



4310-05-P
DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 938

**[SATS No. PA-164-FOR; Docket No. OSM-2016-0013;
S1D1S SS08011000 SX064A000 178S180110;
S2D2S SS08011000 SX064A000 17XS501520]**

Pennsylvania Regulatory Program

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

ACTION: Final rule; approval of amendment.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSMRE), are approving an amendment to the Pennsylvania regulatory program (Pennsylvania program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). This amendment revises the Pennsylvania program to further define the implementation process for the reclamation of alternative bonding system (ABS) “Legacy Sites,” and to clearly identify the current list of Legacy Sites, as well as sites that may qualify in the future as Legacy Sites.

DATES: Effective [INSERT DATE 30 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]

FOR FURTHER INFORMATION CONTACT: Mr. Ben Owens, Chief, Pittsburgh Field Division, Office of Surface Mining Reclamation and Enforcement, 3 Parkway Center, Pittsburgh, PA 15220, Telephone: (412) 937-2827, E-mail: bowens@osmre.gov

SUPPLEMENTARY INFORMATION:

- I. Background on the Pennsylvania Program
- II. Submission of the Amendment
- III. OSMRE's Findings
- IV. Summary and Disposition of Comments
- V. OSMRE's Decision
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I. Background on the Pennsylvania Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, State laws and regulations that govern surface coal mining and reclamation operations in accordance with the Act and consistent with the Federal regulations. See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Pennsylvania program on July 30, 1982. You can find additional background information on the Pennsylvania program, including the Secretary's findings, the disposition of comments, and conditions of approval in the July 30, 1982, Federal

Register, (47 FR 33050). You can also find later actions concerning Pennsylvania's program and program amendments at 30 CFR 938.11, 938.12, 938.13, 938.15 and 938.16.

By letter dated August 1, 2008 (Administrative Record Number PA 802.43), Pennsylvania sent us a proposed program amendment that was intended to satisfy a required amendment that was imposed by OSMRE in a final rule published in the Federal Register on May 31, 1991, (56 FR 24687), and codified in the Federal regulations at 30 CFR 938.16(h). This proposed program amendment, hereinafter referred to as the “ABS Program Amendment,” was also intended to satisfy requirements of an October 1, 1991, letter sent to the state pursuant to the Federal regulations at 30 CFR 732.17 (the “732 letter”). Among other things, the August 1, 2008, amendment proposed significant changes to the State’s revenue raising mechanism for the treatment of polluttional discharges at ABS Legacy Sites. The term “Legacy Sites” is defined in Section III, below.

On August 10, 2010, we published a Federal Register notice announcing our partial approval of the ABS program amendment. 75 FR 48526. The only issue preventing a complete approval was that Pennsylvania had not demonstrated that there was sufficient bond money to cover the cost of land reclamation on two known active surface coal mining sites. On October 1, 2010, Pennsylvania submitted an amendment containing the necessary demonstration of sufficient reclamation funds. OSMRE approved this amendment on September 17, 2015, (see 80 FR 55746), and removed the aforementioned

required amendment at 30 CFR 938.16(h).

II. Submission of the Amendment

By letter dated November 14, 2016 (Administrative Record No. PA 897.00), Pennsylvania sent us an amendment to its program under SMCRA (30 U.S.C. 1201 et seq.).

We announced receipt of the proposed amendment in the March 10, 2017, Federal Register (82 FR 13268). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the adequacy of the amendment. OSMRE received four public comments. The public comment period ended on April, 10, 2017. No public hearing or meeting was requested.

III. OSMRE's Findings

Pennsylvania submitted this program amendment to further define how the Pennsylvania Department of Environmental Protection (“Department”) will implement its obligation under the approved ABS Program Amendment consistent with OSMRE oversight. As defined in 25 Pa. Code § 86.1, “ABS Legacy Sites” are “[m]ine sites, permitted under the Primacy Alternate Bonding System [ABS], that have a postmining pollutional discharge where the operator has defaulted on its obligation to adequately treat the discharge and, either the bond posted for the site is insufficient to cover the cost of treating the discharge, or a trust to cover the costs of treating the discharge was not fully funded and

is insufficient to cover the cost of treating the discharge.” The following are the issues Pennsylvania addressed in its submittal.

A. The amendment contains a current list of ABS Legacy Sites.

B. The amendment provides a process for moving sites from the list of potential ABS Legacy Sites to the list of ABS Legacy Sites. Sites may become ABS Legacy Sites if a bond forfeiture occurs, or under the circumstances set forth in paragraph C, below.

C. The amendment includes the mechanisms by which a site can be added to the list of ABS Legacy Sites if bond release was improperly granted, or if the bond or trust fund is subsequently determined to be inadequate for certain specified reasons.

D. The amendment provides the criteria that must be met in order for a mine to be removed from the list of ABS Legacy Sites. Removal from the list may occur if there is no longer a post-mining discharge requiring treatment, if the amount of bond posted becomes sufficient to guarantee adequate treatment of discharges, or if a fully funded trust fund is established that will guarantee discharge treatment in perpetuity.

