water treatment. The exception allows use of money from the reclamation forfeiture fund for reclamation of land and water resources affected by mine drainage that requires treatment or for an alternative water supply in an amount not to exceed the balance of the alternative financial security provided by the reclamation forfeiture fund. In addition, money from the reclamation forfeiture fund shall not supplement the performance security of a permittee that has provided performance security without reliance on the reclamation forfeiture fund. This section was also revised to add that all investment earnings of the fund shall be credited to the fund and shall be used only for the reclamation of land for which the performance security was provided.

*1513.181: Coal Mining Administration and Reclamation Reserve Fund (Revised by House Bill 443)*

With regard to the fund, this section was revised to remove the provision that fines collected shall be paid into the coal mining administration and reclamation reserve fund. The section was also revised to provide that if the Director of Natural Resources

determines it necessary, he/she may request the controlling board to transfer an amount of money from the coal mining administration and reclamation reserve fund to the unreclaimed lands fund.

*1513.182: Reclamation Forfeiture Fund Advisory Board (Created by House Bill 443)*

This is a new section that provides for the creation of the reclamation forfeiture fund advisory board. It includes provisions for the composition of the board, term limits for board members, compensation of board members, election of officers, meeting frequency, establishment of board procedures, and responsibilities of the board. The responsibilities of the board include: reviewing deposits into and expenditures from the reclamation forfeiture fund; procuring periodic actuarial studies; adopting rules to adjust the rate of tax levied; providing a forum for discussion of issues related to the reclamation forfeiture fund and the performance security that is required; submitting a biennial report to the Governor that describes the financial status of the reclamation forfeiture fund and the adequacy of the amount of money in the fund to accomplish the purposes of the fund; and, recommending to the Governor, if necessary, alternative methods of providing money for or using money in the reclamation forfeiture fund. The board will also evaluate any rules, procedures, and methods for estimating the cost of reclamation for purposes of determining the amount of performance security that is required; the collection of forfeited performance security; payments to the reclamation forfeiture fund; reclamation of sites for which operators have forfeited the performance security; and the compliance of operators with their reclamation plans.

*1513.29: Council on Unreclaimed Strip Mined Lands (Revised by House Bill 443)*

With regard to meeting frequency, this section has been revised to change the requirement to hold at least four quarterly meetings each year to providing that meetings would occur as necessary.

*1513.30: Unreclaimed Lands Fund—Selection of Project Areas (Revised by House Bill 443)*

The section regarding the Chief's recommendations concerning project selection and priorities to the council on unreclaimed strip mined lands has been revised. The revision removes the requirement that the Chief shall mail a

notice at least two weeks before any meeting of the council during which the Chief will submit a project proposal, a project area will be selected, or the boundaries of a project area will be determined, to the board of county commissioners and the board of township trustees of the township in which the proposed project lies, and the Chief executive and the legislative authority of each municipal corporation within the proposed area. The Chief is no longer required to give reasonable notice to the news media in the county where the proposed project lies. This section has also been revised to remove the provision that the controlling board may transfer excess funds from the oil and gas well fund after recommendation by the council to meet deficiencies in the unreclaimed lands fund. Also, if the director of natural resources determines it necessary, he/she may request the controlling board to transfer an amount of money from the fund to the coal mining administration and reclamation reserve fund.

*1513.371: Abandoned Mine Reclamation Fund (Created by House Bill 443, Revised by House Bill 163)*

This is a new section that provides for the creation and management of an abandoned mine land set-aside fund. This section was later revised to delete research and demonstration projects from the list of eligible expenditures from the AML set-aside fund.

*1513.372: Immunity From Liability (Created by Senate Bill 181)*

This is a new section establishing the conditions under which an eligible landowner or nonprofit organization is immune from liability for injuries or damages that occur during an abandoned mine land or acid-mine drainage reclamation project. It also establishes procedures for notifying the division of known, latent, dangerous conditions located at the reclamation project work area and limitations on immunity.

*5749.02: Excise Tax on Severance of Natural Resources (Revised by House Bill 443, House Bill 119, and Senate Bill 73)*

With regard to the excise tax, this section was revised to increase the coal excise tax from 7 cents to 10 cents per ton for providing revenue to administer the state's coal mining and reclamation regulatory program. It also provides that if performance security is provided by way of the bond pool and \$2,500 flat rate bond, then an additional 14 cents per ton is required by those operations and credited to the reclamation

forfeiture fund. It also provides the conditions and applicable dates for adjustment of this tax, depending on the forfeiture fund balance. In addition, it provides the conditions that must exist for determining that forfeiture liability no longer exists and the excise tax can be discontinued for a period of time. It further provides that an additional 1.2 cents per ton is required for coal mined by surface mining methods and credited to the unreclaimed lands fund. With regard to the allocation of the taxes levied, the section has been revised to specify the percentage of each severance tax that will be credited to each of the following funds: coal mining administration and reclamation reserve fund; reclamation forfeiture fund; the unclaimed lands fund; or, other fund as designated. The section was also revised to eliminate the tax levied at the rate of one cent per ton of coal, the monies of which were allocated to reclaim bond forfeiture lands.

