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DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 938

[PA-162-FOR; Docket ID: OSM-2012-0022;
S1D1SSS08011000SX066A00067F134S180110;
S2D2SSS08011000SX066A00033F13XS501520]

Pennsylvania Regulatory Program

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

ACTION: Final rule; approval of amendment.

SUMMARY: We are announcing the approval of an amendment to the Pennsylvania regulatory program (the “Pennsylvania program”) under the Surface Mining Control and Reclamation Act of 1977 (“SMCRA” or the “Act”). Pennsylvania proposed to revise its program at 25 Pa. Code 86.1, 86.3, and 86.17, to reflect the addition of new definitions and revisions to Pennsylvania’s regulations on the use of the Coal Refuse Disposal Control Fund (“CRDCF”) and permit and reclamation fees. OSM is approving the proposed amendment which was submitted by Pennsylvania on December 19, 2012.

EFFECTIVE DATE: [INSERT 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, 3rd Floor, Pittsburgh, Pennsylvania 15220; Telephone: (412) 937-2827; E-Mail:

bowens@osmre.gov.

SUPPLEMENTARY INFORMATION:

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

Section 503(a) of the SMCRA 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." 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, effective July 30, 1982. You can find background information on the Pennsylvania program, including the Secretary's findings,

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

II. Submission of the Proposed Amendment

By letter dated December 19, 2012, (Administrative Record Number, PA 895.00), Pennsylvania sent OSM a request to approve the amendment of regulations found at Chapter 86 relating to surface and underground coal mining. The submission establishes a revised schedule of fees for coal mining activity permit applications. Specifically, Pennsylvania is requesting approval of regulations found at 25 Pa. Code Chapter 86, sections 1, 3, and 17. These changes were made at Pennsylvania's initiative.

We announced receipt of the proposed amendment in the February 26, 2013, Federal Register (78 FR 13002). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting.

We did not hold a public hearing or meeting because one was not requested. The public comment period ended on March 28, 2013. We received one comment from the United States Environmental Protection Agency (Administrative Record Number, PA 895.04).

This comment was in response to OSM's December 26, 2012, letter (Administrative Record Number, PA 895.01) soliciting comment. No comments were received from the public.

III. OSM's Findings

30 CFR 732.17(h)(10) requires that State program amendments meet the criteria for approval of State programs set forth in 30 CFR 732.15, including that the State's laws and regulations are in accordance with the provisions of the Act and consistent with the requirements of 30 CFR Part 700. In 30 CFR 730.5, OSM defines "consistent with" and "in accordance with" to mean: (a) with regard to SMCRA, the State laws and regulations are no less stringent than, meet the minimum requirements of, and include all applicable provisions of the Act; and (b) with regard to the Federal regulations, the State laws and regulations are no less effective than the Federal regulations in meeting the requirements of SMCRA.

Following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. We are approving the amendment, as described below. Any revisions that we do not specifically discuss concern non-substantive wording or editorial changes.

Minor Revisions to Pennsylvania's Regulations

Bifurcation of 25 Pa. Code 86.3 for Clarity Purposes

Pennsylvania proposed minor wording, editorial, and recodification changes to the following previously-approved regulation at 25 Pa. Code 86.3 (a). This section is amended to add subsection (b), which necessitates the lettering of the existing paragraph as subsection (a). Although Pennsylvania has always collected permit application fees, the bifurcation of this section, resulting in the addition of subsection (b) provides clarity regarding the use of the money collected from permit application fees that are deposited in the Coal Refuse Disposal Control Fund ("CRDCF"); a function within Pennsylvania's purview, as the regulatory authority. Specifically, subsection (b), will incorporate the definition of "Permit application fee," discussed at length herein, and will read:

Permit application fees required under this chapter for permit applications submitted under the Coal Refuse Disposal Control Act will be used by the Department to cover its costs to review applications.

OSM finds that this provision is consistent with regulations issued pursuant to 30 CFR 777.17. Accordingly, we are approving this portion of the amendment.

Revisions to Pennsylvania’s Regulations That Are No Less Effective Than the
Corresponding Provisions of the Federal Regulations and No Less Stringent Than
SMCRA.