E. The amendment requires the Department to request concurrence from OSMRE, consistent with its oversight authority, when sites are being added to or removed from the list of ABS Legacy Sites or from the list of potential ABS Legacy Sites. This concurrence will be requested in writing through a letter or email message to the Pittsburgh Field Division, Harrisburg Office. The concurrence request will include a justification of the

action. After the concurrence is received, the Department will publish the notice in the Pennsylvania Bulletin.

F. The amendment provides schedules for completion of land reclamation at ABS bond forfeiture sites, and for installation and completion of ABS Legacy Site postmining discharge treatment systems.

G. The amendment requires the State to submit annual reports to OSMRE on the progress toward installation and completion of ABS Legacy Site postmining treatment systems.

H. The amendment states that sites covered by “mixed site trusts,” (used for discharges from multiple mines that include both ABS and non-ABS sites), “partially funded trusts,” and “Department-directed trusts” will continue to be considered ABS Legacy Sites.

We have determined that the amendment contains no provisions that are inconsistent with SMCRA and its implementing regulations, and are therefore approving it. However, our approval of the provision allowing a site to be added to the list of ABS Legacy Sites if bond release was improperly granted is with the understanding that, prior to reclassifying such a site as an ABS Legacy Site, the Department must take action, as appropriate, to require the operator to reclaim the site. If the permittee no longer exists or is insolvent, and is therefore unable to complete reclamation, the Department must ensure that any

permittees, and the entities and operators that are owned and controlled by them, are linked to any unabated violations and/or bond forfeitures resulting from the site as appropriate.

IV. Summary and Disposition of Comments

Public Comments

We asked for public comments and requests for public hearings or meetings regarding the amendment. We received responses from PennFUTURE and from three individuals: Nolan Murphy-Genao, Sue McLendon, and Stephen Mee. The following summarizes the comments and our responses to them.

PennFUTURE: PennFUTURE agreed with approving the proposed amendment, stating that it has no course-reversing effect on the approved State program. Instead, PennFUTURE said that it advances the objectives of the previously approved elements of the Pennsylvania Regulatory Program and enhances them by adding clarity, certainty and transparency to the approved mechanisms.

OSMRE's Response: We agree with the commenter, and are approving the amendment.

Other Commenters: The three remaining commenters provided comments related to the regulation and enforcement of surface coal mining in general and did not provide specific substantive comments on the amendment proposed.

OSMRE's Response: The comments provided are not germane to the question of approval or disapproval of this amendment.

Federal Agency Comments

On November 16, 2016 (Administrative Record PA 897.01), 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 Pennsylvania program. We did not receive any comments.

Environmental Protection Agency (EPA) Concurrence and Comments

Under Federal regulations at 30 CFR 732.17(h)(11) (ii), we are required to get a written concurrence from EPA for those provisions of the program amendment that relate to air or water quality standards issued under the authority of the Clean Water Act (33 U.S.C. 1251 et seq.) or the Clean Air Act (42 U.S.C. 7401 et seq.). None of the revisions that Pennsylvania proposed to make in this amendment pertain to air or water quality standards. Therefore, we did not ask EPA to concur on the amendment. However, on November 16, 2016, we requested comments from the EPA on the amendment. The EPA responded in a letter dated January 6, 2017, stating, “The EPA has reviewed the proposed amendment and will not be providing comments.” (Administrative Record PA 897.02).

V. OSMRE's Decision

Based on the above finding, we are approving Pennsylvania's amendment that was submitted on November 14, 2016.

To implement this decision, we are amending the Federal regulations, at 30 CFR Part 938, that codify decisions concerning the Pennsylvania program. Section 503(a) of SMCRA requires that the State's program demonstrate that the State has the capability of carrying out the provisions of the Act and meeting its purposes. SMCRA requires consistency of State and Federal standards.

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 exempt from review by the Office of Management and Budget under Executive Order 12866.

Executive Order 12988 - Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that 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 OSMRE. 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 basis for this determination is that our decision is on a State regulatory program and does not involve a Federal regulation involving Indian lands.

Executive Order 13211 - Regulations That Significantly Affect The Supply, Distribution,

Or Use Of Energy

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

National Environmental Policy Act

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

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 et seq.).

Regulatory Flexibility Act

The Department of the Interior certifies that 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), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of \$100 million; (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. - based enterprises to compete with foreign-based enterprises. This determination is based upon the analysis performed under various laws and executive orders for the counterpart Federal regulations.

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 analysis performed under various laws and executive orders for the counterpart Federal regulations.

List of Subjects in 30 CFR Part 938

Intergovernmental relations, Surface mining, Underground mining.

Dated: May 31, 2017.

Thomas D. Shope

Regional Director, Appalachian Region

For the reasons set out in the preamble, 30 CFR part 938 is amended as set forth below:

PART 938 - PENNSYLVANIA

1. The authority citation for part 938 continues to read as follows:

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

2. Section 938.15 is amended by adding an entry to the table in chronological order by “Date of publication of final rule” to read as follows:

§ 938.15 Approval of Pennsylvania regulatory program amendments.

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Original amendment submission dates	Date of publication of final rule	Citation/description
* * * * * November 14, 2016	* * <u>[Insert date of publication in the Federal Register]</u>	Pennsylvania’s commitment to the

		completion of treatment systems for pollutional discharges on ABS Legacy Sites
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[FR Doc. 2017-14376 Filed: 7/7/2017 8:45 am; Publication Date: 7/10/2017]