



**4310-05-P**

**DEPARTMENT OF THE INTERIOR**

**Office of Surface Mining Reclamation and Enforcement**

**30 CFR Part 948**

**[WV-119-FOR (Interim) OSM 2012-0013; WV-121-FOR; OSM-2013-0010 S1D1S  
SS08011000 SX064A000 201S180110; S2D2S SS08011000 SX064A000 20XS501520]**

**West Virginia Regulatory Program**

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

**ACTION:** Final rule; approval of amendment.

**SUMMARY:** We, the Office of Surface Mining Reclamation and Enforcement (OSMRE), are approving an amendment to the West Virginia regulatory program (the West Virginia program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). West Virginia is submitting a proposed amendment to revise the West Virginia Surface Coal Mining and Reclamation Act (WVSCMRA) by creating a new section relating to the award of attorney fees and costs by the Surface Mine Board. On July 11, 2012, OSMRE on an interim basis, approved statutory amendments (WV-119) to the West Virginia regulatory program under SMCRA. West Virginia revised the WVSCMRA to effect changes concerning the special reclamation tax and apportionment of this tax.

**DATE:** The effective date is [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]

**FOR FURTHER INFORMATION CONTACT:** Mr. Ben Owens, Acting Director,

Charleston Field Office, Telephone: (412) 937-2827. E-mail: [chfo@osmre.gov](mailto:chfo@osmre.gov).

## **SUPPLEMENTARY INFORMATION:**

- I. Background on the West Virginia Program
- II. Submission of the Amendments
- III. OSMRE's Findings
- IV. Summary and Disposition of Comments
- V. OSMRE's Decision
- VI. Statutory and Executive Order Reviews

### **I. Background on the West Virginia Program**

Section 503(a) of the Act (30 U.S.C. 1253(a)) 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 West Virginia program on January 21, 1981. You can find background information on the West Virginia program, including the Secretary's findings, the disposition of comments, and conditions of approval of the West Virginia program in the January 21, 1981, **Federal Register** (46 FR 5915). You can also find later actions concerning West Virginia's program and program amendments at 30 CFR 948.10, 948.12, 948.13, 948.15, and 948.16.

### **II. Submission of the Amendments**

By letter dated and received by OSMRE on September 11, 2013 (Administrative

Record No. WV-1584), the West Virginia Department of Environmental Protection (WVDEP) submitted an amendment to revise WVSCMRA. Enrolled Senate Bill 497 created a new section in the West Virginia Code, designated as § 22-3-33, relating to the award of attorney fees and costs by the Surface Mine Board (SMB), which replaced the Reclamation Board of Review (RBR), and Courts in appeals from actions taken by WVDEP under the approved State surface mining program.

In 1994, the West Virginia Legislature adopted House Bill 4065 (Administrative Record No. WV-933). This bill deleted the provisions dealing with the RBR and replaced them in another Chapter and Article of the West Virginia Code with provisions establishing the current SMB, which performs the same functions formerly performed by the RBR. OSMRE approved the provisions establishing the SMB on February 21, 1996, (61 FR 6511) (Administrative Record No. WV-1022).

On April 27, 2012, West Virginia submitted a program amendment, WV-119-FOR, to revise its WVSCMRA to effect changes concerning the special reclamation tax and apportionment of this tax. This amendment was intended to increase and extend the special reclamation tax. Moreover, a specific portion of this tax was allocated to the Special Reclamation Water Trust Fund for the purpose of designing, constructing and maintaining water treatment systems on forfeited mine sites. We approved the reinstatement of the special reclamation tax, its increase to twenty-seven and nine-tenths cents per ton of clean coal mined, as well as fifteen cents of the amount collected allocated for deposit to the Special Reclamation Water Trust Fund on a temporary basis. OSRME's approval took effect upon publication of this interim rule in the **Federal Register** on July 11, 2012 (77 FR 40793) (Administrative Record No. WV-1583).

### **III. OSMRE's Findings**

#### *A. WV-121-FOR: WVSCMRA § 22-3-33 – Award of Attorney fees, costs, and expenses.*

A new section is created in the West Virginia Code, designated as § 22-3-33 to award attorney fees and costs by the SMB and courts of appeals from actions taken by the WVDEP under the approved State surface mining program. The SMB or the court may authorize an award to the petitioner the amount of cost and expenses, including attorney fees.

This action is being taken due to the deletion of State statutory provisions from the approved State program which provided that any person involved in any administrative or judicial proceeding is entitled to reimbursement of all costs and expenses, including attorney fees, incurred by his participation in proceedings as determined by the SMB or State court.

We find the proposed State statutory revisions, as amended, to be no less effective than the Federal requirements at 43 CFR 4.1295 and no less stringent than section 525(e) of SMCRA (30 U.S.C. 1275), which states that costs and expenses, including attorney fees that are reasonably incurred may be awarded, and can be approved.