*5749.11: Nonrefundable Credit (Created by House Bill 443)*

This is a new section that provides for a nonrefundable credit against the severance taxes imposed on coal production based on an issued reclamation tax credit certificate.

*Rule Changes*

As a result of the statutory changes, Federal rule changes, and Ohio's internal review of rules, Ohio made numerous rule changes as described in the paragraphs below. In addition to the substantive changes we mention below, non-substantive changes were also included with this submission. Non-substantive changes include: changes of address; inclusion of Web site addresses; changes in division names and titles; typographical errors; chapter titles; paragraph references; citations; use of "performance security" rather than "bond;" inclusion of reference to the National Register of Historic Places; name change to "reclamation commission;" use of "applicant" and "permittee" rather than "operator" to clarify obligations and responsibilities; and, the incorporation by reference to dates of Federal regulations and Federal laws. Substantive changes to the Ohio Administrative Code, Chapter 1501:13 included in the submission are as follows:

*1501:13-1-02: Definitions*

Ohio made several additions and modifications of definitions that are intended to simplify, clarify, or mirror Federal regulations or state statutory language. Definitions of the following terms have been added to this section:

angle of draw; effluent limitations; incremental mining unit; national pollutant discharge elimination system; point source discharge; receiving water; shadow area; trust fund; and, water quality standards. The following definitions have been revised: collateral bond; engineer; incremental area; operator; performance security; pollution abatement area; person; recurrence interval; runoff; safety factor; surveyor; and valid existing rights.

*1501:13-1-03: Restrictions on Financial Interest of Employees*

The Reclamation Forfeiture Fund Advisory Board was added to this rule to clarify that the restrictions on financial interest of employees do not apply to the advisory board members. However, advisory board members do have to file an annual statement of employment and financial interest.

This section also clarifies that members of the Reclamation Commission do not have prohibited financial interests under this rule and, therefore, will never be ordered by the Chief to take remedial action. Instead, commission members are required to file statements of employment and financial interest and are required to recuse themselves from proceedings which may affect their direct or indirect financial interests. Unlike the requirements for commissioner members, there are prohibited financial interest provisions for hearing officers of the Reclamation Commission.

In addition, more detail was added regarding employees accepting gifts of nominal value from coal companies; clarification was added regarding how an employee is notified that remedial action is necessary to resolve a prohibited interest; and, clarification was added that appeals procedures involving remedial action to be taken by employees are different than those to be taken by the Chief or a hearing officer of the Reclamation Commission.

*1501-13-1-10: Availability of Records*

With regard to the public's accessibility to documents involving permits and inspection and enforcement actions, this rule was changed to only provide access to such documents at the Division of Mineral Resources Management's district office that is responsible for inspection of the mining operation. This rule has also been changed to delete the provision that copies of information sent by mail at the request of a member of the public will occur at the division's expense.

*1501:13-1-14: Incorporation by Reference*

This is a new rule that contains a list of all Federal regulations and Federal laws that are incorporated by reference in Chapter 1501:13 of the Ohio Administrative Code. The rule also explains where the public can find a copy of the Federal regulations and Federal laws, and the editions of the Code of Federal Regulations and United States Code in which the regulations and laws are published.

*1501:13-3-01: Standards for Demonstration of Valid Existing Rights*

This is a new rule that describes the demonstration requirements for a person claiming valid existing rights. As proof of valid existing rights, it requires that a person must provide a property rights demonstration and compliance with the good faith/all permits standard or compliance with the needed for and adjacent standard. In addition, if a person who claims valid existing rights to use or construct a road across the surface of protected lands, he/she must provide additional demonstrations. Possession of valid existing rights only provides exceptions to the prohibited distances from certain structures, facilities, and resources as described under the areas designated as unsuitable for mining provisions of ORC and OAC.

*1501:13-3-02: Submission and Processing of Requests for Valid Existing Rights Determinations*

This is a new rule that describes the requirements for submitting a request for a valid existing rights determination, which is required before preparing and submitting an application for a permit or boundary revision for the land for which the determination is sought. This includes: Requirements for property rights demonstration; additional requirements for the good faith/all permits standard; additional requirements for the needed for and adjacent standard; and requirements for roads.

This rule also describes the procedures Ohio will use to process a request for a valid existing rights determination. This includes the: Initial review of the request; public notice and opportunity to comment; determination of the Chief; and post-determination process.

*1501:13-3-03: Areas Where Mining Is Prohibited or Limited*

This rule was reorganized and a provision was added to provide exceptions for existing operations. The provisions of this rule do not apply to mining operations for which a valid

permit existed when the land came under protection of the law.

*1501:13-3-04: Procedures for Identifying Areas Where Mining Is Prohibited Or Limited*

The rule change clarifies that the rule applies to a complete application for a coal mining and reclamation operation permit as well as to a complete application for revision of the boundaries of a coal mining and reclamation operation permit. It also expands the requirements for obtaining a road permit to include situations where the applicant proposes to relocate or close a public road. The rule also provides that an applicant for a permit to mine on Federal land shall submit a permit application to the Director of the Office of Surface Mining under the terms of the cooperative agreement between OSM and Ohio. An applicant requesting a determination regarding valid existing rights to mine on Federal land must submit a request to the Director of the Office of Surface Mining.