Definition of “Permit application fee” at 25 Pa. Code 86.1

Pennsylvania proposes the addition of a new term; the definition of “Permit application fee.” This term will be found at 25 Pa. Code 86.1. Pennsylvania has always assessed a fee for permits consistent with Section 4(a) of the Pennsylvania Surface Mining Conservation and Reclamation Act and in a manner no less stringent than SMCRA, but did not define this term. In addition to the term, “Permit application fee” being introduced in the “Definitions” section, it will be incorporated in § 86.17, as a sub-section heading and shall be defined as, “[a] nonrefundable filing fee due at the time of submission of an application. The permit application fee is required for an application to be considered complete.” While there are no direct Federal counterpart provisions, section 507(a) of SMCRA specifically authorizes the implementation of a fee for permit applications, providing that a permit application “shall be accompanied by a fee as determined by the regulatory authority, [which] may be less than but shall not exceed the actual or anticipated cost of reviewing, administering, and enforcing such permit . . . ” and that “[t]he regulatory authority may develop procedures so as to enable the cost of the fee to be paid over the term of the permit.” Therefore, we find Pennsylvania’s

introduction of this definition to be no less stringent than SMCRA. Accordingly, we are approving this portion of the amendment.

Pennsylvania's Revision to 25 Pa. Code 86.17, Permit and reclamation fees, creating an increase in permit fees

Pennsylvania has resolved to increase the permit application fee schedule for coal mining permit activity applications in order to pay the costs the Department of Environmental Protection (“PA DEP”) incurs in reviewing permit applications. Prior to this submission, a permit application for coal mining activities or a coal preparation plant was required to be submitted with an application fee of \$250. Additionally, any permit application fee for coal refuse disposal activities required a fee of \$500, plus an additional \$10 per acre fee for acreage in excess of 50 acres. This submission increases the fees and creates new categories of permits with differing fees. Surface mining and coal refuse disposal permits will be assessed a fee of \$3,250; coal refuse reprocessing permits will be assessed a fee of \$1,900; coal preparation plants, anthracite underground mining, and incidental extraction permits will be assessed a fee of \$1,650; bituminous underground mining permits will be assessed a fee of \$5,750; and post-mining activity permits will be assessed a fee of \$300. As discussed above, SMCRA gives the regulatory authority discretion in selecting the fee to be imposed, stating that the fee “may be less than but shall not exceed the actual or anticipated cost of reviewing, administering, and enforcing such permit....” In

establishing the new fees, Pennsylvania calculated the amounts using a workload analysis system. This system assigns a specific number of hours to each task to be completed, such as processing a permit application based on historical data recorded by staff. Using this historical data, the new fees were determined.

Under subsection (b)(2) of the amendment, a new fee for major permit revisions is imposed. This fee is either \$300 or \$1,250, depending upon the permit type.

Subsection (b)(3) introduces a new fee of \$250 for permit transfers. The renewal fee, as detailed in subsection (b)(4), continues to be assessed under the former rate of \$250. Additionally, new fees for auger safety and bond liability revisions will be assessed in the amount of \$200 and \$100, respectively.

Subsection (c) now describes how the collected fees will be allocated. Permit application fees collected for surface coal mine facilities, coal refuse reprocessing facilities, and coal mining activity facilities will be deposited in the Surface Mining Conservation and Reclamation Fund. Permit application fees for bituminous underground mines will be deposited in the Bituminous Mine Subsidence and Land Reclamation Fund. The fees collected for coal refuse disposal facilities are to be deposited in the CRDCF.

The amendment also adds a new component at subsection (d). This subsection requires the PA DEP to review the adequacy of the permit application fees at least once every three years. The results of this review must be submitted in writing to Pennsylvania's Environmental Quality Board. Specifically, the proposed report will identify and reconcile any disparity between the amount of income generated by the fees and the cost to administer these programs as well as recommend a fee increase, as necessary.

Subsection (e) of the current regulation will remain unaltered.

Pennsylvania has established that it has discretion in defining the fees for permit applications provided Pennsylvania conforms to section 507 of SMCRA in performing this analysis. As demonstrated, Pennsylvania, using the recommendations of the PA DEP and the Mining and Reclamation Advisory Board, reviewed historical data to determine the costs of reviewing, processing, and performing these tasks. We find the proposed Pennsylvania amendment to be no less stringent than the applicable SMCRA provisions and no less effective than the regulations promulgated thereunder. Therefore, we are approving this portion of the amendment as proposed by Pennsylvania.

