



4310-05-P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 944

[SATS No. UT-047-FOR; Docket ID No. OSM-2010-0012]

Utah Regulatory Program

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

ACTION: Final rule; approval of amendment.

SUMMARY: We are approving an amendment to the Utah regulatory program (the "Utah program") under the Surface Mining Control and Reclamation Act of 1977 ("SMCRA" or "the Act"). Utah proposed revisions to and additions of rules pertaining to Valid Existing Rights (VER). Utah revised its program to be consistent with the corresponding Federal regulations.

EFFECTIVE DATE: [Insert date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Kenneth Walker, Chief, Denver Field Division, Telephone: (303) 293-5012, Internet address: kwalker@OSMRE.gov.

SUPPLEMENTARY INFORMATION:

- I. Background on the Utah Program
- II. Submission of the Proposed Amendment
- III. Office of Surface Mining Reclamation and Enforcement's (OSM's) Findings
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I. Background on the Utah Program

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

the Utah program on January 21, 1981. You can find background information on the Utah program, including the Secretary's findings, the disposition of comments, and conditions of approval of the Utah program in the January 21, 1981, Federal Register (46 FR 5899). You can also find later actions concerning Utah's program and program amendments at 30 CFR 944.15 and 944.30.

II. Submission of the Proposed Amendment

By letter dated August 9, 2010, Utah sent us an amendment to its program (SATS number UT-047-FOR, Administrative Record No. UT-1224) under SMCRA (30 U.S.C. 1201 et seq.). Utah sent the amendment in response to our February 1, 2008, letter to Utah sent in accordance with 30 CFR 732.17(c) (Administrative Record No. UT-1223). The provisions of the Utah Administrative Code (UAC) that Utah proposed to revise and/or add were: R645-100-200, Definition of Valid Existing Rights; R645-103-221; R645-103-223 through -225; R645-103-230 through -240; R645-201-328; R645-201-342; R645-300-133; R645-301-115; and R645-301-411. All changes pertain to Valid Existing Rights.

We announced receipt of the proposed amendment in the September 30, 2010, Federal Register (75 FR 60375). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the amendment's adequacy (Administrative Record No. UT-1225). We did not hold a public hearing or meeting because no one requested one. We did not receive any comments on the amendment proposal.

III. OSM's Findings

Following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. Utah proposed revisions to the following rules containing language that is the same as or similar to the corresponding sections of the Federal regulations. We are approving the amendment.

R645-100-200, Definition of Valid Existing Rights. Utah proposed to adopt the Federal definition of VER nearly verbatim, changing only appropriate State references and using the term "mining and reclamation operations" in place of the Federal "surface coal mining operations." These existing terms share similar definitions and encompass all of the same activities. This term occurs throughout the UAC, including the revisions discussed below. For a complete discussion of the changes to the definition of Valid Existing Rights, see our December 17, 1999

Federal Register notice (64 FR 70765). Utah's proposed VER definition is functionally identical to and no less effective than its Federal counterpart.

R645-103-221 was revised to delete the word "and" from the term "Valid and Existing Rights." This editorial change provides consistency for the usage of the term as defined under both Utah and Federal rules without altering the provision's meaning or effectiveness.

R645-103-223, Areas Designated by Acts of Congress; Division responsibilities. Utah revised this section to add a specific reference to Section 522(e)(2) of SMCRA. This is the section of SMCRA which prohibits mining on Federal lands within the boundaries of any national forest unless the Secretary of Agriculture finds that there are no significant recreational, timber, economic, or other values which may be incompatible with mining operations. This is the appropriate section of SMCRA to reference for ensuring mining is permissible on Federal lands in national forests.

R645-103-224, Areas Designated by Acts of Congress; Areas Unsuitable for Coal Mining and Reclamation Operations. As proposed for revision, this section and the corresponding Federal regulation at 30 CFR 761.11 prohibit mining on the same lands

designated as unsuitable by acts of Congress unless the applicant has VER. Utah proposed to adopt Federal counterpart language nearly verbatim for the majority of this section. The Custer National Forest is not in Utah and is therefore not included, and Utah makes appropriate references to the UAC where Federal regulations reference 30 CFR. All references have been cross-checked and verified to be appropriate. Rather than adopt counterpart language to 30 CFR 761.12, Utah references it under proposed R645-103-225. Because Utah incorporates the Federal requirements by reference, this part is no less effective than its Federal counterpart. Utah's proposed R645-103-224 and 645-103-225 are substantively identical to 30 CFR 761.11 and 761.12.

R645-103-230 through 233, Areas Designated by Acts of Congress, Procedures. Utah proposed amendments to this subsection to be the same as its Federal counterpart (30 CFR 761.17), with appropriate references to the UAC rather than 30 CFR. All references have been cross-checked and verified to be appropriate. Utah references 30 CFR 761.16 for determining State and Federal responsibilities for VER determinations, establishing application requirements, evaluation procedures and decision making criteria, providing public participation and notification of affected parties, and establishing requirements for the availability of records. This is the correct reference to the CFR for the listed procedures and requirements. By employing the Federal regulation, Utah ensures this part is no less effective

than the Federal counterpart. All proposed changes to this part alter the provision to more closely mirror Federal counterpart language.