*1501:13-4-01: General Contents Requirements for Permit Applications*

This rule change deletes the provision requiring submittal of a permit fee with an application.

*1501:13-4-02: Requirements of Coal Exploration*

With regard to the requirements for a written notice for coal exploration operations, this rule was revised to remove the limitation regarding the requirements for those operations involving the removal of 250 tons of coal or less. This rule was also revised to add the requirement that, for any area where mining is prohibited or limited, a demonstration that the proposed exploration activities have been designed to minimize interference with the values for which those lands were designated as unsuitable for coal mining operations, to the extent technologically and economically feasible. The application must include documentation of consultation with the owner of the feature causing the land to come under the protection of unsuitable for mining and, when applicable, with the agency with primary jurisdiction over the feature with respect to the values that caused the land to come under such protection. With regard to decisions on applications for exploration, this rule was revised to add that before making a finding, the Chief shall provide reasonable opportunity to the owner of the feature causing the land to come under such protection and, when applicable, to the agency with primary jurisdiction over the feature

with respect to the values that caused the land to come under the protection, to comment on whether the finding is appropriate.

*1501:13-4-03: Permit Application, Requirements for Legal, Financial, Compliance and Related Information*

With regard to right of entry and operation information, this rule was revised to clarify that right of entry information must be provided for the permit and shadow areas of underground mines.

*1501:13-4-04: Permit Application Requirements for Information on Environmental Resources*

With regard to groundwater and surface water information, this rule was revised to add parameters for aluminum and sulfates for analyzing water samples. This rule now requires that the application map be prepared by or under the direction of and certified by a surveyor ("engineer" is removed from this portion of the paragraph), or jointly by a surveyor and an engineer, since this map is the responsibility of a surveyor rather than an engineer. This rule was also revised to require that the supplementary maps and cross sections required under this section be prepared by or under the direction of and certified by an engineer ("surveyor" is removed from this portion of the paragraph), or jointly by an engineer and a surveyor, since the information required is the responsibility of an engineer rather than a surveyor.

*1501:13-4-05: Permit Applications; Requirements for Legal, Financial, Compliance and Related Information*

With regard to the requirement that an operation plan include a description of the mining operations proposed and a narrative explaining the construction, modification, use, maintenance, and removal of certain facilities (i.e., dams, overburden, topsoil handling, storage areas, and structures), this rule was revised to delete the requirement that retention of such facilities is necessary for the postmining land use. The revision now provides that the facilities be approved by the Chief for postmining land use. With regard to the application information, this rule was revised to include a requirement that it is the applicant's responsibility to provide adequate information in the application to enable the Chief to determine the estimated cost to reclaim the site in the event of forfeiture. Such information must be sufficient to determine the greatest potential reclamation cost liability to the state. With regard to the operation plan and existing structures,

this rule was revised to no longer allow an applicant to make a showing that existing structures meet interim program performance standards. With regard to the reclamation plan, this rule was revised to clarify that that detailed design plans shall be certified by an engineer, not just prepared under the direction of an engineer.

*1501:13-4-06: Permit Applications, Revisions, and Renewals, and Transfers, Assignments, and Sales of Permit Rights*

With regard to the requirements for applications for permits and permit renewals, this rule was revised to require that an application is deemed complete unless the Chief notifies an applicant within 14 business days of an application submission that an application is incomplete and provides written notification that identifies the deficiencies in the application. This rule was also revised to add the requirement that the Chief review revisions to permits to determine if an adjustment of the estimated cost of reclamation will be required. This rule was also revised regarding transfer, assignment, or sale of permit rights by indicating that any person seeking to succeed by transfer, assignment, or sale must obtain the appropriate performance security coverage for the permitted operation by either obtaining transfer of the original performance security coverage of the original permittee, provided that the successor meets the eligibility requirements for obtaining performance security together with reliance on the reclamation forfeiture fund, or by providing sufficient performance security under the full-cost option.

*1501:13-4-07: Annual Reports*

With regard to the requirements that the permittee file information with the Chief 30 days after each anniversary date of the issuance of a coal mining and reclamation permit, this rule was revised to clarify that estimates of acreages are required for both the permit area and any incremental area or incremental mining unit. With regard to the requirement to provide performance security information, this rule was revised to clarify the information that is required. With regard to the annual map, it also includes the requirement that the annual report must include the boundaries of each incremental mining unit affected during the permit area during the permit year for which the annual report is filed and for all preceding permit years. It removes the requirement that the map be shaded in various colors, if applicable, for the types of bonds posted for each area of the permit and if more than one surety

was procured. This rule has also been revised to add that within 30 days after the completion of mining operations on a permit, a final report shall be filed with the Chief.

#### *1501:13-4-09: General Map Requirements*

With regard to general map requirements, this rule was revised to clarify that acreage figures shall be reported or estimated to the nearest  $\frac{1}{10}$ th of an acre. This rule was also revised to remove engineers, to clarify that the certification of maps is limited to surveyors. A paragraph has been added to explain when a professional engineer must also sign and seal a map.