Pennsylvania also proposes the addition of the term, "Major Permit Revisions," to be added to the Definitions section found at 25 Pa. Code 86.1. This term is also used as a section header, found at 25 Pa. Code 86.17(b)(2). OSM considered the use of this term,

taking into consideration EPA’s reservations regarding the introduction of this term into the Pennsylvania program. EPA’s concerns are discussed at length in the “Federal Agency Comments” section below.

There is no direct, definitional Federal counterpart within SMCRA for the proposed term, “Major Permit Revisions”; however, OSM finds sufficient support for incorporating this term into the Pennsylvania program and has found it to be no less stringent than SMCRA and no less effective than the regulations promulgated thereunder. This, too, is discussed in the “Federal Agency Comments” section below.

IV. Summary and Disposition of Comments

Public Comments

We asked for public comments (Administrative Record Number PA 895.03) on the amendment when advertising the existence of the proposed amendment in the Federal Register on February 26, 2013. We did not receive any public comments on the proposed amendment.

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, including the U.S. Fish and Wildlife Service, the United States Department of Agriculture, and the Mine Safety and Health Administration, with an actual or potential interest in the Pennsylvania program (Administrative Record Number PA 895.01). No comments were received.

Environmental Protection Agency (“EPA”) Comments

On December 26, 2012, (Administrative Record Number PA 895.01), we asked for comment from the EPA. Under 30 CFR 732.17(h)(11)(i) and (ii), we are required to obtain a written concurrence from the EPA for those provisions of the program amendment that relate to air or water quality standards promulgated 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.*). We did not seek concurrence from the EPA for this amendment. The purpose of the amendment is to alter pre-existing guidelines for permit fees; therefore, this amendment does not require EPA concurrence as it does not relate to air or water quality standards as outlined in the regulations.

On February 25, 2013, the EPA, as requested by OSM, provided comments to the proposed amendments, expressing concern that the proposed amendment had the potential for impacting water quality standards. Specifically, the EPA expressed concern

that the addition of the term “Major Permit Revisions” to 25 Pa. Code 86.1, Definitions, and included as a section header at § 86.17, as detailed in the proposed amendment, may undermine the mandatory process of providing public notice and opportunity to comment on any modification to a National Pollutant Discharge Elimination System (“NPDES”) permit issued under the Federal Clean Water Act (“CWA”). As noted by the EPA, this mandatory process is outlined in 40 CFR Part 124 and 40 CFR 123.62, pertaining to decision making and State program amendments of the EPA regulations.

The EPA recommended that the definition of “Major Permit Revisions” at § 86.1, be clarified to specifically state that the Federal regulatory requirements for NPDES permit modifications will apply and may require, among other things, public notice and opportunity to comment.

We gave deference to the EPA’s comment, as the agency promulgating the regulations at 40 CFR Part 124 and 40 CFR 123.62. However, OSM notes that, consistent with section 702 of SMCRA, nothing in the submission shall be construed as superseding, amending, modifying, or repealing the requirements of the Federal CWA. Upon review of the Pennsylvania program, we found direct support for approving the addition of the term “Major Permit Revisions” and its use as a header.

Specifically, the approved Pennsylvania program incorporates by reference provisions of Chapter 92a of the Pennsylvania regulations that govern the implementation of the NPDES Permitting, Monitoring, and Compliance. For each of the permit applications or major permit revisions referenced in the proposed amendment, there are applicable Pennsylvania regulations that incorporate by reference the requirements of the regulations promulgated pursuant to the CWA and the Pennsylvania counterpart, the Clean Streams Law, 35 P.S. 691.5. For example, relative to surface coal mining permits, 25 Pa. Code 87.102(f), Hydrologic balance: effluent standards, specifically reads:

In addition to the requirements of subsections (a)-(e), the discharge of water from areas disturbed by mining activities shall comply with this title, including Chapters 91, 92, 93, 95, 97 (reserved) and 102.