#### *B. WV-119-FOR: WVSCMRA § 22-3-11(h)(1) - Special Reclamation Tax.*

Subsection 22-3-11(h)(1) of the WVSCMRA is substantively amended by increasing the amount of the special reclamation tax to twenty-seven and nine-tenths cents per ton of clean coal mined. The former special reclamation tax, effective as of July 1, 2009, required remittance of fourteen and four-tenths cents per ton of clean coal mined; the collection of this tax is eliminated and replaced with the

aforementioned amount. Additionally, the amended language requires fifteen cents per ton of the collected twenty-seven and nine-tenths cents per ton, be deposited in the Special Reclamation Water Trust Fund (the Fund). Historically, although not codified, WVDEP allocated three cents per ton of clean coal mined to finance the Fund, resulting in a severely underfunded account at the time. It is forecasted that the imposition of the new rate enumerated in Senate Bill 579 will ease the strain placed on the Fund going forward.

Formatting and style changes have been effectuated via Senate Bill 579. Former paragraph (h)(1) is revised to add a caption entitled: *Rate, deposits and review*; additionally, the paragraph has been segregated to add four subparts that incorporate all the former language.

This amendment, was approved on a temporary basis in the **Federal Register** on July 11, 2012 (77 FR 40793) with an effective date of July 11, 2012. As amended, we find the proposed bonding revisions to be consistent with and no less effective than the Federal provisions at 30 CFR 800.11(e) and 800.14, and no less stringent than sections 509 and 519 of SMCRA (30 U.S.C. 1259 and 1269), and therefore, they can be approved on a permanent basis.

#### **IV. Summary and Disposition of Comments**

##### *WV-121-FOR – Award of Attorney Fees, Costs and Expenses*

##### *Public Comments*

We asked for public comments on the amendment, but none were received.

##### *Federal Agency Comments*

In accordance with 30 CFR 732.17(h)(11)(i) and (ii) and section 503(b) of

SMCRA (30 U.S.C. 1253(b)), on May 27, 2014, OSMRE requested comments on the State's program amendment dated September 11, 2013, from those agencies with an actual or potential interest in the West Virginia program (Administrative Record No. WV-1586).

By letter received by OSMRE dated June 27, 2014 (Administrative Record No. WV-1590), the Mine Safety and Health Administration (MSHA) responded that it had no comments on the proposed changes to the State's statutes as written.

By letter received by OSMRE dated June 20, 2014 (Administrative Record No. WV-1594), the Natural Resources Conservation Service (NRCS) responded that it had no comments on the amendment. It stated that, while the surface coal mining industry needed to be accountable to the principles of the WVSCMCA, the industry should not be harassed with claims brought in bad faith.

*WV-119-FOR –Bond Forfeiture Special Reclamation Tax*

By letter dated July 7, 2011 (Administrative Record No. 1564), the NRCS responded that it had no comments regarding the proposed changes to the bonding requirements in this amendment.

By letter received on August 19, 2011 (Administrative Record No. 1565), the Army Corp of Engineers (COE) responded to our request for comments. The COE responded that they have no comments regarding the proposed changes to the bonding requirements at this time.

*Environmental Protection Agency (EPA) Comments and Concurrence*

Under Federal regulations at 30 CFR 732.17(h)(11)(i) and (ii), we are required to solicit comments and 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.*). OSMRE has determined that none of the State revisions pertained to air or water quality standards; therefore, EPA's concurrence was not requested on this amendment. By letter received by OSMRE dated July 24, 2014 (Administrative Record No. 1595), the EPA acknowledged that it had no comments on WV-121-FOR. EPA concurrence was not requested for WV-119-FOR as it does not relate to air or water quality standards.

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

Under Federal regulations at 30 CFR 732.17(h)(4), we are required to solicit comments from the SHPO and the ACHP on amendments that may have an effect on historic properties. Because OSMRE determined that none of the proposed State revisions pertained to historical preservation, the SHPO and the ACHP were not asked to comment on this amendment.

## **V. OSMRE's Decision**

We are approving the changes in the approved State program made by HB 4065 regarding the deletion of former West Virginia Code Chapter 22, Article 4 about the RBR and also approving SB 497 and its authorization to make changes in the approved State program about the award of attorney fees and costs by the SMB and courts in appeals from actions taken by WVDEP.

Furthermore, as discussed above, we are approving, on a permanent basis, revisions to the increase in the State's special reclamation tax at WVSCMRA § 22-3-11(h)(1) to complete land reclamation and water treatment activities at bond forfeiture

sites.

To implement this decision, we are amending the Federal regulations at 30 CFR Part 948, which codify decisions concerning the West Virginia program. In accordance with the Administrative Procedure Act, this rule will take effect 30 days after the date of publication. Section 503(a) of SMCRA (30 U.S.C. 1253(a)) 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. Statutory and Executive Order Reviews**

### *Executive Order 12630 – Governmental Actions and Interference with Constitutionally Protected Property Rights*

This rule does not effect a taking of private property or otherwise have taking implications that would result in public property being taken for government use without just compensation under the law. Therefore, a takings implication assessment is not required. This determination is based on an analysis of the corresponding Federal regulations.

### *Executive Order 12866 - Regulatory Planning and Review and 13563 – Improving Regulation and Regulatory Review*

Executive Order 12866 provides that the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB) will review all significant rules. Pursuant to OMB guidance, dated October 12, 1993, the approval of state program amendments is exempt from OMB review under Executive Order 12866. Executive Order 13563, which reaffirms and supplements Executive Order 12866, retains this exemption.