#### *1501:13-4-12: Requirements for Permits for Special Categories of Mining*

With regard to approximate original contour restoration requirements and variances granted under this rule, this rule was revised to clarify that recreational facilities are considered a public postmining land use allowable under the rules governing variances. For coal preparation plants or support facilities not located within the permit area of a specified mine, this rule adds the requirement that each application for a permit shall contain the information required for the proposed permit area in sufficient detail to determine the estimated cost of reclamation, if the reclamation has to be performed by the state in the event of forfeiture of the performance security by the permittee. It adds that the operational detail shall be sufficient to determine the greatest potential reclamation cost liability to the state and any other operational detail required that may affect the cost of reclamation.

#### *1501:13-4-13: Underground Mining Permit Application Requirements for Information on Environmental Resources*

With regard to groundwater and surface water information, this rule was revised to require testing for the added parameters of aluminum and sulfates. This rule has also been revised to allow surveyors to certify maps, but not cross sections, which are certified by an engineer.

#### *1501:13-4-14: Underground Mining Permit Application Requirements for Reclamation and Operations Plans*

With regard to the requirement that the narrative for the operation plan of an underground mining permit application explain the construction, modification, use, maintenance, and removal of certain facilities, this rule was revised to

delete the requirement that retention of such facilities is necessary for postmining land use. The revision now provides that the facilities be approved by the Chief for postmining land use.

With regard to underground mining permit application general requirements, this rule was revised to add the requirement that each application for a permit shall contain the information required for the proposed permit area in the detail necessary for the Chief to determine the estimated cost of reclamation, if the reclamation has to be performed by the state in the event of forfeiture of the performance security by the permittee. It adds that the operational detail shall be sufficient to determine the greatest potential reclamation cost liability to the state and any other operational detail required that may affect the cost of reclamation. With regard to the operation plan and existing structures, this rule was revised to no longer allow an applicant to make a showing that existing structures meet interim program performance standards. With regard to the reclamation plan, this rule was revised to clarify that detailed design plans shall be certified by an engineer, not just prepared and under the direction of an engineer. With regard to the subsidence control plan, this rule was revised to add the requirement that an application shall include a map of the shadow area, including the angle of draw for the workings described.

#### *1501:13-4-15: Authorization To Conduct Coal Mining on Pollution Abatement Areas*

The rule regarding effluent limits of a remining NPDES permit was revised to clarify that it applies to operators seeking authorization to conduct mining operations under modified effluent limits of a remining NPDES permit. The rule was revised to clarify and establish minimum sampling and data collection criteria, provide criteria for exceptions for meeting the minimum sampling and data collection, and provide exemptions from meeting numeric effluent standards when using best management practices under certain conditions. The rule revision also eliminates the requirement that the permittee must notify the Chief prior to the start and upon completion of each step of the pollution abatement plan. The rule was also changed to clarify criteria for treatment of mine discharges under the pollution abatement plan. Changes to the performance security release criteria clarify that numeric effluent limits established in the remining NPDES permit must be met when applicable.

#### *1501:13-4-16: Requirements for Exemption for Coal Extraction Incidental to the Extraction of Other Minerals*

With regard to the requirements for exemption for coal extraction incidental to the extraction of other minerals, this rule has been revised to add language regarding coal mining activities that are exempt from the requirements of ORC Chapter 1513. For an activity to be exempt from the requirements of the ORC, three of the five requirements were clarified: 1) the requirement that coal must be produced from a geological stratum lying above or immediately below the deepest stratum from which other minerals are extracted for purposes of bona fide sale or reasonable commercial use was clarified to define that the term "immediately below" means that the coal to be mined shall be located not more than three feet below the lowest other mineral to be mined; 2) language was added that other minerals mined in a mining area, but not in the stratigraphic column of coal removed, shall not be used to calculate cumulative production or cumulative revenue; and 3) language was added stating that augering of coal is not used as a mining method, except for permits issued prior to February 29, 1988, with approved mining plans that allowed the augering of coal.

#### *1501:13-5-01: Review, Public Participation, and Approval or Disapproval of Permit Applications and Permit Terms and Conditions*

With regard to the review of permit applications, revisions, and renewals, this rule was revised to add time frames for the review process. This rule was also revised to differentiate between the time frames for review when no informal conference is held and when an informal conference is held. A revision was also made to provide that the Chief shall grant or deny a permit not more than 240 business days after the submission of a complete application. It provides that any time during which the applicant is making revisions to the application or providing additional information requested by the Chief shall not be included in the 240 business days. If the Chief determines that a permit cannot be granted or denied within this time frame, the Chief shall provide the applicant with written notice of the expected delay no more than 210 business days after the submission of a complete application. The word "significant" was added before "revisions" throughout this section to clarify that public notice of

the filing of applications for significant permit revisions is required.