The provisions in Pennsylvania's Chapter 92 deal specifically with Public Participation. This portion of the Pennsylvania environmental protection regulation, found at 25 Pa. Code 92a.82, is incorporated by reference into the Pennsylvania program. Therefore, the Pennsylvania program specifically requires that when dealing with the discharge of water from areas disturbed by mining activities, "a public notice of every new draft individual permit, or major amendment to an individual permit, will be published in the *Pennsylvania Bulletin*." (25 Pa. Code 92a.82(b)) With respect to categorizing revisions and modifications as "minor" or "major," OSM notes that the Pennsylvania definition of "minor amendment," found at 25 Pa. Code 92a.2, directly mirrors, with a few insignificant exceptions, the definition of "Minor modifications" as promulgated by the

EPA at 40 CFR 122.63. The Pennsylvania regulations also provide for a standard 30-day public comment period following publication. (25 Pa. Code 92a.82)

In addition to the provision of the Pennsylvania program dealing with surface coal mining permits, there are similar provisions found at: 25 Pa. Code 89.52(h), applicable to underground coal mine permits and coal preparation facilities permits; 25 Pa. Code 90.102(f), applicable to coal refuse disposal permits, and 25 Pa. Code 88.92(f) applicable to anthracite coal mine permits. The presence of these public notice requirements dispense with the concern raised by the EPA that modifications to NPDES permits may not receive required public notice and comment periods.

Therefore, while taking the EPA's comment into consideration, we conclude that this aspect of the amendment may be approved as it is no less stringent than SMCRA and no less effective than the implementing regulations.

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 December 26,

2012, we requested comments on Pennsylvania's amendment (Administrative Record PA 895.01), but neither responded to our request.

V. OSM's Decision

Based on the above findings, we approve the amendment proposed by Pennsylvania and sent to OSM on December 19, 2012.

We approve, as discussed in finding number 1, 25 Pa. Code 86.3, concerning the CRDCF fund; finding number 2, 25 Pa. Code 86.1, concerning the definition of permit application fee; and finding number 3, 25 Pa. Code 86.17, concerning the change in amount and addition of fees.

Moreover, as stated herein, OSM, while considering the comments received by the EPA, finds that the introduction of the definition, "Major Permit Revisions" found at 25 Pa. Code 86.1, of the Pennsylvania amendment and the reference thereto at 25 Pa. Code 86.17(2), is no less stringent than SMCRA and is not construed as superseding, amending, modifying, or repealing the Federal regulatory requirements for NPDES permit modifications. Specifically, the Pennsylvania program provides for public notice and opportunity to comment for "every...major amendment to an individual permit." (25 Pa. Code 92a.82(b))

VI. Procedural Determinations

Executive Order 12630 – Takings

This rule does not have takings implications. This determination is based on the analysis performed for the Federal regulations. Section 507(a) of SMCRA gives the regulatory authority discretion in selecting the fee to be imposed. Other changes implemented through this final rule notice are administrative in nature and have no takings implications.

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.

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). However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each plan 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 plans and plan amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing 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 because it does not have substantial direct effects on the states, on the relationship between the Federal government and the states, or on the distribution of power and responsibilities among the various levels of government. The rule merely approves a program amendment submitted by the State of Pennsylvania at its own initiative.

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 pertains to the Pennsylvania 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 requiring agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866 (Regulatory Planning and Review), and (2) likely to have 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)).

It is further documented in the DOI Departmental Manual 516 DM 13.5, that agency decisions on approval of State regulatory programs do not constitute major Federal actions.

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.*). The State submittal, which is the subject of this rule, is based upon 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 data and assumptions for the 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, 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.

Dated: May 13, 2013.

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 in the table by adding a new entry in chronological order by “Date of final publication” to read as follows:

§ 938.15 Approval of Pennsylvania regulatory program amendments.

* * * * *

Original amendment submission date	Date of final publication	Citation/description
***** December 19, 2012	** <u>[Insert date of publication in the Federal Register]</u>	Addition of definitions to 25 Pa. Code 86.1, clarification of 86.3, and increase of fees at 86.17.

[FR Doc. 2013-22011 Filed 09/09/2013 at 8:45 am; Publication Date: 09/10/2013]