R645-103-234, Procedures for relocating a public road or waiving the prohibition on coal mining and reclamation operations within the buffer zone of a public road. Utah proposed to adopt Federal language into the UAC with appropriate reference changes to the UAC and minor editorial changes to reflect the State program. All references have been cross-checked and verified to be appropriate. Utah is adopting all of the same requirements for relocating or closing public roads and waiving the prohibition on coal mining and reclamation operations within the buffer zone of a public road as the Federal program. This provision is substantively identical to its Federal counterpart.

R645-103-235, Procedures for waiving the prohibition on coal mining and reclamation operations within the buffer zone of an occupied dwelling. Utah proposed Federal language to be adopted under the UAC, with appropriate reference changes. This language indicates that procedures for waiving the prohibition on coal mining and reclamation operations within the buffer zone of an occupied dwelling do not apply to lands for which a person has VER, existing operations which have been granted an exception, or roads that connect to an existing public road on the opposite side of the dwelling. Minor recodification changes were

necessary as a result of new language added. Recodification changes do not alter the meaning or effectiveness of the provision. Utah also incorporates minor wording changes to mirror Federal counterpart language.

R645-103-236, Procedures where operations will adversely affect any publicly owned park or any place included in the National Register of Historic Places. Utah proposed additional text stipulating the procedures for joint regulatory approval of permits which would adversely affect publicly owned parks or historic places. The proposed text directly mirrors counterpart Federal language with appropriate reference changes to UAC rather than 30 CFR. All references have been cross-checked and verified to be appropriate. This subsection is substantively identical to its Federal counterpart.

R645-103-237 through -238, Procedures for applicants intending to conduct operations on Federal lands within a national forest. Utah proposed language directly corresponding to the counterpart Federal provision (30 CFR 761.13). Minor differences in wording reflect the state program and do not detract from the provision's meaning or effectiveness. Appropriate reference changes to UAC rather than 30 CFR have been made. Utah references the Federal definition of "significant recreational, timber, economic, or other values incompatible with surface coal mining operations" at

30 CFR 761.5. Referencing the Federal definition ensures that the term is as inclusive as the Federal term. This provision is substantively identical to its Federal counterpart. A minor recodification change was necessary as a result of the new language added. Recodification changes do not alter the meaning or effectiveness of the provision.

R645-103-239, Administrative and judicial review of VER determinations. Utah proposed to delete language referring to coal mining and reclamation operations existing on the date of enactment of the coal regulatory program. This deletion reflects a fundamental change made to the Federal program on December 17, 1999 (64 FR 70766). OSM deleted the requirement that VER must be determined based on property rights and other conditions as they existed on August 3, 1977, from the Federal program. OSM did this because SMCRA section 522(e) neither defines VER nor specifies that VER must be determined on the basis of property rights as they existed on the date of enactment. Because the lands and features protected by 30 CFR 761.11 and SMCRA 522(e) are continually changing, OSM believed VER should be determined on the basis of property rights and circumstances that exist at the time that lands come under the protection of 522(e) and 30 CFR 761.11. This revision makes the provision substantively identical to its Federal counterpart (30 CFR 761.16(f)).

R645-103-240, Interpretive rule, subsidence due to underground mining. Proposed additional language indicates that subsidence due to underground mining is not included in the definition of surface coal mining and reclamation operations and is therefore not prohibited in areas protected under SMCRA 522(e). Proposed language directly corresponds to 30 CFR 761.200. Therefore, its inclusion does not conflict with, and is no less effective than, the Federal program.

R645-201-328, Major coal exploration permits, minimizing interference with the values for which lands were designated unsuitable for coal mining and reclamation operations. Utah proposed new language directly corresponding to 30 CFR 772.12(14). This provision requires applicants to demonstrate that exploration activities have been designed to minimize interference with the values for which the land was designated unsuitable for coal mining and reclamation operations. The provision also requires documentation of landowner/agency consultation. New language is substantively identical to its Federal counterpart.

R645-201-342, Major coal exploration permits, written findings required for Division approval of applications. Utah proposed new language directly corresponding to 30 CFR 772.12(d)(2)(iv).

This part requires the Division to find, in writing, that exploration activities on lands protected under R645-103-224 will minimize interference with the values for which those lands have been designated as unsuitable for coal mining and reclamation operations. Before making the finding, the Division must provide a reasonable opportunity for the landowner or agency with primary jurisdiction over the feature to comment on whether the finding is appropriate. Proposed language directly mirrors its Federal counterpart, with appropriate changes for the State program. Additional changes to existing language under R645-201-342 make the provision mirror its Federal counterpart more closely.

R645-300-133, Written findings for permit application approval.

