



4310-05-P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 938

[PA-155-FOR; Docket ID: OSM-2010-0003]

Pennsylvania Regulatory Program

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

ACTION: Final rule; removal of required amendment.

SUMMARY: We are approving a request by Pennsylvania to remove a required amendment to Pennsylvania's regulatory program (the "Pennsylvania program") regulations under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). The provision that we are removing required Pennsylvania to demonstrate that all applications for surface mining permits in Pennsylvania include the specific information for all cessation orders received by the applicant and anyone linked to the applicant through ownership and control, prior to the date of the application.

DATES: Effective Date: This rule is effective [Insert date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: George Rieger, Chief, Pittsburgh Field Division, Harrisburg Office, Office of Surface Mining Reclamation and Enforcement, Telephone: (717) 782-4036, e-mail: grieger@osmre.gov.

SUPPLEMENTARY INFORMATION:

- I. Background on the Pennsylvania Program
- II. Description and Submission of the Amendment
- III. OSM's Findings
- IV. Summary and Disposition of Comments
- V. OSM's Decision
- VI. Procedural Determinations

I. Background on the Pennsylvania Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, "a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of the Act . . .; and rules and regulations consistent with

regulations issued by the Secretary pursuant to the Act.” See 30 U.S.C. 1253(a)(1) and (7).

You can find background information on the Pennsylvania program, including the Secretary's findings, the disposition of comments, and conditions of approval in the July 30, 1982, Federal Register (47 FR 33050). You can also find later actions concerning Pennsylvania's program and program amendments at 30 CFR 938.11, 938.12, 938.13, 938.15, and 938.16.

II. Description and Submission of the Amendment

By letter dated March 4, 2010 (Administrative Record No. PA 844.14), Pennsylvania sent us a request to remove a required program amendment to its program under SMCRA (30 U.S.C. 1201 *et seq.*). The required amendment was imposed on the Pennsylvania program on December 30, 1992, Federal Register (57 FR 62222), and was codified at 30 CFR 938.16(bbb). The required amendment states the following: By May 1, 1993, Pennsylvania shall submit a proposed amendment to Section 86.63(a)(3) to require that all applications for surface mining permits include the specific information required by Section 86.63(a)(3)(i)-(viii) for all cessation orders received, by the applicant and anyone linked to the applicant through ownership and control, prior to the date of the application.

Pennsylvania provided the following information as support for its request for removal.

Pennsylvania states that under its program, a cessation order is a type of violation notice. A cessation order is a compliance order that requires cessation of all or part of a mining operation. Pennsylvania manages its enforcement program so that all violations are associated with an enforcement action. All enforcement actions are “violation notices” because they are the vehicle through which a violator is notified that there is a violation. In practice, the term “violation notice” in 25 Pa. Code 86.63(a)(3) includes the following enforcement actions: Compliance Orders, Cessation Orders, Failure to Abate Cessation Orders, Permit Suspensions, and Bond Forfeitures.

Pennsylvania also states that it manages violation and enforcement data using the eFACTS (Environment, Facility, Application, and Compliance Tracking System) database. The practice to include cessation orders along with the other enforcement actions is embedded in the report that is used to verify violation history data.

Further, the regulation at 25 Pa. Code 86.63(a)(3) requires cessation orders to be reported because in practice the term “violation notice” includes cessation orders. For these reasons, Pennsylvania is requesting that the required program amendment at 30 CFR 938.16(bbb) be removed.

III. OSM’s Findings

For the reasons set forth below, we are approving Pennsylvania’s request that we remove the required amendment codified at 30 CFR 938.16(bbb). This required amendment was

imposed because the Federal counterpart to 25 Pa. Code 86.63(a)(3), at 30 CFR 778.14(c), explicitly required, in 1992, that specific information be provided for both violation notices and cessation orders. Pennsylvania's regulations required this information for violation notices, but did not explicitly require the same information with respect to cessation orders.

On December 19, 2000, OSM revised its regulations at 30 CFR 778.14(c) to drop the terms "cessation orders," "owned or controlled by the applicant," and "owns or controls the applicant." Nevertheless, the revised Federal regulation requires that the information be provided for "violations" which, by definition promulgated in the same rulemaking, include "cessation orders." *See* 30 CFR 701.5. Thus, in substance, the Federal reporting requirement did not change in 2000, Federal Register (65 FR 79582).

Nevertheless, Pennsylvania has demonstrated that it interprets the term "violation notice," which is used in 25 Pa. Code 86.63(a)(3), to include cessation orders. Therefore, with the understanding that a violation notice includes a cessation order, we find that Pennsylvania's regulation is no less effective than its Federal counterpart, and we hereby approve the request to remove the required amendment at 30 CFR 938.16(bbb).

IV. Summary and Disposition of Comments

Public Comments

We asked for public comments on the amendment in the June 21, 2010, Federal Register

(75 FR 34960) (Administrative Record No. PA 844.20). No requests for public meetings were received. We received public comments on two occasions: (1) PennFuture (representing Citizens for Pennsylvania's Future) letter dated July 21, 2010 (Administrative Record No. PA 844.22); and (2) an e-mail from a citizen sent on June 21, 2010 (Administrative Record No. PA. 844.21).