*1501:13-7-01: General Requirements for Providing Performance Security for Coal Mining and Reclamation Operations*

With regard to performance securities, this rule was revised to clarify provisions for those permittees opting to provide performance security with reliance on the reclamation forfeiture fund (performance security pool) and provide new rules for those permittees opting to provide performance security without reliance on the fund (full-cost performance security). The rule now allows performance security to be deposited for incremental mining units and establishes criteria for identifying incremental mining units on the application map and on subsequent annual maps. It also states that once a permittee opts to provide full-cost performance security, the permittee may not change to using performance security with reliance on the reclamation forfeiture fund participation once coal extraction begins.

Changes establish that the Chief will determine an estimated cost of reclamation for the state to reclaim the site should the permittee default on its obligation to reclaim. The rule describes the information the Chief will use to develop this estimate. The rule now specifies that the applicant must notify the Chief of the method chosen for providing performance security and provide the required amount of performance security after the Chief provides the written estimate to the applicant. Changes provide that for an applicant to be eligible to provide performance security with reliance on the reclamation forfeiture fund, the applicant, an owner or controller of the applicant, or an affiliate of the applicant must have had a permit in Ohio for not less than five years. The rule now establishes that if forfeiture of performance security on a permit that is reliant on the reclamation forfeiture fund occurs, the fund will provide the difference between the performance security provided by the permittee and the estimated cost of reclamation provided by the Chief. Changes also provide processes for obtaining release of excess performance security under both options and require the Chief to make adjustments to the estimated cost of reclamation.

*1501:13-7-02: Amount and Duration of Performance Security*

With regard to the amount and duration of a performance security, this rule was revised to distinguish the amount of performance security for

those permittees opting to provide performance security with reliance on the reclamation forfeiture fund (performance security pool) from those permittees opting to provide performance security without reliance on the fund (full-cost performance security). The rule further describes responsibilities for providing performance security for areas affected by material damage and water supplies from subsidence under each option. The rule now lists events that trigger the Chief's review and adjustment of performance security, establishes a permittee's right to request an informal review concerning adjustments of performance security, and provides that a permittee may request the Chief to reduce the performance security estimate when the method of operation or other circumstances reduce the cost of reclamation. An adjustment to performance security is not considered a release of performance security.

*1501:13-7-03: Form, Conditions, and Terms of Performance Security*

With regard to the form, conditions, and terms of performance securities, this rule was revised to include a trust fund as an acceptable form of performance security. The rule is clarified to require that the name of the permittee on the performance security be identical to the name of the permittee on the permit. The rule also provides specific criteria that each form of bond must meet. Revisions further clarify that upon insolvency of an institution that holds the performance security, permittees under the full-cost option will have 90 days to replace performance security coverage. Permittees who are reliant on the reclamation forfeiture fund will have up to one year to replace coverage.

*1501:13-7-04: Self-Bonding*

With regard to self-bonding requirements, this rule has been revised to provide that an indemnity agreement, submitted by a limited liability company, must be signed by at least one member who is authorized to bind the company. The copy of such authorization shall be provided along with an affidavit certifying that such an agreement is valid under all applicable Federal and state laws.

*1501:13-7-05: Procedures, Criteria, and Schedule for Release of Performance Security for Permits Reliant on the Reclamation Forfeiture Fund*

With regard to performance securities, this section heading was revised to clarify that this rule applies to a permittee that provides performance

security together with reliance on the reclamation forfeiture fund. With regard to the procedures for seeking release of performance security, this rule was revised to clarify that a request for approval of a reclamation phase shall also include a request for release of performance security. With regard to the request for approval of a reclamation phase III request for release of performance security, this rule has been revised to provide that the number of acres of the area requested for release that are reclaimed as lands eligible for remining must be stated with the request. With regard to the criteria and schedule for release of performance security, this rule was revised to clarify that any portion of an incremental area requiring extended liability because of augmentation or failure to achieve the crop yields for prime farmland required for phase II performance security may be separated from the rest of the incremental area and have performance security provided separately if approved by the Chief. It also requires that in addition to other requirements for completeness of reclamation, any permanent structures to be maintained as part of the postmining land use must be included in the approved reclamation plan prior to phase II release. With regard to the approval of a reclamation phase, a new paragraph was added regarding remining and security release to provide that a portion of an incremental area requiring a reduced period of liability because of its classification as a remining area shall be separated from the rest of the incremental area and shall be eligible for phase III performance security release.

*1501:13-7-05.1 Procedures, Criteria and Schedule for Release of Performance Security for Permits not Reliant on the Reclamation Forfeiture Fund*

This is a new rule applying only to a permittee that provides performance security without reliance on the reclamation forfeiture fund. This rule provides the terms, conditions, and procedures for seeking approval of a reclamation phase and release of performance security and the criteria and schedule for release of performance security.

*1501:13-7-06: Performance Security Forfeiture Criteria and Procedures*

With regard to forfeiture procedures, this rule was revised to provide that, should the permittee fail to enter into a reclamation agreement or fail to comply with the terms of the reclamation agreement and a trust fund was the performance security filed with the

division, the forfeiture order shall inform the permittee that the state will proceed as set forth in the terms of the trust agreement.