Utah proposed minor wording changes to more closely mirror Federal counterpart language and to add additional language containing permit application requirements for remining operations. Utah references its range of permit eligibility regulations at R645-300-100 through R645-300-132.300, corresponding to 30 CFR 773.7 through 773.14. These Federal regulations have been revised as a result of OSM's Ownership and Control rule changes. Utah was notified of the need to revise these provisions by letter dated October 2, 2009 (Administrative Record No. UT-1226). We are currently processing Utah's proposed Ownership and Control rule changes under SATS No. UT-049-FOR. That amendment package can be found in Docket No. OSM-2012-0015.

Because Utah has formally proposed revisions to address the identified problems with the referenced provisions, we have found the proposed changes to R645-300-133 to be no less effective than the Federal program.

R645-301-115, Status of unsuitability claims, operations within 300 feet of an occupied dwelling or 100 feet of a public road.

Utah proposes editorial changes to adopt language more similar to its Federal counterpart. Reference changes were necessary due to other revisions and recodifications. All references correspond to references made in 30 CFR and are appropriate.

R645-301-411, Environmental description. Utah proposed to add a reference to its VER determination rule at R645-103-231. This is the appropriate reference.

Because these proposed rules contain language that is the same as or similar to the corresponding Federal regulations, we find that they are no less effective than the corresponding Federal regulations and approve them. Utah has now satisfied all required rule changes identified in our February 1, 2008, and September 19, 2000, letters.

IV. Summary and Disposition of Comments

Public Comments

We asked for public comments on the amendment (Administrative Record Document ID No. UT-1225; Regulations.gov Document ID OSM-2010-0012-0001), but did not receive any.

Federal Agency Comments

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Utah program (Administrative Record No. UT-1227). We did not receive any responses to our request.

Environmental Protection Agency (EPA) Concurrence and Comments

Under 30 CFR 732.17(h)(11)(ii), we are required to get concurrence from EPA for those provisions of the program amendment that relate to air or water quality standards issued under the authority of the Clean Water Act (33 U.S.C. 1251 et seq.) or the Clean Air Act (42 U.S.C. 7401 et seq.). None of the revisions that Utah proposed to make in this amendment pertains to air or water quality standards. Therefore, we did not ask EPA to concur with the amendment. Under 30 CFR 732.17(h)(11)(i), we are required to solicit and publicly disclose EPA comments. On September 19, 2011, we requested EPA comments on this amendment (Administrative record No. UT-1229). The EPA did not respond to

our request.

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

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and ACHP on amendments that may have an effect on historic properties. On September 3, 2010, we requested ACHP comments on Utah's amendment (Administrative Record No. UT-1227). On September 19, 2011, we requested SHPO comments on Utah's amendment (Administrative Record No. UT-1228). Neither the ACHP nor the SHPO responded to our request.

V. OSM's Decision

Based on the above findings, we approve Utah's August 9, 2010, amendment.

We approve the rules as proposed by Utah with the provision that they be fully promulgated in identical form to the rules submitted to and reviewed by OSM and the public.

To implement this decision, we are amending the Federal regulations at 30 CFR Part 944, which codify decisions concerning the Utah program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section

503(a) of SMCRA requires that the State's program demonstrates that the State has the capability of carrying out the provisions of the Act and meeting its purposes. Making this regulation effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

Effect of OSM's Decision

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

VI. Procedural Determinations

Executive Order 12630 - Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal

regulation.

Executive Order 12866 - Regulatory Planning and Review

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

Executive Order 12988 - Civil Justice Reform

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

Executive Order 13132 - Federalism

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

Executive Order 13175 - Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally recognized Indian Tribes and have determined that the rule does not have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal government and Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian Tribes. The rule does not involve or affect Indian Tribes in any way.

Executive Order 13211 - Regulations That Significantly Affect The Supply, Distribution, or Use of Energy

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

National Environmental Policy Act

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

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act

(44 U.S.C. 3501 et seq.).

Regulatory Flexibility Act

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

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), of the Small Business Regulatory Enforcement Fairness Act. This rule:

- a. Does not have an annual effect on the economy of \$100 million.
- b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.
- c. Does not have significant adverse effects on competition,

employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises.

This determination is based upon the fact that the State submittal which is the subject of this rule is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

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

List of Subjects in 30 CFR Part 944

Intergovernmental relations, Surface mining, Underground mining.

Allen D. Klein
Regional Director
Western Region

Dated: July 19, 2012

For the reasons set out in the preamble, 30 CFR part 944 is amended as set forth below:

PART 944 - Utah

1. The authority citation for part 944 continues to read as follows:

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

2. Section 944.15 is amended in the table by adding a new entry in chronological order by "Date of Final Publication" to read as follows:

§ 944.15 Approval of Utah regulatory program amendments

* * * * *

| Original amendment submission date | Date of final publication | Citation/description |
|------------------------------------|---|--|
| * * * * * | * * | |
| August 9, 2010 | [<u>Insert date of publication in the Federal Register</u>] | R645-100-200 Definition of Valid Existing Rights; R645-103-221; R645-103-223; R645-103-224; R645-103-225; R645-103-230 through -240; 645-201-328; 645-201-342; 645-300-133; 645-301-115; 645-301-411 |

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