*Executive Order 13771—Reducing Regulation and Controlling Regulatory Costs*

State program amendments are not regulatory actions under Executive Order 13771 because they are exempt from review under Executive Order 12866.

*Executive Order 12988 - Civil Justice Reform*

The Department of the Interior has reviewed this rule as required by Section 3 of Executive Order 12988. The Department has determined that this **Federal Register** notice meets the criteria of Section 3 of Executive Order 12988, which is intended to ensure that the agency review its legislation and proposed regulations to eliminate drafting errors and ambiguity; that the agency write its legislation and regulations to minimize litigation; and that the agency’s legislation and regulations provide a clear legal standard for affected conduct rather than a general standard, and promote simplification and burden reduction. Because Section 3 focuses on the quality of Federal legislation and regulations, the Department limited its review under this Executive Order to the quality of this **Federal Register** notice and to changes to the Federal regulations. The review under this Executive Order did not extend to the language of the state regulatory program or to the program amendment that the State of West Virginia drafted.

*Executive Order 13132 - Federalism*

This rule has potential Federalism implications as defined under Section 1(a) of Executive Order 13132. Executive Order 13132 directs agencies to “grant the States the maximum administrative discretion possible” with respect to Federal statutes and regulations administered by the States. West Virginia, through its approved regulatory program, implements and administers SMCRA and its implementing regulations at the state level. This rule approves an amendment to the West Virginia program submitted

and drafted by the State, and thus is consistent with the direction to provide maximum administrative discretion to States.

*Executive Order 13175 – Consultation and Coordination With Indian Tribal Governments*

The Department of the Interior strives to strengthen its government-to-government relationship with Tribes through a commitment to consultation with Tribes and recognition of their right to self-governance and tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in Executive Order 13175 and have determined that it has no substantial direct effects on federally recognized Tribes or on the distribution of power and responsibilities between the Federal government and Tribes. Therefore, consultation under the Department's tribal consultation policy is not required. The basis for this determination is that our decision is on the West Virginia program that does not include Tribal lands or regulation of activities on Tribal lands. Tribal lands are regulated independently under the applicable, approved Federal program.

*Executive Order 13211 – Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

Executive Order 13211 requires agencies to prepare a Statement of Energy Effects for a rulemaking 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 significant energy action under the definition in Executive Order 13211, a Statement of Energy Effects is not required.

*Executive Order 13045—Protection of Children from Environmental Health Risks and Safety Risks*

This rule is not subject to Executive Order 13045 because this is not an economically significant regulatory action as defined by Executive Order 12866; and this action does not address environmental health or safety risks disproportionately affecting children.

*National Environmental Policy Act*

Consistent with sections 501(a) and 702(d) of SMCRA (30 U.S.C. 1251(a) and 1292(d), respectively) and the U.S. Department of the Interior Departmental Manual, part 516, section 13.5(A), State program amendments are not major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

*National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 3701 *et seq.*) directs OSMRE to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. (OMB Circular A-119 at p. 14). This action is not subject to the requirements of section 12(d) of the NTTAA because application of those requirements would be inconsistent with SMCRA.

*Paperwork Reduction Act*

This rule does not include requests and requirements of an individual, partnership, or corporation to obtain information and report it to a Federal agency. As this rule does not contain information collection requirements, a submission to OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) is not required.

### *Regulatory Flexibility Act*

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 corresponding 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 corresponding 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 on an analysis of the corresponding Federal regulations, which were determined not to constitute a major rule.

### *Unfunded Mandates Reform Act*

This rule will not impose an unfunded mandate on State, local, or Tribal governments, or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local, or Tribal governments or the private

sector. This determination is based on an analysis of the corresponding Federal regulations, which were determined not to impose an unfunded mandate. Therefore, a statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

**List of Subjects in 30 CFR Part 948**

Intergovernmental relations, Surface mining, Underground mining.

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Thomas D. Shope, Regional Director  
North Atlantic – Appalachian Region

For the reasons set out in the preamble, the Office of Surface Mining Reclamation and Enforcement amends 30 CFR part 948 as follows:

**PART 948 - WEST VIRGINIA**

1. The authority citation for Part 948 continues to read as follows:

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

2. In § 948.15 amend the table by adding in chronological order by “Date of publication of final rule” entries for “W.Va. Code 22-3-33, Attorney fees and costs” and “W.Va. Code 22-3-11(h)(1), Increase in Special Reclamation Tax” to read as follows:

**§ 948.15 Approval of West Virginia regulatory program amendments.**

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Original amendment submission date	Date of publication of final rule	Citation/description
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***** September 11, 2013	** <u>[Insert date of publication in the Federal Register]</u>	W.Va. Code 22-3-33, Attorney fees and costs;
April 25, 2011	<u>[Insert date of publication in the Federal Register]</u>	W.Va. Code 22-3-11(h)(1), Increase in Special Reclamation Tax.

[FR Doc. 2020-23214 Filed: 11/5/2020 8:45 am; Publication Date: 11/6/2020]