A paragraph was removed that provided that if during the forfeiture reclamation conducted by the state it appears that the cost of reclamation is greater than the performance bond filed for the incremental area and if there remains on file with the Chief performance bond for other incremental areas which have not already been forfeited, then the Chief may proceed to declare forfeit the remaining bond and collect monies under the bond up to an amount equal to the difference between the actual costs of reclamation and monies already collected. New language was added to the section to clarify that the Chief shall order forfeiture of all remaining performance security on deposit for the permit.

*1501:13-7-06.1: Tax Credit for Reclamation Outside an Applicant's Permit Area*

This is a new rule that applies to a permittee providing performance security together with reliance on the reclamation forfeiture fund who wishes to claim a tax credit under Section 5749.1 of the Revised Code. This rule sets forth the terms and conditions under which the Chief may approve an application to perform reclamation and establishes eligibility and application requirements for permittees applying for a tax credit. It also establishes procedures for obtaining the tax credit once reclamation is completed.

*1501:13-7-08: Reclamation Phase Approval Conference and Performance Security Release Conference*

With regard to reclamation phase approval and performance security release, this section heading was changed to clarify that this rule applies to reclamation phase approval conferences in addition to performance security release conferences. With regard to the procedures for requesting such releases, this rule was revised to establish a reclamation approval conference since reclamation can be approved on portions of permits or incremental mining units without a release of performance security on sites under full-cost performance security.

*1501:13-9-01: Signs and Markers*

With regard to signs and markers, this rule was revised to clarify that perimeter markers must be placed to clearly define the perimeter so that adjacent markers are visible by a person standing at any other marker along the perimeter.

Markers must be maintained until final grading is approved.

*1501:13-9-03: Topsoil Handling*

With regard to the topsoil to be salvaged and removed before any drilling for blasting, mining, spoil, or other surface disturbances, this rule was revised to provide the conditions for which the Chief may choose not to require the removal of topsoil for minor disturbances that occur at the site of small structures, such as power poles, signs, or fence lines, or will not destroy the existing vegetation and will not cause erosion. With regard to final grading and replacement of topsoil, this rule was revised to provide that final grading shall follow the completion of backfilling and rough grading with a timeframe that will allow replacement of topsoil or approved resoiling materials to begin and be completed during either the current normal period for favorable planting or at the start of the first appropriate normal period for favorable planting following final grading, whichever occurs first. It also provides that resoiling shall begin, continue reasonably uninterrupted, and be completed prior to the end of the normal period for favorable planting unless the permittee receives an extension of time limit because of climatic conditions. With regard to final grading and replacement of topsoil and soil thickness, this rule was revised to clarify that topsoil or approved alternative resoiling materials shall be redistributed in a manner that achieves an approximately uniform, stable thickness when consistent with the postmining land use, contours, and surface-water drainage systems. Soil thickness may also be varied to the extent such variations help meet the specific revegetation goals identified in the permit.

*1501:13-9-06: Use of Explosives*

With regard to the general provisions of the use of explosives, this rule was revised to provide that blasts that use more than five pounds of explosive or blasting agent shall be conducted according to the schedule required. With regard to how blasting operations shall be conducted, this rule was revised to clarify that in addition to a certified blaster, a member of the blasting crew under the direct supervision of the certified blaster may detonate a blast. With regard to who shall be responsible for controlling access to the blasting area to prevent the presence of livestock or unauthorized persons at least ten minutes before each blast, this rule was revised to delete references to the "permittee" and

include references to "certified mine foreperson" because that is the person responsible for controlling access to the blasting area. With regard to blasting occurring within one-half mile of any public or private institution, this rule was revised to clarify that notification to an institution occurs on the same day of a blast instead of the day before. With regard to the definition of flyrock, this rule was revised to provide that debris does not include dust. The rule concerning flyrock being cast beyond the permit boundary was revised to require initial telephone notification to the Division of Mineral Resources Management within two hours, followed by a more detailed written report within three days. The rule regarding airblasts was revised to require that maximum levels not exceed 133 decibels (except as authorized). With regard to seismic measuring systems, this rule was revised to replace existing provisions regarding seismic measuring systems with more detailed seismograph specifications to match current technology. The rule regarding blast records was revised to clarify the data required in blast records, to match current technology, and more clearly document how a blast was designed. With regard to when bulk-loaded explosives are used, this rule was revised to provide that the blast record data for bulk-loaded explosives must be completed no more than 24 hours after the blast is detonated. The rule regarding maximum ground vibration was revised to refer to the frequency-dependent particle velocity limits that are being added through the chart. With regard to frequency-dependent particle velocity limits, a new chart was added that establishes frequency-dependent particle velocity limits using the Bureau of Mines' alternative blasting level criteria, which have become the standard of comparison for blasting seismology consultants and the legal community. The rule for protected structures and facilities was changed to clarify the types of structures and facilities within 300 feet that are protected. With regard to seismographic records, "scaled-distance" was changed to "scaled distance" and "Ds" was changed to "SD" to reflect standard industry usage. The term "eight-millisecond period" was changed to "period less than eight milliseconds" to clarify the requirements.