PennFuture Comments: PennFuture comments that OSM may remove the required amendment because it has deleted from 30 CFR 778.14(c) the specific reference to “cessation order” on which the subpart was based. However, PennFuture notes while the result Pennsylvania advocates is correct, it is so for a different reason than the one Pennsylvania provides.

PennFuture contends that the argument Pennsylvania advances today – namely that the term “violation notice” in Section 86.63(a)(3) includes cessation orders – was fully available to Pennsylvania in 1992, and Pennsylvania could have sought judicial review of subpart (bbb) on that basis pursuant to 30 U.S.C. 1276(a)(1). As a result, if nothing else had changed since December 30, 1992, Pennsylvania would be barred from seeking the removal of subpart (bbb) by the principle of administrative finality incorporated into Section 706(a)(1) of SMCRA, which requires that challenges to final rules on program amendments be filed within 60 days. Thus, without more than Pennsylvania offers, OSM could not validly grant the relief Pennsylvania seeks.

OSM Response: We disagree with PennFuture that the December 19, 2000, revision to 30

CFR 778.14(c) provides the basis for removal of the required amendment, since the revised Federal regulation continues to require the relevant information to be provided for all violations, which, by definition, include cessation orders. Rather, our decision to approve Pennsylvania's request to remove the required amendment is based on our determination that Pennsylvania's regulations are no less effective than current Federal regulations. That determination, set forth above in our findings, stems from an explanation that Pennsylvania submitted on March 4, 2010 (Administrative Record No. PA 844.14).

We also disagree that Pennsylvania is time-barred by section 526(a)(1) of SMCRA, 30 U.S.C. 1276(a)(1), from submitting this explanation. Pennsylvania's interpretation is not a judicial challenge to our 1992 decision, but instead it is an attempt to explain how its program complies with a counterpart Federal regulation. Clarifications of this sort are authorized in the Federal regulations, at 30 CFR 732.17(a), which acknowledge that States may alter their programs on their own initiative. If States may propose program alterations, it follows logically that they may propose altered interpretations of their programs for OSM to consider, subject to public notice and opportunity for comment. The SMCRA regulatory scheme confers this privilege upon State regulatory authorities, but not upon private individuals or other "persons." Instead, the remedy available to private entities is a Section 526(a)(1) challenge to an OSM program amendment decision. Whether this statutory remedy is even available to State regulatory authorities is uncertain; nevertheless, the applicable regulations are sufficiently flexible to allow States to request that OSM re-evaluate a previous decision on a program amendment.

Citizen Comment: The commenter expresses concern about Pennsylvania's laxity of enforcement on natural gas extraction and believes a fee should be added to every lease where drilling is taking place. The commenter also states the residents of Pennsylvania are at risk from their water turning into contamination.

OSM Response: We cannot respond to the comment since natural gas extraction is not germane to Pennsylvania's request, or to our finding with respect to the request.

Federal Agency Comments

Under Federal regulations at 30 CFR 732.17(h)(11)(i) and Section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Pennsylvania program (Administrative Record No. PA 844.14).

We received responses from two agencies: (1) the Mine Safety and Health Administration, District 1, in a letter dated March 31, 2010, (Administrative Record No. PA 844.18) responded that it does not have any comments or concerns with this request; and (2) the Fish and Wildlife Service, in an e-mail sent March 30, 2010, (Administrative Record No. 844.17) responded that it has no 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.

V. OSM's Decision

Based on the above findings, we are removing the required amendment at 30 CFR 938.16(bbb) in response to Pennsylvania's request sent to us on March 4, 2010.

VI. Procedural Determinations

Executive Order 12630 - Takings

This rule does not have takings implications. This determination is based on the fact that the rule is administrative in nature. It revises the CFR, but the revision does not have a substantive effect on the State's regulatory program.

Executive Order 12866 - Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget under Executive Order 12866.

Executive Order 12988 - Civil Justice Reform

The Department of the Interior has conducted the reviews required by Section 3 of Executive Order 12988 and has determined that, to the extent allowable by law, this rule meets the applicable standards of Subsections (a) and (b) of that Section. However, these standards are not applicable to the actual language of State regulatory programs and

program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under Sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

Executive Order 13132 - Federalism

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to “establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.” Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be “in accordance with” the requirements of SMCRA, 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 Government

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally-recognized Indian tribes and have determined that the rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities

between the Federal Government and Indian Tribes. The basis for this determination is that our decision is on a State regulatory program and does not involve a Federal program involving Indian lands.

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

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

National Environmental Policy Act

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 (NEPA) (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 effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This determination is based on the fact that the rule is administrative in nature. It revises the CFR, but the revision does not have a substantive effect on the State's regulatory program.

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. The rule is administrative in nature and it: (a) Does not have an annual effect on the economy of \$100 million; (b) Will not cause a major increase in costs or prices for consumers, individual industries, geographic regions, or Federal, State, or local government agencies; and (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. - based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that the State

submittal, which is the subject of this rule, is based upon 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 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 938

Intergovernmental relations, Surface mining, Underground mining.

Thomas D. Shope, Regional Director
Appalachian Region

July 25, 2011 _____
Date

Editorial Note: This document was received at the Office of the Federal Register on Friday, April 27, 2012.

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

PART 938 – Pennsylvania

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

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

§938.16 [Amended]

2. Section 938.16 is amended by removing and reserving paragraph (bbb).

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