*1501:13-9-10: Training, Examination, and Certification of Blasters*

With regard to the certified blaster examination, this rule was revised to require 40 hours of training for initial blaster certification instead of 30 hours.

The section on certification and recertification was revised to clarify that, in addition to the Chief, an agency, board, or institution authorized by the Chief may provide certification. It also provides that each person approved for certification shall receive a certificate suitable for office display and a wallet-size identification card. The certificate and identification card shall include, at a minimum, the type of certification, the person's name, certification number and date of expiration, and the name and signature of the Chief or of the official of the authorized agency, board, or institution granting the certification.

#### *1501:13-9-13: Contemporaneous Reclamation*

With regard to contemporaneous reclamation, this rule was revised to provide that highwall mining is added to the language regarding auger mining timing requirements. With regard to final grading and replacement of topsoil, seeding and planting, and tree planting, this rule was revised to provide a timing element for each phase of reclamation. With regard to the Chief's granting additional time for backfilling and rough grading, this rule was revised to provide the requirements for requesting a permit revision including minimum criteria that must be provided to justify additional time.

#### *1501:13-14-02: Enforcement*

With regard to when the Chief has issued a cessation order for failure to abate a violation of the contemporaneous reclamation requirements, and performance security was provided together with reliance on the reclamation forfeiture fund, this rule was revised to add that the Chief may require the permittee to increase the amount of performance security for the permit from \$2,500 per acre to \$5,000 per acre of land. This rule was also revised to provide that the Chief may determine the amount of performance security increase depending on the status of reclamation at the site. In addition, if the Chief orders the permittee to increase the amount of performance security, the Chief shall also order the permittee to show cause why the permittee has the ability to comply with the requirements. If the Chief orders the permittee to increase the amount of performance security, the increased performance security shall remain in effect for the permit, including all future acreage of the permit, until the Chief determines that the amount of performance security may be reduced. A reduction in the amount of performance security shall not be

considered release of performance security.

#### *1501:13-14-05: Informal Conferences*

With regard to requests for informal conferences, this rule was revised to clarify and include that the permittee may request an informal conference on a proposed performance security adjustment in addition to requesting that the Chief hold an informal conference on the application for a permit or application for significant revision or renewal of a permit. It also provides that the request shall be filed with the Chief not later than 30 days after receipt by the permittee of the proposed performance security adjustment. With regard to the timeliness of an informal conference, this rule has been revised to add the provision that the Chief hold an informal conference within a reasonable time, not to exceed 60 days following the close of the comment period for a permit application or significant revision or renewal or within a reasonable time, not to exceed 60 days following receipt by the permittee of a performance security adjustment. It was also revised to provide that if the informal conference has been held, the Chief shall issue and furnish the applicant for a permit, persons who participated in the informal conference, and persons who filed written objections, with the written finding of the Chief granting or denying the permit in whole or in part and stating the reasons therefore within 60 days of the conference.

#### *Reclamation Forfeiture Fund Advisory Board Information*

Included in this submission are two reports, dated June 2009 and June 2011, providing an actuarial analysis of the Reclamation Forfeiture Fund (Fund) along with letters from the Reclamation Forfeiture Fund Advisory Board (Board) to the Governor of Ohio dated June 2009 and June 2011 regarding the Reclamation Forfeiture Fund and the actuarial analysis.

*Actuarial Analysis Reports:* The 2009 and 2011 actuarial analysis reports were the result of the Board's commission of Pinnacle Actuarial Resources, Inc. to prepare an analysis of the Fund. The 2009 actuarial analysis report made similar findings to the 2011 report using a somewhat different analytical approach, but reported a higher amount of expected risk to the Fund. Since the 2011 report is the most current, we have summarized it below for purposes of this notice.

The 2011 report concluded that the Fund is solvent on a short-term basis, as

the current Fund assets exceed the current Fund's outstanding liabilities and obligations for forfeited reclamation projects. For longer-term solvency, the measurement compares the current available Fund's assets to the Fund's long-term expected exposure or liability. The reviewers do not believe that the Fund currently meets the criteria for long-term solvency, nor do scenario projections of future revenues fully place it in a compliant basis for some period of time into the future. There is currently a mismatch between the revenues collected and the future exposure to reclamation forfeiture for which this revenue and accumulated capital is needed. The report further concludes: "Based upon the methodology and assumptions \* \* \*, we have estimated the present value of expected liability of \$32.254 million." The report further states: "In actuarial and insurance regulatory language, the Fund has significant risk of material adverse deviation from the estimated expected loss."

*Reclamation Forfeiture Fund Advisory Board Recommendations:* The Board sent a letter to the Governor of Ohio on June 27, 2011, and did not recommend changes to the severance tax rates. The Board felt that more time was necessary to study the effectiveness of the present revenue structure to meet the requirements of the Fund. The letter outlined the key points concerning the review of the report, which included that the Fund is adequate to address the small current forfeiture liabilities; the current liabilities were estimated to be less than \$100,000 and the fund had \$9.92 million as of June 15, 2011; the backlog of forfeited sites was reclaimed at the end of calendar year 2010, with only small maintenance costs remaining; the Fund never received \$5 million from the legislature in 2007 to eliminate the backlog of forfeitures as intended by House Bill 443; the actuarial study projects various financial liability scenarios into the future; the study concludes that the Fund may have longer-term solvency issues in the future, based on two of the three projected scenarios; the Division of Mineral Resources Management continues to do a very good job of fulfilling their duties in regulating the coal industry's performance regarding contemporaneous reclamation of permitted sites and of overseeing the reclamation of forfeited sites; generally speaking, the Ohio coal industry's financial strength and attention to good reclamation practices have improved over the past five to ten years; and since the Fund may have a longer-term

solvency issue, an abundance of caution dictates that the Board review the Fund's status next year. The Board recommended that an updated actuarial study be prepared in conjunction with the biennial report due to the Governor in 2013. In 2009, the Board asked DMRM to provide an analysis of Alternative Bonding Systems (ABS) conducted in other coal mining states. With the assistance of Pinnacle studying ABS systems in West Virginia and Kentucky, the Board believes that Ohio's ABS is at least as effective as those systems; the Board believes that a reasonable timeframe to reclaim forfeited sites is in the range of three to five years; should one of the largest five permit holders become insolvent, the Fund would likely be inadequate to allow reclamation within the 3 to 5-year range; and the Board will continue to study the model prepared by Pinnacle to refine, improve, and monitor this model of the Fund's inadequacy.

The full text of the program amendment is available for you to read at the locations listed above under **ADDRESSES**.

### III. Public Comment Procedures

Under the provisions of 30 CFR 732.17(h), we are seeking your comments on whether the submission satisfies the applicable program approval criteria of 30 CFR 732.15. If we approve the amendment, it will become part of the Ohio program.

#### *Electronic or Written Comments*

If you submit written comments, they should be specific, confined to issues pertinent to the proposed regulations, and explain the reason for any recommended change(s). We appreciate any and all comments, but those most useful and likely to influence decisions on the final regulations will be those that either involve personal experience or include citations to and analyses of SMCRA, its legislative history, its implementing regulations, case law, other pertinent state or Federal laws or regulations, technical literature, or other relevant publications. We cannot ensure that comments received after the close of the comment period (see **DATES**) or sent to an address other than those listed above (see **ADDRESSES**) will be included in the docket for this rulemaking and considered.

#### *Public Availability of Comments*

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may

be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. We will not consider anonymous comments.

#### *Public Hearing*

If you wish to speak at the public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4 p.m., local time February 29, 2012. If you are disabled and need reasonable accommodations to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT**. We will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an opportunity to speak, we will not hold the hearing.

To assist the transcriber and ensure an accurate record, we request, if possible, that each person who speaks at a public hearing provide us with a written copy of his or her comments. The public hearing will continue on the specified date until everyone scheduled to speak has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after everyone scheduled to speak and others present in the audience who wish to speak, have been heard.

#### *Public Meeting*

If there is only limited interest in participating in a public hearing, we may hold a public meeting rather than a public hearing. If you wish to meet with us to discuss the submission, please request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings are open to the public and, if possible, we will post notices of meetings at the locations listed under **ADDRESSES**. We will make a written summary of each meeting a part of the administrative record.

### IV. Procedural Determinations

#### *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.

#### *Other Laws and Executive Orders Affecting Rulemaking*

When a State submits a program amendment to OSM for review, our regulations at 30 CFR 732.17(h) require us to publish a notice in the **Federal Register** indicating receipt of the

proposed amendment, its text or a summary of its terms, and an opportunity for public comment. We conclude our review of the proposed amendment after the close of the public comment period and determine whether the amendment should be approved, approved in part, or not approved. At that time, we will also make the determinations and certifications required by the various laws and executive orders governing the rulemaking process and include them in the final rule.

#### **List of Subjects in 30 CFR Part 935**

Intergovernmental relations, Surface mining, Underground mining.

Dated: November 23, 2011.

**Thomas D. Shope,**

*Regional Director, Appalachian Region.*

[FR Doc. 2012-3424 Filed 2-13-12; 8:45 am]

**BILLING CODE 4310-05-P**

### **ENVIRONMENTAL PROTECTION AGENCY**

#### **40 CFR Parts 50 and 51**

[EPA-HQ-OAR-2010-0885, FRL-9630-6]

RIN 2060-AR32

#### **Implementation of the 2008 National Ambient Air Quality Standards for Ozone: Nonattainment Area Classifications Approach, Attainment Deadlines and Revocation of the 1997 Ozone Standards for Transportation Conformity Purposes**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The EPA is proposing thresholds for classifying nonattainment areas for the 2008 ozone National Ambient Air Quality Standards (NAAQS) (the "2008 ozone NAAQS") promulgated by the EPA on March 12, 2008. This proposal also addresses the timing of attainment dates for each classification. Finally, we are proposing to revoke the 1997 ozone NAAQS 1 year after the effective date of designations for the 2008 ozone NAAQS for transportation conformity purposes only.

**DATES:** Comments must be received on or before March 15, 2012. Please refer to **SUPPLEMENTARY INFORMATION** for additional information on the comment period.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2010-0885, by one of the following methods: