

FEDERAL REGISTER: 59 FR 28136 (May 31, 1994)

DEPARTMENT OF THE INTERIOR

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

30 CFR Parts 795, 870, 872, 873, 874, 875, 876, and 886

Abandoned Mine Land Reclamation Fund Reauthorization Implementation; Part II

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) of the U.S. Department of the Interior is issuing final rules to amend its abandoned mine land regulations, 30 CFR Subchapter R implementing amendments made to Title IV of the Surface Mining Control and Reclamation Act (SMCRA) of 1977, by the Omnibus Budget Reconciliation Act of 1990 (November 5, 1990) (which included the Abandoned Mine Reclamation Act of 1990, as amended), and by the Energy Policy Act of 1992 (October 24, 1992).

EFFECTIVE DATE: June 30, 1994.

FOR FURTHER INFORMATION CONTACT: Norman J. Hess, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240; Telephone: 202-208-2949.

SUPPLEMENTARY INFORMATION:

- I. Background
- II. Organization
- III. Final Rules and Disposition of Comments
- IV. Procedural Matters

I. BACKGROUND

A. SUMMARY OF THE ABANDONED MINE LAND PROGRAM - PUBLIC LAW 95-87

The Abandoned Mine Land (AML) Reclamation Program was established by SMCRA, Public Law 95-87, *30 U.S.C. 1201 et seq.*, in response to concern over extensive environmental damage caused by past coal mining activities. In effect, the Abandoned Mine Reclamation Fund (Fund) and the program it supports is the coal industry's equivalent to the "Superfund" administered by the Environmental Protection Agency to address hazardous waste discharges.

As originally enacted, only areas abandoned prior to the date of enactment of SMCRA, where there is no continuing reclamation responsibility by any person under State or Federal law, were eligible for reclamation under Title IV. Funding of reclamation projects is subject to a priority schedule. For example, "priority 1" projects concern those that involve the protection of public health, safety, general welfare and property from extreme danger of the adverse effects of coal mining practices. "Priority 3" projects, on the other hand, concern environmental problems associated with past coal mining practices that do not necessarily constitute a public health or safety threat.

The Fund, administered by the Secretary of the Interior through OSM, is financed by a reclamation fee assessed on every ton of mined coal at the rate of 35 cents per ton of surface mined coal, 15 cents per ton of underground mined coal and 10 cents per ton for lignite. Expenditures from the Fund are subject to appropriation by Congress. The authority to collect the reclamation fee was due to expire on August 3, 1992, 15 years after the date of enactment of SMCRA.

The Fund is divided into the State/Tribal and Federal shares with each State or Indian tribe under a federally approved reclamation program (generally referred to as "program" or "primacy" States) entitled to 50 percent of the reclamation fees collected from coal operations within the State or Indian lands. Annually, these States/Indian tribes receive reclamation project construction grants and administrative grants from their share of the Fund. States are also authorized to use up to \$3 million of their State share funds to establish State coal mine subsidence insurance programs, and deposit ten percent of their annual grants into special interest-bearing State trust accounts for use after August 3, 1992, to carry out reclamation activities.

The Federal share of the Fund is allocated among a number of Federal programs such as emergency projects (involving sudden and life-threatening situations which demand immediate attention), high-priority reclamation projects in States and Indian tribes without federally approved reclamation programs (referred to as "nonprogram" States), the Rural Abandoned Mine Program (RAMP) administered by the Secretary of Agriculture through the Soil Conservation Service (SCS), and the Small Operators Assistance Program (SOAP) which provides financial assistance to coal operators who produce less than 100,000 tons per year to help defray certain costs associated with the surface coal mining permitting process. Remaining funds are distributed to program States under an allocation formula. At present, 23 States and three Indian tribes have OSM-approved abandoned mine reclamation programs.

Noncoal abandoned mine reclamation projects can be undertaken in only two instances. Program States and Indian tribes can utilize State or Tribal share monies to reclaim an abandoned noncoal mine site if the request is made by the State governor or Tribal head and the project represents a public health and safety hazard. Moreover, once a program State or Indian tribe certifies it has completed the reclamation of all eligible abandoned coal mine projects, it can then use the full amount of its State or Tribal share for abandoned noncoal mine land reclamation projects.

B. AML REGULATIONS

On October 25, 1978, OSM published final regulations implementing an abandoned mine land reclamation program incorporating the provisions of Title IV of the Act. The regulations establish procedures and requirements for the preparation and implementation of State and Indian reclamation programs, consisting of reclamation plans, submission of annual projects, and applications for annual grants. Additional parts of this subchapter include provisions for Federal, State, and Indian Abandoned Mine Reclamation Funds, general reclamation objectives, rights-of-entry, liens, emergency reclamation acquisitions, disposition of lands and waters, reclamation on private lands, and Indian reclamation programs.

Regulations relating to the amount and collection of fees were promulgated in 30 CFR part 837 on December 31, 1977 (*42 FR 62713*). This part has since been redesignated as part 870.

On June 30, 1982, OSM published revisions to its abandoned mine land regulations in response to the Administration's request for regulatory review. These revised rules concerned the establishment and administration of the Abandoned Mine Land Reclamation Program by the States, Indian tribes, and Federal Government, as required by SMCRA. For more information regarding the exact nature of these revisions refer to *47 FR 28574-28604* (June 30, 1982).

C. ACCOMPLISHMENTS OF THE ABANDONED MINE LAND RECLAMATION PROGRAM

AML FEE COLLECTIONS

From the beginning of the program through the Fiscal Year 1992, reclamation fee collections into the Abandoned Mine Land Reclamation Fund amounted to approximately \$3.2 billion. The Fund also received donations, user charges, and other recovered amounts such as late-payment fines.

AML EMERGENCY PROGRAM

Since the beginning of the program, OSM has encouraged States to take over emergency project responsibility. Beginning in 1983, Arkansas and Montana assumed emergency project responsibility, followed by Illinois in 1984. During 1988-89, Kansas, Virginia, and West Virginia took over responsibility for their emergency projects, and Alabama assumed responsibility in 1990. In 1992, Ohio and Alaska assumed responsibility. In 1989, OSM established a new emergency program policy that provided Federal share funds, in addition to the formula-based allocation, to States with emergency programs. Since 1988, it has been OSM policy to stabilize the emergency portion of AML problems permanently, and then to refer any remaining work at the site to the State for consideration under its regular AML reclamation program. In 1992, OSM declared 179 new emergency projects, while States with emergency programs initiated 110.

STATE AND TRIBAL AML PROGRAMS

Beginning with Texas in 1980, OSM has approved State reclamation programs so that currently all primacy States except Mississippi have approved AML programs. During 1988 the Navajo and Hopi Tribe programs were approved,

and in 1989 the Crow Tribe received approval for its program. States and the Indian tribes received grants totaling \$143,541,172 in 1993. Since 1981, when the States began receiving AML administrative grants to operate their programs and construction grants to complete reclamation projects, through 1993, they have received over \$1.9 billion from the Fund.

MINIMUM PROGRAMS

The minimum-level AML program was established by Congress in 1988 to assure funding for existing high-priority projects in States where the annual State share allocation is too small for the State to administer a program and initiate reclamation. Eleven States and Indian tribes (Alaska, Arkansas, Iowa, Kansas, Maryland, Missouri, New Mexico, North Dakota, Oklahoma, Utah, and the Crow Tribe) were eligible for minimum-level program funding during 1993 and received such grants during the year. Authorized funding of the minimum-level program was up to \$2,000,000 per eligible State/Indian tribe for 1993. The minimum-program States/Indian tribes received \$14,669,719 of Federal share money in 1993, to bring these States to the minimum program level.

D. ABANDONED MINE RECLAMATION ACT (AMRA) OF 1990

Since 1977, when the AML Fund was established, many of the scars left from past mining practices have been reclaimed. Thousands of acres have been contoured, revegetated and brought back to productive uses. Despite such accomplishments, the inventory of unreclaimed high priority public health and safety problems is still significantly high. All such problems would not have been addressed with AML Funds collected through 1992, the original expiration date for fee collection.

In light of this continuing need to address high priority coal problems, Congressman Rahall introduced a bill, H.R. 2095, in the 101st Congress to extend the AML fee and adjust the allocation of AML Funds. A detailed examination of this bill, as amended, can be found in H.R. Report 294, 101st Congress, 1st Session (October 18, 1989). H.R. 2095, as amended, was passed by the House of Representatives on October 23, 1989.

On October 16, 1990, the House again passed H.R. 2095 as part of H.R. 5835, the Omnibus Budget Reconciliation Act of 1990. In conference with the Senate, the text of H.R. 2095 was retained except for six modifications and one addition. They are as follows: First, the authority to collect reclamation fees was extended through September 30, 1995, rather than the year 2007. Second, a provision that provided for modified reclamation fees after 1992 in States which have certified the completion of all abandoned coal mine projects was dropped. Third, provisions that would have expanded the scope of the emergency program were deleted. Fourth, while the House bill limited the objectives of the Fund to the first three priorities listed in current law, the amendments maintain the current law list of project priorities. Fifth, the requirement that the Secretary promulgate environmental standards for reclamation projects was deleted. Sixth, the bill's authorization of a new abandoned minerals and mineral materials mine reclamation fund was dropped. Finally, an amendment relating to certain projects in certified States was adopted.

On November 5, 1990, the President signed into law the Omnibus Budget Reconciliation Act of 1990, Public Law 101-508, which included the Abandoned Mine Reclamation Act of 1990, as amended. Besides extending the authority to collect reclamation fees, the amendments to Title IV contain several other significant provisions as follows:

The amendments concentrate a greater amount of resources toward combating the highest priority abandoned coal mine reclamation projects. This goal is accomplished by allocating forty percent of the Federal share of funds to program States and Indian tribes until they complete all of their priority 1 and 2 abandoned coal mine reclamation projects.

The new provisions also provide additional resources to combat abandoned coal mine hazards by enabling interest to accrue to amounts in the AML Fund and by strengthening reclamation fee collection and auditing authority.

The legislation also recognizes the severe hazards to public health and safety caused by water supplies contaminated by past mining practices.

The new amendments allow States and Indian tribes to establish comprehensive acid mine drainage programs to combat the devastating effects on land, water and quality of life in areas affected by acid mine drainage.

The new provisions allow States and Indian tribes to address high priority coal sites abandoned after enactment of the 1977 Act. Sites which were abandoned prior to a State receiving primacy pursuant to Title V of SMCRA, or which remain unreclaimed due to the insolvency of a surety company, can now be addressed with Title IV funds.

The new legislation provides for a specific allocation of collected fees from which funds may be transferred annually to the Department of Agriculture to administer RAMP under Section 406 of SMCRA.

The new legislation expands the rights of States and Indian tribes which have certified the completion of all known coal problems to utilize State/Indian tribe share funds for noncoal reclamation purposes, including the protection, repair, replacement, construction, or enhancement of public facilities damaged by past mining practices or which exist in communities adversely impacted by present mining.

The new legislation also provides that mineral owners and purchasers be reported to OSM each quarter with the filing of the Form OSM-1.

Finally, the new legislation raised the annual coal production limit from 100,000 to 300,000 tons for eligibility under the Small Operator Assistance Program authorized at Section 507(c).

E. PROPOSED RULES

OSM published proposed rules implementing the 1990 amendments to Title IV and Title V of SMCRA and requested comments from the public. In addition, other changes were proposed for part 795, Small Operator Assistance, based on statutory authority existing under SMCRA. *56 FR 57376-57401* (November 8, 1991). During the comment period on the proposed rules, OSM received comments through three public hearings as well as written comments from a variety of sources.

Pursuant to Executive Order 12866, every Federal agency is required within applicable statutory limits to choose regulatory goals that maximize benefits to society and to select the most effective means to achieve these goals. To this end OSM has met with and received comments and recommendations from the representatives of coal mining States/Indian tribes.

All comments received during the comment period were considered in this rulemaking process, and all substantive comments received are addressed in the following preamble. All comments received, as well as summaries of meetings held and the record of the public hearings, are available for inspection in the OSM Administrative Record, room 660, 800 N. Capitol Street, NW., Washington, DC.

F. THE ENERGY POLICY ACT OF 1992

On October 24, 1992 the President signed into law the Energy Policy Act of 1992, Public Law 102-486. Included in this law were several amendments to the Abandoned Mine Reclamation Program under Title IV of SMCRA and to the Small Operator Assistance Program established pursuant to Section 507(c) of SMCRA. The legislative changes to the AML program include: an extension of the AML reclamation fee; the transfer of AML funds to the United Mine Workers of America Combined Benefit Fund; a reallocation of interest earned by the AML Fund; the deletion of the reclamation priority regarding AML funded coal research; the extension of reclamation eligibility for AML water problems created after August 3, 1977; new mine fire control procedures; and the modification of AML eligibility criteria for sites affected by remaining operations.

The Energy Policy Act of 1992, Public Law 102-486, also amended the Small Operator Assistance Program (SOAP) authorized at Section 507(c) of SMCRA. The changes to the SOAP at Section 2513 of the Energy Policy Act fall into two areas that will be covered in this rulemaking. First, enhancements have been added to the basic technical services to provide a more complete permitting package. These enhancements include: Engineering analyses and designs necessary for the determination of probable hydrologic consequences; cross-section maps related to the permitting requirements of SMCRA; collection of archaeological and historical information required by SMCRA and regulatory authorities and development of associated plans; collection of site-specific resource information and production of protection and enhancement plans for fish and wildlife habitats and other environmental values required by the regulatory authority; and

pre-blast surveys required by SMCRA. Geologic drilling for collection of samples associated with the statement of results of test borings and core samplings is also authorized by the Energy Policy Act.

Second, This rulemaking also includes another SOAP provision from the Energy Policy Act that deals with reimbursement of costs. A coal operator who has received assistance must reimburse the regulatory authority if the operator's actual and attributed annual production of coal for all locations exceeds 300,000 tons during the 12 months immediately following the date on which the operator is issued the surface coal mining and reclamation permit.

Except for provisions dealing with mine fire control procedures and the training of eligible small operators concerning the preparation of permit applications (which will be the subject of separate rulemakings), OSM has included in these final rules the provisions made by the Energy Policy Act, as outlined above for the Small Operators Assistance Program and for the Abandoned Mine Reclamation Program. Such changes are mandated by statute and do not require additional implementing provisions or conditions. Accordingly, OSM is adopting these provisions, as enacted, without interpretation or the addition of any new requirements. Notice and comment pursuant to the Administrative Procedure Act, 5 U.S.C. 553 is not required. All amendments made by the Energy Policy Act of 1992 that are adopted by these final rules are specifically explained in more detail in Part III-Final Rules and Disposition of Comments.

II. ORGANIZATION

The regulatory revisions are intended to implement the requirements of the Act consistent with the purposes stated in Section 102(h), its legislative history, and the Secretary's commitment to avoid excessive and burdensome rules. The material concerning the Abandoned Mine Land Program is organized into parts which comprise Subchapter R. The material regarding the Small Operator Assistance Program (SOAP) is found in Subchapter H. At the end of each part, comments received from interested parties are addressed. It should also be noted that the term "allocated" as used in this preamble refers to the earmarking of funds for a specific purpose. This administrative identification in OSM records of monies in the Fund for a specific purpose does not mean that such monies will be appropriated in a specific appropriation or will be available for use in the year in which they were allocated.

In response to comments from Indian tribes, OSM has inserted throughout the regulations references to Indian tribes when it uses the word "State". Section 405(k) of SMCRA specifically provides that an Indian tribe should be considered as a "State" for purposes of Title IV. OSM has also made one further adjustment for Indian tribes. Regarding the reclamation of post-SMCRA sites pursuant to Section 402(g)(4)(E) of SMCRA, the new amendments reference the date in which the Secretary approved a State program pursuant to Section 503. Indian tribes, however, do not have approved regulatory programs. To rectify this problem, OSM has used September 28, 1984, as the applicable date for Indian tribes. This date was chosen because it is the date that the permanent Federal regulatory program on Indian lands took effect.

III. FINAL RULES AND DISPOSITION OF COMMENTS

PART 795 - PERMANENT REGULATORY PROGRAM-SMALL OPERATOR ASSISTANCE PROGRAM

GENERAL

The initial authorization for the SOAP at Section 507(c) of SMCRA provided certain technical permitting services for hydrology and overburden and geology for operators annually producing 100,000 tons or less of coal from all locations. These technical services are directly linked to the permitting requirements associated with the determination of probably hydrologic consequences (PHC) and the statement of results of test borings.

The Abandoned Mine Land Act of 1990 amended Section 507(c) by raising the annual coal production cap from 100,000 to 300,000 tons at all locations for eligibility for the technical permitting services provided under the program.

The Energy Policy Act of 1992, Public Law 102-486, further amended Section 507(c) by adding enhancements to the program's basic services in order to provide a more complete permitting package. These enhancements include: Engineering analyses and designs necessary for the PHC; cross-section maps required by the permitting provisions of SMCRA; collection of archaeological and historical information; collection of site-specific resource information and production of protection and enhancement plans for fish and wildlife habitat and other environmental values; and pre-blast surveys. Furthermore, geologic drilling for the collection of samples associated with the requirements for the

statement of the results of test borings is authorized. The Energy Policy Act also reduced the operator's liability period for reimbursement of costs from up to five years or the length of the permit, whichever is shorter, as specified in OSM regulations, to 12 months starting with the date the operator is issued the permit.

DISCUSSION

SECTION 795.3 - DEFINITIONS

The definition of "qualified laboratory" is being amended by adding "or other services as specified at Section 795.9." This will ensure that qualified laboratories provide all technical services authorized for the SOAP, i.e., the new technical services mandated by the Energy Policy Act, as well as the basic hydrologic and geologic services.

SECTION 795.4 - INFORMATION COLLECTION

Section 795.4 contains a list of the information collection requirements contained in part 795 and the Office of Management and Budget (OMB) clearance number. The proposed revision updates the data contained in this section by including the estimated reporting burden per respondent for complying with the information collection requirements. The revision also provides the OSM and OMB addresses where comments regarding the information collection requirements may be sent.

No comments were received on this section which is therefore adopted as proposed.

SECTION 795.6 - ELIGIBILITY FOR ASSISTANCE

In paragraph 795.6(a)(2), OSM proposed revising the production level of 100,000 tons to 300,000 tons with respect to operator eligibility under the SOAP program. This change is nondiscretionary and has been mandated by the Abandoned Mine Land Reclamation Act of 1990. OSM wishes to emphasize that past production will be used as the standard for evaluating whether an operator's probable total attributed annual production from all locations is reasonably expected to be within the 300,000 ton limit for eligibility under the SOAP. This approach will reduce the potential for fraud and abuse by eliminating large independent operators who might otherwise qualify under the reduced liability period of paragraph (a)(2).

No comments were received on this paragraph.

Regarding paragraphs 795.6(a)(2)(i) and (a)(2)(ii), OSM proposed changing the five percent to ten percent with respect to the baseline above which ownership will play a role in determining "attributed coal production." The basis for the ten percent baseline is Section 507(b)(4) and regulations for determining ownership and control, as well as permit information requirements promulgated thereunder. The change would make SOAP eligibility provisions for ownership and control consistent with all other similar requirements in the permanent program rules.

One commenter stated that the proposal to change five percent to ten percent with respect to the baseline above which ownership would play a role in determining attributed coal production is logical and necessary to have SOAP consistent with the normal permitting requirements of ownership and control.

Another commenter, however, disagreed stating that the change from five to ten percent for the purposes of attributing coal production mistakenly links the percentage of ownership to the other provisions of the Act where ownership is relevant only for permit-blocking and other enforcement purposes. The commenter noted that existing part 795 already contains self-limiting language and believes that threshold for attributed production should be set low so that assistance through the SOAP is provided to those most in need. The commenter offered that the Security and Exchange Commission (SEC) considers five percent ownership significant for reporting purposes.

OSM disagrees with the dissenting comment. SOAP provides permitting services and like all permitting requirements is authorized under Section 507 of SMCRA. Furthermore, eligibility for the SOAP is tied to eligibility for a permit at existing Section 795.6(a)(3) as explained at 48 FR 2268, January 18, 1983. OSM is unaware of any significance or benefits to be gained by linking the percentage of attributed production to SEC reporting requirements and the

commenter provided none. For these reasons, attributed production in the final rule will be tied to the ten percent ownership as proposed and thus be consistent with related permitting requirements.

SECTION 795.9 - PROGRAM SERVICES AND DATA REQUIREMENTS

Paragraph (a) contains a general description of the basic technical services available under the SOAP and references paragraph (b). The language "and provide other services" is being added to reference the list of enhancements added to paragraph (b) by the Energy Policy Act of 1992.

Paragraph (b) lists the specific technical services authorized for the SOAP. Paragraph (b)(1) authorizes the determination of probable hydrologic consequences. The phrase "including the engineering analyses and designs necessary for the determination" is being added based on the similar provision in the Energy Policy Act.

Under Section 795.9(b)(2), OSM proposed adding "Drilling and" at the beginning of Section 795.9(b)(2). The objective is to clarify, consistent with Section 507(c) of the Act, that drilling where it is needed to provide the rock samples for overburden analysis is an authorized service under the program. OSM believes that to link these services is both logically and technically sound. Drilling of ground observation wells is authorized currently on a case-by-case basis. To coordinate any drilling with respect to serving needs for both rock samples and ground water monitoring for baseline data would integrate several important technical components of SOAP assistance and help to create a sounder environmental analysis. It would also have the added benefit of shortening the time frame for completion of technical studies.

OSM wishes to emphasize that drilling would be used only in situations where adequate samples cannot be obtained from other sources such as existing cores or nearby freshly exposed highwalls. Furthermore, drilling is in no way intended to be explorative in nature. Exploration activities are the responsibility of the operator and the program administrator must ensure that the information on coal depth, thickness, and reserves required under existing Section 795.7 is reasonably accurate before authorizing drilling.

In the proposal, the phrase "drilling and" was inadvertently placed in the middle of the rule instead of at the beginning. The objective of the proposal as discussed in the preamble at *56 FR 53379*, November 8, 1991, would authorize drilling under the SOAP.

Two comments were received on this proposal and both were supportive. One of the commenters pointed out the editorial error discussed above and recommended that section 795.9(b)(2) be reworded, as done in this final rule, to reflect that drilling is being added as an authorized SOAP service. The other commenter noted that adding the words "Drilling and" at the beginning of this paragraph to allow for the payment of geologic drilling services is a long sought change and totally supported.

This paragraph is being adopted as proposed with the exception of the editorial changes highlighted earlier.

Paragraphs (b)(3) through (b)(6) are being added based on specific provisions contained in the Energy Policy Act. Statutory references to SMCRA contained in the Energy Policy Act for these provisions have been changed to the corresponding permanent program regulations.

Paragraph (b)(3) authorizes cross-section maps and plans as required by 30 CFR 779.25 and 783.25 of the permanent program regulations.

Paragraph (b)(4) authorizes the collection of archaeological and historical information and related plans required by 30 CFR 779.12(b), 780.31, 783.12(b) and 784.17 of the permanent program regulations, as well as other information required by the regulatory authority.

Paragraph (b)(5) authorizes pre-blast surveys required by 30 CFR 780.13 of the permanent program regulations.

Paragraph (b)(6) authorizes the collection of site-specific resources information and production of protection and enhancement plans for fish and wildlife habitats required by 30 CFR 780.16 and 784.21 of the permanent program

regulations and information and plans for any other environmental values required by the regulatory authority under SMCRA.

SECTION 795.12 - APPLICANT LIABILITY

Paragraph (a) sets forth an introduction for the liability factors. An editorial change is being made by substituting the phrase "services rendered" for the existing phrase "laboratory services performed" to be consistent with similar language associated with the Energy Policy Act codified in paragraph (a)(2) below.

Paragraph (a)(2) deals with the liability period during which the operator must reimburse the regulatory authority if the operator's production exceeds the 300,000 annual ton limit. Paragraph (a)(2) is being revised by substituting the following language from the Energy Policy Act for the current requirement which references a liability period of five years or the length of the permit, whichever is shorter: "A coal operator who has received assistance pursuant to Section 795.9 shall reimburse the regulatory authority for the cost of the services rendered if * * * (2) The program administrator finds that the operator's actual and attributed annual production of coal for all locations exceeds 300,000 tons during the 12 months immediately following the date on which the operator is issued the surface coal mining and reclamation permit."

One commenter stated all operators being monitored under a liability period should be held to the 300,000 ton standard for any coal produced after October 1, 1991. The commenter believed this option to be simple, logical and fair and consistent with the intent of Congress in raising the eligibility standard for new operators to 300,000 effective that date. Another commenter stressed that it made little sense to be providing SOAP services to a new company mining 300,000 tons while at the same time penalizing a smaller company for exceeding a 100,000 ton production cap.

OSM agrees with the first comment and believes a dual standard for liability as proposed, would cause confusion and disenchantment with the SOAP, contrary to the intent of Congress. The final rule deletes the phrase "exceeds coal tonnage governing SOAP eligibility in effect at the time assistance was approved" from the proposal and in its place the final rule will provide for an annual liability limit of 300,000 tons as mandated by AMRA. The 300,000 ton limit will not be retroactive. Coal production prior to October 1, 1991, must be less than 100,000 tons to avoid liability and reimbursement under the SOAP.

Section 795.12(a)(3) deals with transferred liability in the event a permit acquired with SOAP assistance is sold, transferred, or assigned to another person. OSM proposed removing this section and thus eliminating liability in cases where SOAP supported permits were sold, transferred, or assigned to others as a normal business practice. Notwithstanding this view, OSM believed there to be a potential for abuse by removing 795.12(a)(3) and specifically sought comments on this concern or on regulatory criteria that could be used to distinguish between normal business practices and those practices that could result in abuse of the SOAP.

Two comments were received. One commenter supported the proposal and stated that no significant potential for abuse is perceived. The other commenter opposed the proposal and stated that requirements such as contained in Section 795.12(a)(3) are essential to ensuring that SOAP funds are not raided through the use of sham entities and further that SOAP is not mandatory and thus anyone believing transferred liability to be disruptive need not participate in the SOAP.

Because of the potential for abuse and the fact that no substantive reasons were provided to balance this concern and no regulatory criteria were offered to distinguish between normal business practices and those that could result in abuse of the SOAP, the proposal to remove Section 795.12(a)(3) which deals with transferred liability in the event a permit acquired with SOAP assistance is sold, transferred, or assigned to another person, has been rejected. This paragraph is being updated to reflect the Energy Policy Act provisions by replacing the phrase "100,000 ton annual production limit during any consecutive 12-month period of the remaining term of the permit" with the new phrase "300,000 ton production limit during the 12 months immediately following the date on which the permit was originally issued."

PART 870 - ABANDONED MINE RECLAMATION FUND - FEE COLLECTION AND COAL PRODUCTION REPORTING

GENERAL

Title IV of the Surface Mining Control and Reclamation Act of 1977 directed the Secretary of the Interior to collect per-ton reclamation fees from coal mine operators to support the reclamation and other activities listed under this Title. OSM developed a reclamation fee collection program and published rules in the Federal Register to assist mine operators in meeting their fee obligations, to specify management activities for fee collection, and to define a range of compliance activities that include compliance audits, debt collection, and litigation procedures.

The major components of the fee collection program are the fee collection system, the fee compliance system, and the litigation system.

Fee collection system: OSM operates and maintains the Abandoned Mine Land Fee Collection System (AMLFCS) in Denver, Colorado.

The AMLFCS is an automated system which records and accounts for: (1) Collections and deposits of reclamation fees into the Federal depository, (2) fee payments and delinquencies, and (3) identification of collections for appropriation and use by States and Indian tribes under OSM approved reclamation programs.

Fee compliance system: Duly authorized officers, employees, or representatives of the Secretary are located in the coal producing regions to ensure that fees are collected through appropriate investigations and audits.

Litigation system: The Associate Solicitor, Division of Surface Mining, in concert with the Department of Justice (Justice), is responsible for litigation associated with the collection of delinquent fees. The Division initiates enforcement action through Justice to collect delinquent fees and provides legal assistance to OSM on fee-related issues.

On December 13, 1977, OSM published final rules as part 837 (*42 FR 62713*) setting forth procedures for payment of reclamation fees and recordkeeping requirements. On May 15, 1978, OSM published an amendment to these rules (*43 FR 20793*) to establish the interest rate on late payments. These rules were later renumbered in the Code of Federal Regulations as part 870.

DISCUSSION

SECTION 870.5 - DEFINITIONS

OSM has amended the definitions in section 870.5 for "eligible lands and water," and "left or abandoned in either an unreclaimed or inadequately reclaimed condition," and added new definitions for "mineral owner" and "qualified hydrologic unit." The new definitions update these terms so that they are consistent with the amendments made by the Abandoned Mine Land Act of 1990, Public Law 101-508 (November 5, 1990) and the Energy Policy Act of 1992, Public Law 102-486 (October 24, 1992). Although, due to oversight, most of these definitions were not presented in the proposed rules published November 8, 1991 (*56 FR 57376-57401*), OSM is publishing them in the final rule. These definitions merely reflect the eligibility criteria already presented in the proposed rule. OSM therefore believes that it has received adequate comment on the eligibility criteria. In addition, the changes to the definitions reflect the mandatory changes to eligibility as set forth in the 1990 and 1992 amendments to Title IV of SMCRA. The definitions now reflect the additional eligibility for lands adversely affected by mining between August 3, 1977 and November 5, 1990; for noncoal lands after certification of the reclamation of all known coal problems; for water projects; and finally for lands affected by qualifying remaining operations.

SECTION 870.10 - INFORMATION COLLECTION

OSM has revised section 870.10 which contains a list of the information collection requirements contained in part 870 and the OMB clearance numbers. The revision updates the data contained in the section by including the estimated reporting burden per respondent for complying with the information collection requirements. The revision also provides the OSM and OMB addresses where comments regarding the information collection requirements may be sent.

SECTION 870.12 - RECLAMATION FEE

New section 870.12(d) has been added to specify the new termination date for the payment of reclamation fees. As originally passed by Congress in 1977, the reclamation fee obligation was for a 15-year period starting in the last quarter of 1977 and extending to September 30, 1992. Congress extended this date 3 years through the enactment of Public Law 101-508. The reclamation fee obligation was applicable to coal produced through September 30, 1995. As noted in H.R. Report No. 294, 101st Congress, 1st Session 17-18 (1989), the extension of the reclamation fee was based in large measure on the continuing need to address high priority coal problems. Though the AML program over the last 13 years has reclaimed a significant number of acres of abandoned lands, Congress found that the "inventory of unreclaimed high priority coal mine sites was still overwhelming". *Id.* at 17.

In 1992 Congress once again took up the issue of an AML fee extension as part of the Energy Policy Act of 1992. H.R. Report No. 474, accompanying H.R. 776, recommended that the AML fee be extended until 2010. Of significance to the House Committee was an OSM estimate that when the existing authority to collect the reclamation fee expires in 1995, approximately \$1.6 billion worth of high priority health and safety threatening sites would remain unreclaimed. In order to finance the reclamation of these remaining sites, the Committee recommended extending the AML fee until 2010 (H.R. Rept. No. 474, 102d Cong., 2d Sess. 90 (May 5, 1992)). In conference this date was revised to September 30, 2004. The amendment to 30 CFR 870.12 would implement this new fee extension date.

One commenter stated that based on the estimated costs for reclaiming all AML sites under its jurisdiction, OSM would not complete this task under current funding levels until 2035 AD. Thus, OSM is urged to consider extending the AML fee.

OSM does not accept this comment. Extensions of the fee collection authority are a matter to be addressed by legislation and are considered to be beyond the scope of this rulemaking.

SECTION 870.15 - RECLAMATION FEE PAYMENT

OSM has amended Form OSM-1 to collect additional coal production and ownership information. Public Law 101-508 requires that additional information be reported in the quarterly report filed by operators; specific requirements include identification of the permittee, the permit number, the Mine Safety and Health Act (MSHA) number, the owner of the coal, the preparation plant, tipples, or loading point for the coal, and the purchaser of the coal.

In OSM's proposed rule the Agency sought comments regarding the detail to which this information must be collected so as to ensure that information that is to be collected is useful. Also, as a means of achieving Congress' intent of minimizing the reporting burden, OSM noted its consideration of the establishment of thresholds (percentage of coal purchased, or percent of mineral ownership) for purposes of determining who qualifies as a reportable mineral owner and reportable purchaser, with the requirement that each Form OSM-1, when the thresholds are not met, identify at least the largest mineral owner and purchaser.

Information contained in the quarterly reports, including information updates would be maintained in a computerized data base by OSM. In enacting these new reporting requirements, Congress believed that this information would be necessary for the agency to determine the identity of entities from whom to seek payment in the event of under-payment or non-payment of the reclamation fees. H.R. Report. No. 294, 101st Congress, 1st Session 26 (1989).

OSM has also made a minor editorial change to section 870.15(C) consistent with its proposed rule. This modification changes the title of the current Form OSM-1 from "Coal Production and Reclamation Fee Report" to "Coal Sales and Reclamation Fee Report." This is intended to more closely reflect the rules under section 870.15(b) which require operators to report tonnage of coal sold, used, or transferred as opposed to coal produced.

The SMCRA amendments require that mine operators report changes in mineral ownership, purchasers, tipples, preparation plants, loading points, and other information required to be reported as part of the quarterly Form OSM-1 process. Congress stated it did not expect these new requirements to place a significant additional reporting burden on operators.

The revised Form OSM-1 incorporates the new information required by the amendments. The instructions accompanying the Form OSM-1 set forth the new data reporting requirements, including mineral owner, purchaser, tipples, loading points, etc. As part of OSM's analysis of the new amendments for this part, the Agency conducted a study of owner/purchaser profiles in large, medium, and small coal producing companies to develop an estimate of the nature and extent of the owner/purchaser information which OSM might collect (and require operators to report) as a result of the 1990 AML amendments.

OSM analyzed data from eight coal companies to determine how the amendments could impact their administrative reporting burden. The Agency gathered ownership and sales statistics for two large companies, four medium companies and two small companies in order to evaluate the potential impact of the SMCRA amendments. While the study was not based on statistical selection criteria, the data fairly represents the kind of owner/purchaser relationships that OSM would expect to encounter across the industry.

The study supports the need to establish reasonable interpretations of the terms "owner" and "purchaser" in order that the data furnished by operators to OSM is both manageable and useful. The eight companies examined represent a wide spectrum of purchaser and owner relationships. For example, during 1990, one large company in Kentucky operated its own mines, bought coal from contract miners, brokered coal representing several purchasers, and sold coal to 90 individual purchasers. Four purchasers (major public utilities) accounted for about 90 percent of its sales. The company reported 2,100,000 tons of coal sales during 1990.

In contrast, a small Colorado coal company operated a single mine. Except for one major buyer, the company sold coal on a cash basis to as many as 652 customers during a single quarter, each purchasing one ton or less. Annual sales amounted to 24,500 tons.

Another coal company located in Ohio operates eight company mines and purchases coal from seven contract miners. There are 47 permits associated with the 8 MSHA-ID's under which the company reports and pays its quarterly fees. On one permit number which OSM selected for review, there were three mineral owners registered with the regulatory authority. Similar profiles exist for other companies selected for review.

Although OSM's study was limited, the data suggests that thresholds would assure that the information collected identifies only those mineral owners and purchasers who are in a position to influence the coal operations that are reported. This would avoid a proliferation of reporting and data collection and the associated significant administrative and cost burden that would otherwise result.

On the basis of this study and other information, OSM proposed the following threshold definition of "owners" and "purchasers" for Form OSM-1.

The name and address of any person or entity who, in a given quarter, is the owner of () percent or more of the mineral estate for a given permit, and any business entity or individual who, in a given quarter, purchases () percent or more of the production from a given permit shall be reported to OSM on a quarterly basis. In the event that no single mineral owner or purchaser meets the () percent rule, then the largest single mineral owner and purchaser shall be reported.

OSM suggested that the threshold value of 10 percent be incorporated into the above definition, and accordingly requested comments on this or other threshold values. Without thresholds, OSM believed that data reporting and collection would proliferate without significant benefit. However, by establishing reporting limits, OSM would not only minimize its own administrative burden and that of the operator, but it would assure the usefulness of the data by identifying only those individuals and entities who, by the significance of their ownership and/or purchasing power, may influence coal mining operations.

Three commenters provided detailed comments regarding their opposition to the reporting requirements in 30 CFR 870.15, particularly the requirements relating to the submission of information on persons who own 10 percent or more of the mineral or who purchase 10 percent or more of the production. The commenters note that the current proposal would amend the regulations at 30 CFR 870.15 to require operators to report tonnage on a revised Form OSM-1. One of these commenters refers to the preamble wherein OSM states that the legislation reauthorizing the AML fee expanded the reporting requirements to include the identification of the permittee, the permit number, any operator in addition to

the permittee, the owner of the coal, the preparation plant, tipple, or loading point for the coal and the purchaser of the coal. *30 U.S.C. 1232(c), 56 FR 57379, 57396.*

OSM's own study, however, reveals that the reporting of all ownership and purchaser data would impose costly reporting burdens on companies with multiple operations and/or purchasers. Requiring the operator to report all ownership and purchaser information on a quarterly basis would be a wasteful and costly exercise. Thus, OSM set the threshold value at 10 percent.

The commenters agree that the results of the OSM study demonstrate the need to establish reasonable interpretations of the terms "owner" and "purchaser" in order that "the data furnished by operators to OSM is both manageable and useful." *56 FR 57380* (col. 1). They further agree that establishing limits on such reporting data would "minimize [OSM's] own reporting burden and that of the operator."

The commenters disagreed, however, with several aspects of the proposal. First, they disagree with the establishment of an arbitrary 10 percent threshold (or any numerical threshold) for reporting mineral purchases and ownership. Instead, they suggest that OSM simply require the operator to report the single largest mineral owner and purchaser. In many cases, they assert, the operator/lessee will be the single largest mineral owner, often leasing reserves from several different mineral owners prior to submitting a permit application. Requiring the identification of all lessors will only increase the administrative burden on the operator and OSM, and will duplicate the existing permit application information requirements at Section 507(b), *30 U.S.C. 1257(b)*.

The commenters further state that while the OSM proposal to reduce the reporting burden is a step in the right direction, there is no rational basis for establishing a minimum 10 percent threshold for reporting mineral ownership or coal purchases on Form OSM-1. In fact, the commenters assert, OSM itself provides no justification in the preamble for its suggestion that a 10 percent threshold be set. They argue that, while the ownership and control rules provide that the ownership of 10 percent of the voting stock of an entity creates a rebuttable presumption of control over the surface coal mining operation, *30 CFR 773.5(b)(5)*, the rules do not establish a similar presumption for 10 percent mineral owners, nor has OSM cited evidence demonstrating that such owners/purchasers are responsible for payment of the fee. Moreover, many operations lease the coal from several different owners, and are, for all practical purposes, the owners of the coal. The commenters assert that requiring the additional listing of all coal owners who lease to any company will only increase the reporting burden on operators and OSM, without providing any meaningful information on the person responsible for the fee payment.

The commenters believe that in order to meet the requirements of Section 402(c) of SMCRA, it should be sufficient for an operator/lessee, especially one that leases coal from multiple lessors and that sells to more than one purchaser, to list the single largest purchaser and mineral owner on Form OSM-1. They argue that requiring coal operators to list all mineral owners or purchasers would impose a heavy administrative burden on both the industry and the Secretary, without any corresponding benefit. In the commenters' view, identifying all of the coal purchasers or purchasers of 10 percent or more of the coal or all of mineral owners or owners of 10 percent or more would reveal no useful information and would subvert the Congressional intent that the agency collect and computerize the information required by Section 402(c) for the purpose of determining "what parties are responsible for payment of the reclamation fees, and * * * the identity of entities from whom to seek payment in the event of under or non-payment of the reclamation fees." H.R. Rep. No. 101-294, 101st Cong., 1st Session 26 (1990).

The commenters further state that identifying the mineral owners and purchasers is a costly, time-consuming task. One company that is among the nation's "top 10" coal producers, reported that it took 8 man-days to complete approximately 50 OSM-1 forms, with each form listing an average number of 3 purchasers. This substantial amount of time does not include the time it would take to list all mineral lessors, as the company/lessee has listed itself as the owner of the coal on each form.

Secondly, these commenters also raised concerns regarding OSM's revised Form OSM-1 and the agency's proposed 10 percent threshold for reportable mineral ownership or coal purchaser information. They state that the proposed rules refer to the revised Form OSM-1 and request comment on whether the agency should establish a 10 percent threshold for reportable mineral ownership or coal purchaser information. *30 CFR 870.15*. Yet the agency has proceeded to implement the 10 percent threshold requirement prior to the close of the comment period. The revised Form OSM-1 currently

requires operators to list "the names and addresses of any person or entity owning 10 percent or more of the mineral estate for [the] permit." Similarly, a purchaser of coal is defined as follows:

* * * those persons or entities who purchased 10 percent or more of the production from a given permit.

See, Instructions for Completing Form OSM-1, Part 3.

The commenters questioned the agency's apparent predisposition to establish a 10 percent threshold without benefit of public comment on the issue, pursuant to the Administrative Procedure Act.

Third, a commenter stated that the 10 percent threshold for reporting mineral ownership is the same definition used in 30 CFR 773.5 in the context of ownership and control (as it pertains to permit applications). The commenter argued that, although it is conceivable that an entity who owns the coal may indeed have the authority to directly or indirectly determine the manner an applicant, operator, or other entity conducts the coal mining operations, OSM must also realize that many mineral owners do not exercise "control" of the surface mining operations.

Even more troubling to the commenter is the assertion that the definition as used on the Form OSM-1 is one for which there is no rebuttable presumption, particularly if it is the same definition that OSM uses for "owned or controlled and owns or controls."

Another commenter disagreed. This commenter stated that the establishment of thresholds for mineral owners and purchasers undercuts the collection of information that may be of significance for both Title IV purposes, and for supporting the database for ownership and control under Title V. Particularly in the case of contract mining situations, the purchaser and mineral owner information becomes of critical importance.

Typically, the commenter noted, the mineral owner information is readily available to the reporting entity, since it appears on the mine lease or other document authorizing coal removal, or is readily accessed in courthouse records. Establishment of a threshold in this case is unnecessary. Similarly, direct marketing of small amounts of coal is unheard of, and the reporting entity can readily access the information relating to where the coal was marketed or brokered.

Alternatively, the commenter said, if a tonnage or percentage of sales threshold is to be used, it should be set at a level so as to exclude de minimis amounts but low enough to "capture" all information that might reflect ownership or control of the disposition of the coal.

In response to the first general comment, regarding the appropriateness and practicality of the 10 percent threshold, OSM has carefully reviewed these concerns but has elected to retain the 10 percent threshold. A strict interpretation of the language of the Act might require collection of information on all mineral owners and purchasers. OSM, on the basis of its experience and the study conducted after this legislation was enacted, however, has determined that a lesser level of information collection is justified and is consistent with Congressional intent.

OSM believes that Congress' intent in enacting this language was to provide information relevant to the collection of ownership and control data on mining operations. For instance, it must be noted that Congress specifically required that the information be retained in a computerized database. Clearly, the best known computerized database maintained by OSM, both at the time that the AML legislation was enacted and currently, is the Applicant/Violator System (AVS). The information provided under Section 402(c) would be relevant to the identification of ownership or control links pursuant to 30 CFR 773.5. Such identified owners or controllers might, under certain circumstances, be responsible for implementing certain requirements under the Act, such as the payment of AML fees. See 30 CFR 773.5(a)(3) and 30 CFR 773.5(b)(6). See also *United States v. Rapoca Energy Co.*, 613 F. Supp 1161 (1985).

Application of Section 402(c) to all mineral owners and purchasers would impose an excessive administrative burden on the agency. If information on every owner or purchaser, no matter how minor their interest, were collected and maintained on AVS, AVS would be cluttered with irrelevant information that would not clearly identify actual owners or controllers of surface coal mining operations. The net effect of such extraneous information would be to hinder the effective implementation and maintenance of AVS. Accordingly, OSM believes that limiting the collection of information to owners or purchasers with interest of 10 percent or more fulfills the intent of the legislation by enabling OSM to

identify the most likely owners or controllers of surface coal mining operations. In substance, the larger percentage owners or purchasers are more likely to be the actual owners or controllers of surface coal mining operations.

On the other hand, with respect to the concern that OSM should require identification of only the single largest owner or purchaser, OSM believes that this could create a misleading picture of a surface coal mining operation. For instance, under the theory of this comment, a surface coal mining operation with a significant number of both mineral owners and purchasers would only report the single largest owner and purchaser. The difference between the largest purchaser or owner and the smallest purchaser or owner could be a de minimis amount. There is no useful purpose in distinguishing one small percentage owner or purchaser from another. This in no way would advance OSM's mission of identifying the true owners or controllers of the site. Further, under the theory of this comment, a site with only a few owners or purchasers would report only one of each category under this theory. Thus, OSM would not have access to information identifying potentially influential persons who can exercise control over the site.

With respect to the concern about how time-consuming it is to identify purchasers and mineral owners, OSM recognizes that this task will require some commitment on the part of the regulated community. Nevertheless, the task has been imposed by the Congress in its revision of Section 402(c). OSM has made every attempt to make this a manageable task by establishing the 10 percent threshold, which should ensure that no more than 10 owners and 10 purchasers are required for each Form OSM-1 submission. Furthermore, the commenters should remember that information on all mineral owners is already a requirement of the permit application; this information thus should be readily available for Form OSM-1 compliance.

OSM also understands the commenters' concern regarding the collection of information prior to promulgation of this rule. This rule is prospective in its application, and OSM's actions prior to promulgation were not intended to affect the decisions made in this rulemaking. However, the relevant provisions of SMCRA contained in Section 402(c) went into effect on October 1, 1991. As of that date, OSM was required to collect the information required by the Federal statute, and did so. In the absence of a reasonable threshold standard for the information collection, OSM and the AVS would have been inundated with information which would have included de minimis owners and purchasers. Such information would have been of limited utility for purposes of identifying parties responsible for the payment of reclamation fees and the owners and controllers of surface coal mining operations. Accordingly, OSM acted to limit the amount of information collected to assure that useful information was collected in a manageable manner for storage and use on AVS. To the extent that the commenter believes that insufficient information was collected prior to the promulgation of this rule, that issue is beyond the scope of the current rulemaking, and may be addressed in another forum.

The third issue raised by the commenters concerned the use of ownership and control concepts in AML reporting requirements. In substance, the commenters' concern appears to be that OSM has inappropriately mixed the statutory requirements of Title IV with the regulatory requirements of Title V. For instance, they note that OSM has applied the 10 percent threshold of presumed control by stockholders under 30 CFR 773.5(b) to the reporting of mineral owners and purchasers under Section 402(c) of SMCRA.

OSM disagrees with the view that ownership and control concepts are irrelevant to the implementation of Section 402(c) of SMCRA. The reporting requirements imposed by Congress in the legislation appear to track the needs of OSM's ownership and control regulation at 30 CFR 773.5(b)(6) which provides a presumption of control of surface coal mining operations for certain mineral owners. Further, the legislation contains an explicit reference to OSM's computerized database (i.e., AVS), which indicates that the focus of the amended reporting requirements of Section 402(c) is to assist the ownership and control review process.

Accordingly, the use of ownership and control concepts, such as a 10 percent threshold, are appropriate in OSM's implementation of Section 402(c) of SMCRA. Although the 10 percent threshold is not applied to mineral owners or purchasers under the current ownership and control rule, application of a 10 percent threshold to such individuals under Section 402(c) of SMCRA is consistent with Congressional intent, serves the public interest, and is within the spirit of the ownership and control rules.

OSM further recognizes that the application of the 10 percent threshold to purchasers and mineral owners may not identify the controllers of a surface coal mining operation in every case, or those otherwise responsible for the payment of AML fees in every case. Nevertheless, such a threshold for reporting is a good starting point to enable OSM to identify

potential owners or controllers, and represents an achievable level of reporting and record keeping for both the agency and the regulated community.

Further, in response to the concern that the use of ownership and control concepts creates an irrebuttable presumption that the purchasers or mineral owners control surface coal mining operations, OSM observes that the disclosure of the purchaser, mineral owner, or other information pursuant to Section 402(c) would not, in and of itself, establish a presumption of ownership or control for either Title IV or Title V purposes. OSM's use of concepts from the ownership or control rule is undertaken to simplify reporting by the regulated community and data collection by OSM under section 402(c) in a manner which OSM believes is consistent with Congressional intent in revising Section 402(c) and requiring such disclosure.

Besides those comments regarding the 10 percent threshold issue, other comments were submitted on 30 CFR 870.15, raising issues of privacy regarding information collected under the revised Form OSM-1 requirements. The commenters state that requiring disclosure of owners and purchasers raises serious concerns about the potential disclosure of sensitive and confidential information about coal markets, royalty rates and utility customers. They argue that release of this information could prove extremely damaging and that there is no guarantee in the statute or the proposed rules that such information shall remain confidential. They indicate that although the information on owners and controllers of surface coal mining operations is a matter of public record, the proposed regulations would go well beyond that, to require operators to list all purchasers and coal owners whose interests exceed 10 percent of the resources produced. Thus, the commenters assert, operators should have the right to request confidentiality of such information, in order to avoid the disclosure of sensitive information about coal purchasers and markets that might be used unfairly by competitors. This, they argue, is consistent with the Freedom of Information Act (FOIA) policy against disclosure of commercial or financial information deemed privileged or confidential. *5 U.S.C. 552(b)(4)*. They assert that the identity of all coal purchasers from a mine is not a matter of public record and should remain confidential.

OSM permitting regulations allow coal operators to request that certain data be withheld from public disclosure. 30 CFR 773.13(d)(3). The commenters believe that OSM should incorporate similar protection for confidential financial information in the rules governing the submission of Form OSM-1.

With regard to these comments on privacy, OSM accepts the comments in part. OSM has concluded that the comments, by themselves, do not establish a reason to believe that disclosure of this information may result in competitive harm. However, OSM recognizes commenters' concerns that they be able to request confidentiality for certain information submitted under Section 402(c) of SMCRA. In response to these concerns, OSM has revised Section 870.15(b) to allow submitters to request confidentiality.

Section 870.15(b) includes a provision specifically intended to afford submitters of information under Section 402(c) with the opportunity to designate such information as confidential. Following such opportunity, if a submitter does not designate the information as confidential, OSM will treat the information as subject to disclosure upon request. Conversely, if a submitter in good faith designates the information as confidential, OSM will treat the information as subject to disclosure upon request. Conversely, if a submitter in good faith designates the information as confidential, OSM will notify the submitter of any request for that information unless an exception to the notification requirement applies. Such exceptions appear in the Department's FOIA regulations at 43 CFR 2.15(d)(4).

For example, under 43 CFR 2.15(d)(4)(iii) OSM would not be required to notify submitters of Section 402(c) information when the information is required to be disclosed by statute or regulation. Two sections of SMCRA, Sections 507(e) and 517(f), require public disclosure of permit applications and other information on file with regulatory authorities. *30 U.S.C. 1257(e) and 1267(f)* (1988). The information required to be listed in permit applications, in part, is set forth in 30 CFR part 778, Permit Applications-Minimum Requirements for Legal, Financial, Compliance, and Related Information. Specifically, 30 CFR 778.13(d) requires permit applicants to list their owners or controllers. Under 30 CFR 773.5(b)(6), "owners" or "controllers" presumptively include persons who own or lease coal to be mined by another and who have a right to receive the coal after mining. Thus, in permit applications coal operators are required to identify coal purchasers when such persons own or control surface coal mining operations. As previously noted, these applications are required to be publicly disclosed under Sections 507(e) and 517(f) of SMCRA (*30 U.S.C. 1257(e) and 1267(f)*). Consequently, to the extent a submitter provides OSM with coal purchaser information that identifies owners or controllers, the exception in 43 CFR 2.15(d)(4)(iii) applies, regardless of a confidentiality designation.

In addition, Congress authorized disclosure of coal purchaser information to the extent such information is available on OSM's AVS. Section 402(c), as amended, requires the Secretary of the Interior to maintain coal production and purchaser information on a computerized database. *30 U.S.C. 1232(c)*, as amended by Public Law 101-508 (November 5, 1990). At the time of the 1990 amendments, Congress was aware that OSM maintained the AVS as the pertinent computerized database for including such information. In accordance with Section 402(c) as amended, OSM thus intends to place such information on the AVS.

Congress also was aware, at the time the 1990 AML amendments were enacted, that it is the function of the AVS database to disclose ownership and control information: To Federal, State, and local authorities responsible for investigating and enforcing violations of SMCRA; to the Internal Revenue Service when assisting OSM in collecting civil penalties and AML fees; to Congressional offices upon request; to public interest groups as may be required by court order; to applicants and permittees pursuant to permit determinations; and to individuals or entities in response to their requests for permit-related information about themselves and related entities. See, *52 FR 29570 (1987)*, amended *53 FR 22575 (1988)*. Thus, the statutory requirement that Section 402(c) information be placed in a computerized database that, as its function, discloses information to various parties, falls squarely within the exception to notification found in 43 CFR 2.15(d)(4)(iii). Consequently, to the extent information is available on the AVS, the exception in 43 CFR 2.15(d)(4)(iii) applies, regardless of a confidentiality designation.

The commenters are also concerned about the structure of the revised Form OSM-1. Part 3 provides that the operator list the mineral owners and purchasers of coal by permit number. For large companies operating mines under several different permit numbers, tracking the coal produced by permit number and consumer presents an impossible burden. Typically an operator delivers the coal produced from its mines to a preparation plant, where it is blended with coal produced at other mines operated by the same company and then delivered to the utility consumer. The companies do not possess the ability to report the specific amount of coal purchased by a customer from a particular permit number. The company simply reports the total tonnage produced at its various mines. While it can identify purchasers of coal, it cannot link the specific amount purchased to a particular permit number.

For these reasons, the commenters believe that Form OSM-1 should be further revised to allow the company to report the tonnage produced from its mines, without having to track that tonnage to a particular utility purchaser or broker, and that simply reporting the tonnage and identifying the largest purchaser meets the requirements of SMCRA.

OSM appreciates the commenter's concern, but disagrees with the commenter's suggested solution. Instead of only identifying one purchaser, it would be acceptable to report purchasers on a pro rata basis in situations involving the commingling of coal produced under several permits and sold to multiple purchasers. For example, if coal produced from five permitted mines was commingled and sold to three purchasers, operators would identify each of the three purchasers on the Form OSM-1 filed for each permit, according to their percentage of the total coal sold.

In response to these comments OSM has included a definition of "mineral owner" in Form OSM-1 and revised Section 870.5 to include a similar definition. "Mineral owner" is defined as any person or entity owning 10 percent or more of the mineral estate for a permit. If no single mineral owner meets the 10 percent rule, then the largest single mineral owner shall be considered to be the mineral owner. If there are several persons who have successively transferred the mineral rights, OSM is requesting in Form OSM-1, information on the last owner(s) in the chain prior to the permittee, i.e. the person or persons who have granted the permittee the right to extract the coal. If the permittee has obtained the right to mine the coal directly from the fee simple property owner(s), then those owners should be shown.

SECTIONS 870.16 AND 17 - PRODUCTION RECORDS AND COMPLIANCE AUTHORITY

Although the regulations in Section 870.16 have not been amended, OSM notes that provisions in Public Law 101-508 have clarified and ratified the Secretary's authority to conduct compliance audits of coal operators. Moreover, the provisions would require the Secretary to share information obtained through audits of coal operators with the Internal Revenue Service. In addition, the provisions in Section 870.17 have been expanded and clarified, utilizing the authority in Sections 201(c) and 413(a) of SMCRA, to cover all persons involved in a coal transaction, including without limitation, permittees, operators, brokers, purchasers, and persons operating preparation plants and tipples.

Section 870.17 currently provides that fee compliance officers have the authority to examine records of the second party involved in the sale or transfer of ownership of coal by the operator. The amended section no longer refers to the

terms "fee compliance officers" or "second party," and specifies that the Secretary or any duly authorized officer, employee, or representative of the Secretary would have access to relevant documents. The final language regarding duly authorized persons makes this section consistent with the language in Section 870.16.

These revisions are supported by a number of provisions of SMCRA in addition to Section 402(c). Section 413(a) of SMCRA provides that the Secretary shall have the power and authority, if not granted otherwise, to engage in any work and to do all things necessary or expedient, including the promulgation of rules and regulations, to implement and administer the provisions of Title IV. Section 201(c) (1) and (2) also provides authority for these rules.

The legislative authority to conduct audits of coal production and the payment of fees, including tipples and preparation plants as well as the authority to have access to relevant documents of any other person involved in a coal transaction, including purchasers of coal whether or not the purchase is from one who originally produced the coal, a secondary seller or an ultimate end user of the coal is a means to provide reasonable assurance that coal operators are properly reporting coal produced and subsequently sold, used, or transferred. This authority is necessary for the Agency to determine the identity of entities from whom to seek payment in the event of underpayment or nonpayment of the reclamation fees. The Agency believes that the new provisions in Section 402(d)(2) of SMCRA reinforce OSM's ongoing audit activities and do not mandate any specific level of tipple or preparation plant audit. OSM auditors have always verified the AML fee payment or non-payment and the accuracy of the tonnage reported. The legislative amendments confirm OSM's interpretation of its existing authority as implemented through current regulations.

In enacting these provisions, Congress sought to provide OSM the authority to verify for accuracy and completeness the representations made in the quarterly reports. H.R. Report No. 294, 101st Congress, 1st Session 26 (1989). Moreover, through these amendments Congress provided that the Secretary report any failure to pay the full amount of the reclamation fee to the federal agency responsible for ensuring compliance with provisions of Section 4121 of the Internal Revenue Code.

Congress believed that this sharing of information would foster greater compliance under the Black Lung Disability Trust Fund.

Two commenters state that the proposed rules dramatically expand the powers of OSM to conduct audits of coal sales, transfers and use, beyond the authority contained in SMCRA. Under the proposed rules at 30 CFR 870.17, OSM would gain access not only to records of the permittee or the operator of a surface coal mining operation, but also to "* * * any person involved in a coal transaction, including without limitation * * *" brokers, purchasers, persons operating preparation plants and tipples, and any recipients of royalty payments for the coal.

The commenters oppose the expanded audit requirements that allow the OSM compliance officers access, without guarantee of confidentiality, to records of mineral owners, brokers and other parties to a coal transaction. The commenters assert that matters involving royalties paid to mineral owners are matters of utmost secrecy within the industry and their potential disclosure through an audit to third parties could have substantial anti-competitive impacts.

The commenters believe that under the proposed regulation, OSM seeks to gain access to the records of mineral owners, as well as utilities and other end users of the coal, without limitation and without any showing that the information is needed to identify the person responsible for payment of the fee or the tonnage produced. In the commenters' view, such sweeping, limitless authority to conduct audits of persons whose only involvement with the permittee or operator is through a coal purchase or royalty agreement exceeds the authority conferred by Congress in Section 402(d)(2) of SMCRA that only permits the Secretary to audit the books and records of "any person who is subject to the provisions of this Title." *30 U.S.C. 1232(d)(2)*. Title IV of SMCRA does not apply to mineral owners, coal brokers, or end users of the product. Thus, the commenters argue, such persons are "not subject to the provisions of this Title," as that term is used therein. Section 402(a) of SMCRA limits the provisions of Title IV and the levy on coal production to "operators of coal mining operations subject to the provisions of this Act." *30 U.S.C. 1232(a)*. Thus, the statute only empowers the Secretary to "conduct audits of any surface coal mining and reclamation operation, including without limitation, tipples and preparation plants," but goes no further. *30 U.S.C. 1232(d)(2)*.

The commenters further stated that as defined by SMCRA, the term "operator" includes a person "engaged in coal mining who removes or intends to remove more than 250 tons of coal from the earth," a term that does not automatically include coal brokers, owners and particularly end users. *30 U.S.C. 1291(13)*. According to the commenters, OSM had

offered no explanation of the reasons why the authority to audit operators is not sufficient to ensure that the Secretary has access to the documents and other records needed to determine the accuracy of AML fee reporting.

The commenters stated that OSM also has failed to explain why such a dramatic expansion of its auditing authority is needed to implement the changes in the AML program enacted by Congress. The statute clearly does not command or authorize such a rule, they asserted. OSM itself admits that the new provisions in Section 402(d)(2) "do not mandate any specific level of tippie or preparation plant audit * * * and merely confirm OSM's interpretation of its existing authority as implemented through current regulations." *56 FR at 57380* (col. 3). If anything, the commenters said, OSM's preamble explanation demonstrates that the existing regulatory scheme is adequate and sufficient to ensure that the agency has reasonable access to books and records verifying the accuracy of the tonnage reported and/or fees paid. OSM has pointed to no evidence of under collection or noncollection of AML fees that necessitates granting it the sweeping powers of audit virtually every person connected with the coal transaction, regardless of whether they are in a position to control the operation, nor does such evidence exist.

The commenters believe that OSM's current regulations provide sufficient authority to audit the books and records of persons associated with a coal transaction most likely to be responsible for the payment of AML fees. Compliance officers possess the authority to examine the records of: (1) The second party involved in the sale or transfer of coal by the operator and (2) any party selling coal to the operator. 30 CFR 870.17. The ability to review the records of the second party enables the fee compliance officer to review the records maintained by coal tippie operators and those immediately involved in the coal sales transaction who might exercise control over the surface coal mining operation, to determine the person ultimately responsible for payment of the fee. There is no indication that OSM has ever used such authority to audit the records of the end user of the coal, nor is such authority necessary or appropriate, the commenters stated. *47 FR 28579* (June 30, 1982).

According to the commenters, OSM's reliance on its general powers in Section 413(a) and 201(c) of SMCRA to do all things necessary or expedient to implement the provisions of SMCRA, including the promulgation of rules and regulations, provides no independent basis for this rulemaking. As the Supreme Court has held, an administrative agency's powers to promulgate regulations is limited to the authority delegated by Congress. *Bowen v. Georgetown University Hospital*, 109 S. Ct. 468, 471 (1988). An "agency may not bootstrap itself into an area in which it has no jurisdiction." *SEC v. Sloan*, 436 U.S. 103, 118-119 (1978). Congress limited the agency's authority to audit the records of the operator of a "surface coal mining operation," the commenters stated, including tippie and preparation plant operators subject to the provisions of Title IV of SMCRA, a term that does not include end users of coal or minerals owners not engaged in coal mining operations. Thus, in the commenters' view, the general powers to do all things necessary and expedient to implement the provisions of SMCRA provide no basis for the current rulemaking proposal, where no authority to promulgate such rules exists in the first place.

OSM does not accept these comments. Section 402(d)(2) states, in part, that "The Secretary shall conduct such audits * * * as may be necessary to ensure full compliance with the provisions of this title." The rule, as proposed, is a proper and natural interpretation of the congressional intent to recognize a need to expand and strengthen OSM's audit powers. Experience gained by OSM auditors is evidence of the need for that authority. In Fiscal Year 1993, OSM's audit staff identified \$7.3 million in unreported or under reported AML fees. In identifying those amounts, the audit staff has used the existing authority in Section 870.17 to examine the records of a second party involved in a coal transaction, with little or no objection from those parties. This production was necessary because the operators failed to meet their recordkeeping obligations. In effect, the expanded rule language in Section 870.17 further defines and identifies the term "second party" in a way that will enable OSM to more effectively execute and enforce the Section 402 provisions of SMCRA in those cases where such action is necessary. For OSM to ensure compliance with the reclamation fee provisions of SMCRA, it is essential for the audit staff to have access to information of all parties involved in coal transactions. The OSM auditors frequently encounter cases involving missing or incomplete operator records, thus necessitating a determination of the correct tonnage through other means. While data from buyers is useful in these circumstances, royalty information is also an invaluable aid in validating the tonnage subject to fees.

These comments also opposed the expanded audit authority due to concerns about potential disclosure of financial information. OSM rejects these comments for two reasons: (1) As explained previously, the rule is consistent with Congressional intent; and (2) the need for expanded audit authority outweighs commenters' concerns, which can be accommodated in other ways. Where requested, all copied information shall be protected to the extent authorized or required by the Privacy Act and the Freedom of Information Act (*5 U.S.C. 522, 552a*). OSM would point out that

Section 870.16(c) already provides that if the AML fee is paid at the maximum rate, fee compliance officers shall not copy information relative to price.

Furthermore, OSM does not intend to use this expanded authority as a primary means of identifying audit targets. Instead, it generally will be used to provide the agency with additional sources of information to identify coal sales or transfers.

PART 872 - ABANDONED MINE RECLAMATION FUNDS

GENERAL

The United States Department of the Treasury established an account on its books in accordance with Title IV provisions of Public Law 95-87 and Treasury's rules for a fund of this type. Section 401(a) creates the authority for the account:

There is created on the books of the Treasury of the United States a trust fund to be known as the Abandoned Mine Reclamation Fund (hereinafter referred to as the "fund") which shall be administered by the Secretary of the Interior.

Section 401(d) delineates availability and purpose of account monies:

Moneys from the fund shall be available for the purposes of this Title, only when appropriated therefor, and such appropriations shall be made without fiscal year limitations.

These provisions provide the authority for a fiduciary relationship whereby Congress controls the use of fund monies for Title IV purposes by the appropriation process, and the Treasury maintains the amounts collected in a special account.

Fund revenues are derived from per-ton reclamation fees and late payment interest charges, sales of acquired lands, and donations. The fees and interest charges are paid by coal mine operations and submitted with coal sales and reclamation fee reports for payment identification and credit through a lockbox operation to OSM's Finance Center in Denver.

Collections and related transactions are controlled by Deposit Tickets (prepared by the collection officer), Debit Vouchers issued by the Federal depository for uncollected checks, and Refund Schedules for overpayment. These transactions are identified by mine operators as well as by mine and geographic location. Data from the OMB approved Form OSM-1 submitted by mine operators with their payments are coded and stored in OSM's automated system for compliance and disbursement purposes. Net collections (per deposit tickets, debit vouchers and refund schedules) are reconciled on a monthly basis with the amounts reported by mine operators on OSM's approved forms.

All accounts are closed at the end of business on September 30, the final day of the Federal fiscal year. The system is reconciled and collections are identified by State and Indian lands. Fifty percent of the fiscal year collection is reserved for use by States and Indian tribes to carry on approved reclamation programs. The remainder is to be allocated or expended by the Secretary of the Interior through the Director, OSM, as set forth in Section 402(g) of Title IV. Any errors found in prior year allocations are corrected in current allocations. This financial information is one of the inputs for budget requests to support Title IV programs.

SMCRA, as originally enacted, did not authorize the investment of the AML Fund. In the new amendments to Title IV, however, Congress specifically provided for the investment of the AML Fund into interest-bearing accounts.

To comply with this mandate OSM has developed, with the assistance of the Department of the Treasury, a cash management plan providing for the investment of AML monies not required for current withdrawals.

DISCUSSION

SECTION 872.10 - INFORMATION COLLECTION

This section deals with information collection requirements and includes the estimated reporting burden per respondent for complying with these requirements. Due to oversight this section did not appear in the proposed regulation, however, it is now being included in the interest of providing a comprehensive regulation.

SECTION 872.11 - ABANDONED MINE RECLAMATION FUND

OSM has added a new paragraph 6 to Section 872.11(a) to note that interest and any other investment income from the AML Fund would be earned and credited to the Federal share of the Fund. Options for splitting the earned interest between the State and Federal shares were not accepted. As explained in the response to comments below, it is clear from the language of the amendments and the legislative history that Congress sought to place the interest only in the Federal share. H.R. Report No. 294, 101st Congress, 1st Session 19, 20 (1989). See amended Section 402(g) of SMCRA.

The Energy Policy Act of 1992 established a different use relating to the interest earned by the AML fund, however. Rather than using the money to supplement Federal reclamation responsibilities, Congress directed that an amount equal to the interest earned by the AML fund be available for transfer to a private pension fund. Beginning on October 1, 1995, the Secretary is directed to transfer from the AML fund to the United Mine Workers of America Combined Benefit Fund (Combined Benefit Fund) an amount goal to: (1) the interest estimated to be earned and paid to the AML fund during the fiscal year and (2) to the extent that such amount transferred is less than \$70,000,000, and amount sufficient so that the total of the amounts transferred equal \$70,000,000, or the amount requested by the Trustees of the Benefit Fund, whichever is less. OSM has implemented these provisions in the final rules.

Congress did limit these additional funds, however, so that the aggregate amount transferred under (2) for all fiscal years could not exceed an amount equivalent to all interest earned and paid to the fund after September 30, 1992 and before September 30, 1995. Additionally, the aggregate amount transferred for any fiscal year may not exceed the amount of expenditures which the trustees of the Combined Benefit Fund estimate may be debited against the unassigned beneficiaries premium account under Section 9704(e) of the Internal Revenue Code of 1986 for the fiscal year of the Combined Benefit Fund in which the transfer is made.

To summarize, interest earned by the AML Fund in fiscal year 1992 would be credited to the Federal-share of the AML fund and used to carry out the Federal reclamation responsibilities enumerated in Title IV. All interest earned in fiscal years 1993, 1994, and 1995, would be recorded and, beginning in fiscal year 1996, an amount equal to such interest would be used to supplement the funds transferred to the private pension fund if the AML interest amounts earned and the amount necessary to be transferred were less than \$70,000,000. Assuming that the trustees of the pension fund document the need for additional funds, as set forth in Section 402(h) of SMCRA, an amount equal to all interest earned by the AML fund starting in fiscal year 1996 would be transferred by the Secretary to the pension fund. Such transfers would continue under the present statutory scheme as long as a need is documented by the trustees and the AML fund earns interest.

The United Mine Workers of America (UMWA) health and retirement funds were established in 1974 pursuant to an agreement between the UMWA and the Bituminous Coal Operator's Association (BCOA) to provide pension and health benefits to retired coal miners and their dependents. The funds have been maintained for this purpose through a series of collective bargaining agreements. The funds created in 1974 were a restructuring of the original benefit fund which was established in 1946.

The funds consist of four different plans, each of which is funded through a separate trust. The 1950 Pension Plan provides retirement benefits to miners who retired on or before December 31, 1950 and their beneficiaries. The 1950 Benefit Plan provides health benefits for retired mine workers who receive pensions under the 1950 Pension Plan and their dependents. The 1974 Pension Plan provides retirement benefits to miners who retire after December 31, 1975 and their beneficiaries. The 1974 Benefit Plan provides health benefits to miners who retire after December 31, 1975. It also provides health benefits to miners whose last employers are no longer in business or, in some cases, no longer signatory to the applicable bargaining agreement. These miners are generally referred to as "orphaned" retirees.

The Energy Policy Act of 1992 provides that the 1950 Benefit Plan and the 1974 Benefit Plan are to be merged into a new UMWA Combined Benefit Fund to provide health and death benefits for eligible retirees and their dependents. The Combined Benefit Fund is to be financed by health benefit premiums, death benefit premiums, and unassigned beneficiaries premiums imposed on assigned operators. The Combined Benefit Fund would also receive additional funding from transfers from the 1950 Pension Plan and, as discussed above, moneys from the AML Fund. The Energy Policy Act also created a 1992 Benefit Fund to provide benefits for persons not eligible under the Combined Benefit Fund. Congressional Record H-12169-70 (October 5, 1992) (Conference Committee statement on H.R. 776).

The final rules in section 872.11(a)(6) implement the statutory scheme discussed above. This is, AML interest payments earned in fiscal year 1992 would be allocated to the Federal share for use in carrying out Federal reclamation responsibilities as outlined in Title IV of SMCRA. An amount equal to interest earned in succeeding years would be available for use as specified in Section 402(h) of SMCRA regarding transfers to the Combined Benefit Fund. OSM is also revising the language of Section 872.11(b)(3) regarding allocation of AML fees and interest to the Rural Abandoned Mine Program (RAMP). In 1992 RAMP would be allocated 20% of the interest earned from the AML fund. This represents RAMP's percentage allocation of the Federal share of the AML fund. Further allocations of AML interest would be made to RAMP; however, an amount equal to such interest might have to be transferred to the Combined Benefit Fund unless the trustees of the Combined Benefit Fund notify OSM pursuant to Section 402(h) of SMCRA that the estimated expenditures to be debited against the unassigned beneficiaries premium account for the fiscal year of the Combined Benefit Fund in which the transfer is made would be less than the AML interest estimated to be earned that year.

The following comments address OSM's proposed rule for allocating interest income. As noted in the preceding discussion, however, subsequent to the publication of the proposed rule, Congress in the Energy Policy Act of 1992 designated a new scheme relating to interest. Accordingly, the comments received on the proposed rule do not reflect the current statutory scheme. Because of certain Federal/State issues raised by the comments, OSM has decided to respond to these comments.

The majority of the comments received on section 872.11(a)(6) disagree with OSM's proposed rule regarding the allocation of related income and believe that interest income should be credited to the entire Fund (i.e., Federal and State share). Commenters state that the controlling authority for allocating interest is found in Section 401(e) (e.g., credited to and form a part of the Fund) and that OSM's references to the legislature history to support its proposal is invalid.

Another commenter, however, disagreed with the other commenters and stated that it supported OSM's allocation of interest.

Although OSM is sympathetic to the arguments raised by the commenters favoring the distribution of interest payments to the State accounts, OSM believes that it is constrained by the specific statutory language of SMCRA and the legislative history of the 1990 and 1992 amendments, and therefore has decided to allocate interest income only to the Federal share accounts consistent with the rationale set forth above.

Specifically, Section 402(g)(1) of SMCRA allocates to the States/Indian tribes only 50 percent of the fees collected. There is no mention of interest payments as was done for RAMP in Section 402(g)(2). In addition, the language regarding the allocations to the different Federal accounts does not refer to percent allocations as was done for State/Indian tribe allocations, but instead refers to distributions of monies from the Fund not previously allocated (see Sections 402(g) (2), (3), (4), and (5)). OSM therefore interprets the language of SMCRA as directing that interest allocations are only to be distributed to the Federal accounts. Commenters argue that OSM should give greater credence to the language in Section 401(e) which specifies that interest income is to be "credited to, and form a part of, the fund." This language, however, is not dispositive. The interest income does become a part of the AML Fund. The States/Indian tribes, though, have no additional rights to this income money merely because the income is credited to the Fund. The AML fees result from a Federal tax and are Federal funds. Their distribution to the States must be based on specific Congressional direction and, based on OSM's review of the statute, there is no explicit directive to allocate income money to the individual State/Indian tribe accounts.

To support this decision, OSM has also reviewed the legislative history of this section, and it is clear that Congress intended that the interest income to be distributed only to the Federal accounts. For example, the following three excerpts

from the House Report accompanying H.R. 2095 (the legislation which formed the core of the 1990 amendments) clearly demonstrate how Congress envisioned the distribution of interest income.

H.R. Report 294, 95th Cong., 1st Sess. 19 (1989)

* * * The remaining 50 percent of reclamation fees collected would continue to be dedicated to the Secretary's discretionary share of the Abandoned Mine Land Reclamation Fund for Federal programs. However, the legislation provides for the Secretarial share to be augmented by interest authorized to accrue to the unappropriated balance in the entire Fund * * *

H.R. Report 294, 95th Cong., 1st Sess. 20 (1989)

* * * Under the bill, after allocation of the State and tribal shares, the remaining amounts in the Fund (the Secretary's share of the reclamation fees plus all interest which would accrue to the unappropriated balances as authorized by legislation) would be available for a number of current Federal Title IV programs * * *

H.R. Report 294, 95th Cong., 1st Sess. 27 (1989)

* * * The Committee further notes that while interest would accrue to the entire unappropriated balance in the Fund, amounts earned from this interest would be dedicated solely to programs financed under the Secretarial share of the Fund * * *

Some commenters argue that OSM should not resort to this legislative history since the bill was never enacted as originally passed by the House of Representatives. OSM, however, discounts this argument. Although H.R. 2095 was not passed as a separate bill, it was included in the Omnibus Budget Reconciliation Act of 1990. Accordingly, the legislative history for H.R. 2095 is relevant. Additionally, although the bill was ultimately amended during the House-Senate conference review process (see previous discussion in preamble regarding conference amendments), these amendments did not alter the statutory provisions regarding interest. Moreover, if the commenters are correct in their assertion, logic would dictate that the House-Senate Conference Committee would have noted such concerns about the relevance of the legislative history. However, there are no such references. Accordingly, OSM believes that the legislative history to H.R. 2095 is relevant in determining Congressional intent.

Based on the specific language in SMCRA and the legislative language discussed above, OSM has decided to keep the provisions originally set forth in the proposed rule to allocate interest income only to Federal accounts.

Section 872.11(b) has been revised to incorporate the provisions of Section 402(g) of the Act as amended by the Abandoned Mine Reclamation Act of 1990. Section 872.11(b) describes the manner in which monies deposited into the Fund are allocated by the Secretary. These funds, once appropriated by Congress, would be used to accomplish the purposes of Title IV of SMCRA.

Existing paragraph (b)(1) has been removed and allocations of funds of SOAP are addressed at new paragraph (b)(5) as specified at Section 401(c)(11) of SMCRA. The distribution of AML Funds for RAMP is funded from the 20 percent to the funds remaining after allocation of collections to the States/Indian tribes in accordance with Section 402(g)(2) of the Act. The distribution of funds for RAMP is set forth in paragraph (b)(3).

In response to comments regarding the discretionary authority to withdraw granted unexpended AML funds, OSM has deleted Section 872.11(b)(1)(ii) and (b)(2)(ii) and merged the language in (b)(1)(i) and (b)(2)(i) into the main text of those sections. OSM's practice is not to withdraw funds. Rather, it is to deobligate funds and make them available to the States/Indian tribes in future years. This policy is further explained in the following comment response section.

Existing paragraphs (b)(2) and (b)(3) of the regulations are revised and redesignated as paragraphs (b)(1) and (b)(2). These redesignated and revised paragraphs continue to require the allocation of 50 percent of annual fee collections to a specific State or Indian tribe. This fulfills the requirements of the Act at Section 402(g)(1). The new amendments use the grant award date as the time from which to calculate the three year period the States and Indian tribes have to use appropriated funds. Monies which remain unexpended by a State or Indian tribe after the three year period may, under certain conditions, or withdrawn and expended by the Secretary to accomplish the purposes of Title IV.

Existing paragraph (b)(4) of the regulations has been redesignated as paragraph (b)(3) and revised to require that 10 percent of the monies collected and deposited annually, and 20 percent of the interest, if such amount is not necessary for transfer to the Combined Benefit Fund based on the provisions of 402(b) of SMCRA under the 1992 amendments, and other miscellaneous receipts to the Fund, be allocated for use by the Secretary of Agriculture for the purpose of funding RAMP. Twenty percent of funds, if withdrawn from the State's and Indian tribe's unexpended grant awards under Section 402(g)(1)(D) of the Act, would also be reprogrammed to RAMP. This requirement is consistent with Section 402(g)(2) of the Act.

A new paragraph (b)(4) has been added to the regulations to fulfill the requirement of Section 402(g)(5) of SMCRA. New paragraph (b)(4) requires that 40 percent of the monies deposited in the Fund annually after making the allocations of subparagraphs (b) (1) and (2) shall be allocated for use in making additional grants to the States and Indian tribes. To be eligible for funds allocated under this provision, a State or Indian tribe would not have certified under Section 411 (a) of SMCRA and would have priority 1 and priority 2 coal problems within the State or on Tribal lands. Under this paragraph, the distribution of funds would be based on a formula addressing the respective State's or Indian tribe's historical coal production prior to August 3, 1977, as a percentage of the nationwide total for eligible States and Indian tribes.

Also, funds to be granted under this paragraph could be reduced or curtailed under two specific conditions relating to the adequacy of funding. These two conditions are: (1) if State or Tribal share funds to be granted in a given year are sufficient to address remaining eligible priority 1 or priority 2 coal sites, no additional funds will be provided during that year; and (2) if the cost to reclaim all remaining priority 1 or priority 2 coal sites exceeds the amount of State or Tribal share funds to be granted in a year pursuant to Section 402(g)(1), but is less than the total amount of funds to be granted to the State or Indian tribe in that year under paragraphs (b) (1), (2), (3) and (4) of this section, Federal funds granted under this paragraph will be reduced to that amount required to fully fund all remaining priority 1 or priority 2 coal sites after utilizing all available State share funds. To make the above determination each year on September 30, OSM will continue to use its Abandoned Mine Land Inventory System in order to determine the dollar amount of remaining (i.e., unfunded) eligible priority 1 and priority 2 coal problems.

Existing paragraph (b)(5) of the regulations has been revised to list the purposes for which the Secretary may expend funds from the remaining or unallocated balance of the AML Fund (not already allocated to the States, Indian tribes, and RAMP), in accordance with Section 402(g)(3) of the Act. These purposes would include SOAP, emergency projects, nonemergency projects in nonprogram States and on nonprogram Tribal lands, funding for eligible interim program and insolvent surety sites, and administration of Title IV of the Act.

Two million dollars is the minimum program level established at Section 402(g)(8) of the Act. A new paragraph (b)(6) is added to the regulations to specify that not less than \$2,000,000 would be distributed annually to States and Indian tribes having an approved abandoned mine reclamation program and eligible lands and waters pursuant to Section 404, so long as an allocation of funds is necessary to achieve the priorities stated in paragraphs (1) and (2) of Section 403(a) (priority 1 or priority 2 coal problems). However, annual State share funds must be utilized first, and supplemental funds granted under paragraph (b)(4) and this paragraph shall not exceed the costs of reclaiming all remaining priority 1 and priority 2 sites. In response to comments, OSM notes that minimum program States, like all other AML States, will still be able to do associated priority 3 work when they do priority 1 or 2 reclamation projects. No change to the proposed rule was deemed necessary.

A new paragraph (b)(7) is also added to the regulations to specify that additional funds allocated or expended annually by the Secretary would not be deducted from funds allocated or granted annually to a State or Indian tribe pursuant to Sections 402(g)(1), (5) or (8) of SMCRA. In response to comments, OSM added the word "allocate" to ensure States and Indian tribes that there will be no reduction against allocated funds.

Finally, the new statutory provisions in Section 402(g)(3)(C) authorize the Secretary to expend monies for reclamation purposes in States or on Indian lands which do not have an approved abandoned mine land program. Section 872.11(b)(8) implements this provision.

One commenter stated that the word "expended" in Section 872.11(b) (1) and (2) should be defined so that it can be used consistently. In the past words like "expended" and "obligated" have had different meanings depending on the

context. "Expended" could mean obligated, paid out for goods or services, drawn down from the Federal account, etc., the commenter said.

The term "expended" is already defined in Section 870.5. For purposes of these regulations "expended" means that monies have been obligated, encumbered, or committed for reclamation by contract by OSM, State, or Indian tribe for work to be accomplished or services to be rendered.

Another commenter stated that proposed regulation 872.11(b)(1)(ii) concerning the withdrawal after three years of unexpended grant funds is too subjective and could result in arbitrary OSM Field Office recommendations.

The commenter suggested that this term be defined as follows:

* * * as a result of avoidable delays that are beyond the direct control of the state AML Program director * * *.

This language would not hold the State AML programs hostage to delays caused by other State agencies, programs, or policies over which the State program director has no direct control or authority, the commenter argued.

Another commenter stated that the phrase "granted to a State or Indian tribe that have not been expended" does not appear to include those unspent funds from a prior grant which are deobligated for grants management purposes and are again available to be regranted to that State. Such funds should not be included in the three year limitation, the commenter stated.

The regulations should clarify this. Also, all funds withdrawn from a State or Indian tribe because of the three year limitation should be returned to the Federal share of the Fund and should then be available for any other discretionary share purpose, not restricted solely to those purposes identified under Section 872.11(b)(5), as proposed. If these are discretionary share funds, they should be made available for any and all discretionary purposes, the commenter asserted.

OSM has accepted the spirit of the comments. The language regarding the withdrawal of funds in Section 872.11(b)(1) and (2) implements a specific statutory provision in Section 402(g)(1) of SMCRA. OSM notes, however, that the authority to withdraw is discretionary. OSM's practice since the beginning of the AML program is not to withdraw funds from the States/Indian tribes. Rather, funds which are not expended by a State/Indian tribe during the grant period are returned to the State/Indian tribe account for future grants. This practice is within the discretionary language of the Act and still provides States/Indian tribes flexibility to manage their programs. To avoid any misunderstanding regarding this practice, OSM has decided to delete the language in proposed Section 872.11(b)(1)(ii) and (b)(2)(ii) and to merge the language found in (b)(1)(i) and (b)(2)(i) into the main text in those sections.

One Indian tribe commented that there are 11 abandoned coal sites located on Tribal land. Three of these sites are priority 1. The total estimated cost to reclaim the sites is \$2 million. There are 86 abandoned noncoal sites located throughout the reservation. Four sites are priority 2. The estimated cost to reclaim all sites is \$17.9 million. The Indian tribe has \$3.2 million available as Tribal share money, but has inventoried \$19.9 million of abandoned sites. It is apparent that the current allocation method will leave numerous sites which present a hazard to public health and safety unreclaimed. Due to this inadequate funding and due to the fact that the Indian tribe has no historical production records for coal which was stolen from the Indian tribe, the Indian tribe urges OSM to amend the proposed regulations to allow a State/Indian tribe with a demonstrated need for reclamation to qualify for minimum program funding of priority 3 projects. In addition, since there are no historical records of the stolen coal, OSM should provide some special consideration under this regulation.

OSM has not been able to implement this comment due to the specific provisions contained in Section 402(g)(8) of SMCRA which limits allocations for minimum program States and Indian tribes to those necessary to carry out priority 1 and 2 coal projects. OSM has looked into the matter of historic coal production from Indian lands and determined that the three Indian tribes with approved AML programs would not qualify for more funds pursuant to Section 402(g)(5) of SMCRA. This is caused by the amount of unfunded priority 1 and 2 coal projects in each Indian tribe and not historical coal production.

Other commenters also stated that prohibiting minimum program States and Indian tribes from doing priority 3 work would be discriminatory. Minimum program States need the latitude to determine when associated priority 3 reclamation

is necessary and beneficial to the total priority 1 and 2 reclamation within the State. All States and Indian tribes receiving discretionary and or minimum program monies should be treated equally and impartially.

OSM has accepted these comments. OSM will treat minimum program States/Indian tribes the same as other States/Indian tribes. That is, all States/Indian tribes with approved AML programs under Title IV of SMCRA will be able to do priority 3 projects that are associated with a priority 1 or 2 site. There will be no artificial limitation on minimum program States. In addition, OSM will be reviewing the criteria for priority 1 and 2 projects to provide the States and Indian tribes greater flexibility in selecting eligible projects. Due to the limitations in SMCRA regarding the funding of priority 1 and 2 projects from minimum program and historic coal production allocations, however, OSM believes States/Indian tribes must still maintain their focus on projects that qualify as a priority 1 or 2 site.

Another commenter stated that the Act in Section 402(g)(5) provides that 40 percent of discretionary funds should be allocated to the States and Indian tribes on a historical production basis as inventoried high priority problems require. This 40 percent of the remaining funds includes the interest and other fund revenues including withdrawn funds from States and Indian tribes plus other miscellaneous receipts to the Fund. According to the commenters, the regulations should specifically state this to be consistent with the Act. This is consistent with the allocation of 20 percent of the interest and other fund revenues to RAMP in Section 872.11(b)(3).

OSM has declined to implement this comment. As previously discussed in this preamble, interest earned by the AML fund will be allocated among the three Federal accounts based on the percentages specified in SMCRA. OSM does not believe that such language needs to be specified in a regulation. Furthermore, as previously noted, under Section 402(h) an amount equal to the interest earned by the AML Fund needs to be available, if necessary, to transfer to the United Mine Workers of America Combined Benefit Fund.

Another commenter stated concerning Section 872.11(b)(4)(ii) that the proposed regulation should provide that if the actual cost of reclamation to accomplish all inventory priority 1 and 2 problems is less than the Federal share funds actually granted for minimum program States or Indian tribes, then any excess funds must be returned to the Federal share of the Fund.

OSM has not accepted this comment. The preamble to the rules specifies how distributions will be made as a State or Indian tribe funds all remaining 1 or 2 priority projects. Further references in the regulations regarding funding procedures are unnecessary.

Another commenter agreed with OSM's proposed rule which provided funding only until all priority 1 and 2 problems have been addressed. This commenter states, however, that the rules should further provide that no supplemental grants under this provision will be expended on any site other than a priority 1 or 2 problem area as defined in Section 403(a) of SMCRA.

As noted previously, OSM has decided to fund the reclamation of priority 3 problems if they are associated with priority 1 or 2 problem sites. This should avoid artificial distinctions and arguments on what qualifies as a priority 2 or 3 problem and allow States and Indian tribes greater flexibility in selecting eligible projects. By allowing States and Indian tribes the authority to do associated priority 3 work, OSM believes that the cost effectiveness and overall efficiency of the AML program will be improved.

Most commenters responding to OSM's proposed rules in 872.11(b)(4) (historical coal production allocation) and 872.11(b)(6) (minimum program funding) disagreed with OSM's approach and stated that minimum program States should be able to reclaim priority 3 projects. Some commenters felt that minimum program States or Indian tribes should be able to do any priority 3 reclamation work; others, however, were more limited. Some felt that minimum program States should be able to do priority 3 work if it is associated with higher priority reclamation activities, and others felt that minimum program States should be able to utilize their State share funds for any priority. Most commenters requesting authority to do some type of priority 3 work felt that such authority was consistent with the intent of Congress and the purposes of the AML program. According to these commenters, such authority is cost-effective and provides the States the management authority which OSM's consolidated grant approach is supposed to provide.

Other commenters, however, disagreed and stated the minimum program States should be required to complete all known priority 1 and 2 sites before funding priority 3 projects. Moreover, OSM should consider funds set-aside by the

State for future reclamation purpose (873.12(a)) in determining the appropriate distribution amount.

Given the various limitations in SMCRA regarding program funding, OSM's options regarding distributions to minimum program States and Indian tribes are somewhat constrained. Federal share funds are limited to priority 1 or 2 problem coal sites. Accordingly, comments suggesting no restrictions concerning the funding for priority 3 sites could not be accepted. Similarly, OSM does not believe it would be proper to go to the opposite extreme and deny funding for all types of priority 3 work. States and Indian tribes are still receiving State/Indian tribe share funds and in many instances doing associated priority 3 work would increase the efficiency of the State/Indian tribe program. OSM has, instead, chosen a middle ground. OSM will not single out minimum program States/Indian tribes for more stringent funding criteria, but instead will treat all States/Indian tribes equally. OSM will fund associated priority 3 work.

OSM has not accepted the part of the comment requesting that OSM require minimum program States and Indian Tribes to use their future set-aside funds first. By statute once these funds have been granted and placed in a special trust fund, the monies are considered to be State funds. In addition, the purpose behind the establishment of specific State set-aside funds was to allow the AML States to prepare for a time when the AML program had ended and the AML funding had ceased. At that time States could utilize the set-aside funds if AML problems arose. Mandating the use of such funds at this time would be contrary to this purpose.

One commenter commended OSM for funding emergency projects separately from grants allocated to the States pursuant to the annual reclamation plan. This funding mechanism encourages States which do not presently administer an emergency program to work toward eliminating those obstacles which prevent them from assuming these responsibilities. The unpredictable nature of emergencies coupled with the potential for expensive reclamation techniques could seriously disrupt a State's reclamation plan if emergency funding had to come from the State's annual grant.

Another commenter observed that under Section 872.11(b)(7), "Funds allocated or expended annually by the Secretary under Sections 402(g)(2), (3) or (4) of SMCRA for any State or Indian tribe shall not be deducted against funds to be granted annually to a State or Indian tribe under the authority of Section 402(g)(1) (5) or (8) of SMCRA." According to the commenter, the use of the word "granted" as opposed to "allocated" suggests that Section 402(g)(2), (3) or (4) expenditures may still ultimately be deducted from State share allocations, even though OSM will not reduce annual grants. This should be clarified to provide that such expenditures shall not reduce annual grants or be deducted from total allocations, the commenter said.

OSM notes the language in Section 872.11(b)(7) implements language in Section 402(g)(5) of SMCRA. This provision controls funds that are either "allocated or expended." To avoid any misunderstanding OSM has made the change suggested by the comment and has added the word "allocated" to the regulatory language.

PART 873 - FUTURE RECLAMATION SET-ASIDE PROGRAM

GENERAL

In 1987 Congress amended Section 402(g)(3) SMCRA authorizing States to deposit up to ten percent of their annual State share grant funds into special trust accounts. Such funds deposited, together with any interest earned, could then be utilized by a State after August 3, 1992, to carry out the purposes of Title IV. The purpose behind the 1987 provision was to ensure that a State would have AML Funds available after the expiration of the AML fee provisions to handle future reclamation problems.

The new statutory amendments in Public Law 101-508 also include a future reclamation set-aside program with five specific differences. First, this new set-aside program does not supersede or transfer funds deposited under the original set-aside program established in 1987. Funds deposited under that program can still be utilized by a State/Indian tribe at its discretion after August 3, 1992, to carry out the purposes of Title IV. Second, the new trust fund accounts have a new timeframe. Funds deposited pursuant to the amendments of 1990 may only be utilized after September 30, 1995. Third, the new trust accounts would only be utilized to reclaim eligible coal problems. The original set-aside accounts could be used for any purposes in Title IV; thus both coal and noncoal problems could be addressed. Fourth, rather than being limited to up to ten percent of the State/Indian tribe share funds granted annually, the States/Indian tribes can now deposit up to ten percent of the total State/Indian tribe share and historic coal production (Federal share) funds granted annually. Fifth, the State/Indian tribe now has an option on whether to utilize funds for the future reclamation set-aside

program or to deposit the monies in a special trust account for use in a State/Indian tribe acid mine drainage program. The statute and regulations allow States/Indian tribes to utilize available funds for either the acid mine drainage program or the future reclamation set-aside program. However, a ten percent cap is placed on the total funds available annually.

DISCUSSION

SECTION 873.1 - SCOPE

This section provides requirements for the award of grants to States/Indian tribes for the creation of special trust accounts to provide funds for coal reclamation purposes after September 30, 1995.

SECTION 873.11 - APPLICABILITY

This section provides that provisions of this Part would apply only to the granting of funds and their use by the States/Indian tribes for coal reclamation purposes after September 30, 1995.

SECTION 873.12 - FUTURE RECLAMATION SET-ASIDE PROGRAM FUND CRITERIA

This section tracks the legislative language of Congress and limits the use of the monies to eligible coal reclamation purposes after September 30, 1995. To be eligible to receive a grant for such purposes, a State/Indian tribe would have to first establish a special trust fund account which would limit the use and withdrawal of the funds as specified earlier.

If the conditions are met and monies are properly deposited, Section 873.12(c) specifies that the monies so deposited, together with interest earned, would be considered State/Indian tribe monies. The 1987 amendment originally establishing the special State set-aside specified that monies deposited in the special State trust accounts, as well as interest earned, would be considered State monies. Although the 1990 amendments do not contain equivalent language, OSM intends to provide the same treatment under these proposed rules because the legislative history of the 1990 Act does not evidence Congressional intent to change this feature of the set-aside.

All comments received on this Part objected to OSM's proposal to limit future set-aside funds to coal problems only. These commenters argued that OSM's reliance upon the legislative history to H.R. 2095 was inappropriate given the vast difference between the original bill and the fund language in the Omnibus Budget Bill. Moreover, these commenters believe that Sections 403(a) and 404 can be interpreted to include both coal and noncoal problems.

OSM is unable to accept this comment and therefore has made no changes to part 873. OSM interprets the 1990 amendments to SMCRA as limiting future set-aside grants to coal projects only. This interpretation is consistent with the statutory language and the legislative history. As stated in H.R. Report 294:

* * * Provision is made for a State to deposit up to 10% of its annual state share allocations, including amounts available to the State from Secretarial share supplemental grants, into a special interest-bearing trust fund established by the State for the purpose of undertaking abandoned coal mine reclamation * * *. The Committee notes that several states have already established such a program under the current law provision limiting use of set-aside amounts for use after August 3, 1992. The current law provision does not necessarily restrict the use of set-aside amounts for abandoned coal mine reclamation projects. As such, the Committee intends for states to have the opportunity, at their discretion, on or after August 3, 1992, either to withdraw or maintain as a separate account for the purpose of accomplishing authorized Title IV purposes, as set forth prior to the amendment of this Title by the legislation, amounts set-aside prior to enactment of the Abandoned Mine Reclamation Act of 1989.

H.R. Report 294, 101st. Cong., 1st. Sess. 28 (1989).

The modifications made to Section 403(a) do not expand this authority as urged by the commenters. These modifications merely cross reference another set of priorities which would be applicable to a State's noncoal program. The commenters' position is not supported by any references in the legislative history. As demonstrated above, however, the opposite is true. House Report 294 specifically directs that set-aside funds be limited to coal projects only and that this future set-aside program (limited to coal only) is different than the previous set-aside program which authorized expenditures to carry out any Title IV purposes. See H.R. Report 294, 101st. Cong., 1st. Sess. 28 (1989). Finally, if the

commenters' position were correct that Congress wanted to fund both coal and noncoal projects with future set-aside monies, logic would dictate that the language in the old law would have been repeated, i.e. "accomplish the purposes of this title." However, this was not the case. Instead, Congress referenced the coal eligibility section only.

PART 874 - GENERAL RECLAMATION REQUIREMENTS

GENERAL

Part 874 sets forth requirements relating to eligibility and selection of reclamation projects that are equally applicable to those reclamation activities to be carried out by OSM and to the Rural Abandoned Mine Program administered by the Secretary of Agriculture under Title IV.

DISCUSSION

SECTION 874.11 AND 12 - APPLICABILITY AND ELIGIBLE COAL LANDS AND WATER

SMCRA, as enacted in 1977, specified that lands and water eligible for reclamation funding are those which were mined for coal or which were affected by such mining, wastebanks, coal processing, or other coal mining processes, and abandoned or left in an inadequate reclamation status prior to the date of enactment (August 3, 1977) and for which there is no continuing reclamation responsibility under State or other Federal law.

The amendments to Title IV significantly enlarge these original eligibility criteria. Most notably, Congress has extended in two instances the eligibility criteria for reclamation funding to priority 1 or 2 coal problems on lands which have been mined and abandoned after August 3, 1977. The first time interval involves land mined and abandoned between August 4, 1977 and the date on which the Secretary approved a State program under Section 503 of SMCRA and specifies that any funds for reclamation or abatement which are available pursuant to a bond or other form of financial guarantee or from any other source must not be sufficient to provide for adequate reclamation or abatement at the site. Regarding the reclamation of post-SMCRA sites pursuant to Section 402(g)(4)(E) of SMCRA, the new amendments reference the date on which the Secretary approved a State program pursuant to Section 503. Indian tribes, however, do not have approved regulatory programs. To rectify this problem, OSM has used September 28, 1984 as the applicable date for Indian tribes. This date was chosen because it is the date that the permanent Federal regulatory program on Indian lands took effect. The second time interval would extend eligibility to lands mined and abandoned between August 3, 1977 and November 5, 1990, where the surety of the mining operator became insolvent and funds immediately available from other proceedings or sources are not sufficient to provide for adequate reclamation or abatement at the site.

The eligibility requirements for sites abandoned prior to August 3, 1977, are set forth in Section 874.12 (a), (b), and (c). To these general eligibility requirements, OSM has added subsections 874.12 (d), (e), (f), (g) and (h) to address eligibility for sites abandoned after August 3, 1977.

In order for sites abandoned after August 3, 1977, to be eligible for funding, lands adversely affected during either of the time intervals as discussed above and specified in Section 874.12(d), must be abandoned and must qualify as a priority 1 or 2 problem pursuant to Section 403(a) of SMCRA.

Subsection 874.12(e) establishes the eligibility criteria for States and Indian tribes to reclaim lands adversely affected after August 3, 1977. It is similar to subsection (d), and includes the same criteria with one additional requirement. In addition to making the findings required for subsection (d), a State or Indian tribe would also have to find in writing that the reclamation priority of the site is the same or more urgent than the reclamation priority for the lands and water adversely affected prior to August 3, 1977 and that the site qualifies as a priority 1 or 2 site. This subsection implements Section 402(g)(4)(E) of SMCRA.

In extending eligibility to high priority sites left abandoned after August 3, 1977, Congress noted that tens of thousands of acres of land mined since August 3, 1977 remain unreclaimed due to the less stringent standards applicable during the "interim program" period and the bankruptcies of the mining companies and their insurers. The damage to these lands has created a new generation of abandoned mine problems unforeseen by the original law. Indeed, Congress notes in its report on H.R. 2095 that the public health and safety threat posed by these acres may exceed those of eligible but lower priority pre-August 3, 1977, sites. H.R. Report No. 294, 101st Congress, 1st Session 24 (1977).

Although not part of the amendments passed by Congress in 1990, the Secretary is utilizing his rulemaking authority granted under Section 413(a) of SMCRA in establishing two additional subsections to Section 874.12. Subsection (f) provides that any monies recovered or available from other sources to reclaim sites abandoned after August 3, 1977, should be either utilized to offset the cost of the reclamation or transferred to the AML Fund. This ensures that monies available for reclamation purposes are ultimately used for such purposes and not lost due to the intervention of Title IV activities. The operative language in the statutory amendments states that "available funds are insufficient to reclaim" the lands. This language addresses only availability and does not specifically state that the monies must be utilized. Subsection (f) resolves this ambiguity by requiring that the monies either be used to reclaim the land or transferred to the AML Fund if no longer needed to reclaim the entire permitted site.

Subsection (g) is similar to the intent and purpose of subsection (f) in that it tries to prevent unjust enrichment. This subsection specifies that a person shall be liable for reclamation expenses which are in excess of any bond forfeited to ensure reclamation. The permittee shall reimburse the Abandoned Mine Land Fund for the cost of reclamation. This ensures that a party liable for the reclamation damages does not evade his legal and financial responsibilities to reclaim the land. Further, this subsection specifies that neither the Secretary nor a State or Indian tribe performing reclamation on these sites would be held liable for any Title V violations, whether they occur before, during or after the reclamation. As provided in Section 874.13(a), the reclamation activities need only comply with the AML Final Guidelines for Reclamation Programs and Projects (*45 FR 14810-14819*, March 6, 1980). These requirements should protect the public and health and safety, while also protecting a State or Indian tribe or the Secretary from potential liability and provide the State flexibility to utilize its scarce resources in the most efficient manner.

The Energy Policy Act of 1992 affected the eligibility criteria in two ways. First, Congress extended eligibility to lands which are reaffected by remining operations. OSM has added a new Section 874.12(h) to specify that surface coal mining operations on lands eligible for reclamation under SMCRA Sections 404 (abandoned prior to August 3, 1977), 402(g)(4)(B)(i) (affected between August 3, 1977 and the date on which the Secretary approved the State program pursuant to Section 503), and 402(g)(4)(B)(ii) (affected between August 3, 1977 and November 5, 1990) would not affect the eligibility of such lands for reclamation and restoration following the release of the bond for any such operation as provided for under Section 519 of the Act. In the event the bond or deposit for a surface coal mining operation on lands eligible for remining is forfeited, funds available under Title IV of the Act may be used if the amount of such bond or deposit is not sufficient to provide for adequate reclamation or abatement, except that if the conditions warrant, the Secretary may immediately exercise his emergency authority under Section 410 of the Act. The regulatory text tracks the amended language of SMCRA and is not intended to impose additional requirements.

One commenter stated that Section 402(g)(4)(B)(i) does not seem to require that eligible interim sites must be abandoned prior to primacy. Specifically, mining must have "occurred during the period beginning on August 4, 1977, and ending on or before the date in which the Secretary approved a State program * * *" (emphasis added). Mining activities prior to August 4, 1977 may be eligible as provided under Section 404 of SMCRA. According to the commenter, mining activities occurring after States achieved primacy should be eligible to the extent that "mining occurred" during the statutory period and those mining activities were not conducted under authority of permanent program permits. Not until after State primacy was granted were operators confronted with the new mining constraints and required to make a decision as to whether they would proceed with mining under permanent program permits. The interim program regulations, 30 CFR 773.11, allowed operators eight months after primacy to obtain these permits. In reality, it took much longer. If they did not proceed, abandonment and forfeiture frequently occurred in some cases, several years after primacy. The commenter did not believe Congress desire to exclude these sites from eligibility through Public Law 101-508. The Civil Penalty program which funds reclamation of similar forfeiture sites does not preclude reclamation of sites mined after State primacy.

The commenter said that the interim reclamation program is, in many respects, a continuation of the Civil Penalty program, and, therefore, the cut-off date should be the date of the issuance of the permanent program permit for the site, if there was one. In other words, eligible interim sites should be defined as sites without permanent program permits where mining activities occurred during the period beginning August 4, 1977, and ending on or before the date at which the State was awarded primacy.

Similarly, the commenter believes that site eligibility under Section 402(g)(4)(B)(ii) should be addressed in the same manner with the further requirement that the surety of the mine operator became insolvent sometime during the period

from August 4, 1977 through November 5, 1990. A literal interpretation of Section 874.12(d)(3) may require that mining end exactly on November 5, 1990. The section seems to extend eligibility for Title IV funding to primacy sites. The commenter asked if this possibility is consistent with OSM's position.

OSM has not accepted this comment. Although OSM realizes that certain interim sites were allowed to exist after a State received primacy, the language of the 1990 amendments does not allow flexibility. The amendment states that it applies to coal operations abandoned between two specific dates. The ability to alter those dates does not exist.

Another commenter stated that OSM appears to favor retention by States and Indian tribes of flexibility in determining standards to be achieved for these interim program and insolvent surety sites. The commenter asked how this flexibility will be implemented in a consistent manner by the various OSM Field Offices. The commenter believes that OSM must strive to assure consistent application of Title IV regulations and policies nationwide. Additionally, this commenter questioned whether environmental assessments were necessary for mined and permitted sites.

OSM will develop the necessary guidance documents to ensure that the regulations are consistently applied by its Field Offices. In addition, OSM will be reviewing its procedures for complying with the National Environmental Policy Act (NEPA). OSM will ensure that all NEPA requirements are met.

Another commenter stated that under the new SMCRA amendments post-1977 sites which are in the immediate vicinity of a residential area or which have an adverse economic impact upon a community should be considered a priority 1 or 2 site. Furthermore, the commenter asserted, consistent with Section 402(g)(4)(E) of SMCRA, the State is the sole determiner of reclamation priorities and the extent of reclamation. This SMCRA section provides that if the reclamation priority of a post-1977 site is the same or more urgent than sites eligible under Section 404, the State may make the sole determination of the priority.

OSM has accepted this comment in part. Sites that are in the immediate vicinity of a residential area or which have an adverse economic impact upon a community will be considered priority 1 or 2 sites eligible for funding. Similarly, if a State makes a determination that the priority of a site is the same or more urgent than the reclamation priority of sites eligible under Section 404, and meeting the criteria in Sections 403(a) (1) or (2), that site automatically will become a priority 1 or 2 site eligible for funding.

One commenter stated that Section 874.12(d)(2) expands eligibility to include interim program sites where bonds are insufficient to provide for adequate reclamation at the site. The commenter believes that the site would be eligible if mining ended before the date on which the Secretary approved a State program if the site qualified as a priority 1 or 2. Further, Section 506(a) of the Act allows mining activities under the interim program for up to eight months beyond the date of primacy. The commenter believes that the interim period should include this eight month grace period, and in certain circumstances could even extend further. The commenter requested clarification of this section in order to assure that all sites which can be technically defined as interim could be considered under this section.

OSM has examined this issue and, as discussed previously, the new amendments to SMCRA do not provide flexibility on this point. The dates on eligibility are specific and OSM does not believe that it has the authority to extend such dates to take into account the "grace period" mentioned in the comment.

Several commenters noted that Section 874.12(d)(3) would expand eligibility to include sites where mining ended prior to November 5, 1990 where the surety of the mining operator became insolvent and funds available from proceedings are not sufficient to provide for adequate reclamation at the site. In some States alternate bonding pools have been set up to provide a more economic method of such bonding opportunities. In these cases, the commenters stated, when an alternate bonding pool is insufficient, such sites should remain eligible and if the alternate bonding source is insufficient the State or Indian tribe should not incur any additional financial liability for the reclamation. The commenters requested clarification in this regard in the rules.

OSM has not made any changes to its regulations based on these comments. The new amendments to SMCRA do not specifically prohibit eligibility for sites abandoned after 1977 in primacy States which utilize bonding pools. However, where bond pools are solvent and applicable, such sites would not be eligible.

An additional commenter suggested that the term "immediately available" in Section 402(g)(4)(B)(ii) should be interpreted in the AML regulations to mean "in-hand" as illustrated by an account deposit entry on or before November 5, 1990. Any funds collected after that date and before completion of construction should simply be expended to pay billings, to the extent necessary to settle obligations, in preference to using grant funds. Money recovered in excess of remaining billings during construction and money recovered after project completion would be payable to the Fund, limited to the total cost and consistent with the statute. Bond recovered in excess of the total cost of reclamation and specific to the site would be returned consistent with surety law. Recoveries or settlements, not site specific, resulting from State actions would be managed at the discretion of the State.

Another commenter urged OSM to revise the proposal in 30 CFR 874.12(d)(3) to enable States with alternative bonding systems to qualify for Title IV monies on sites with insolvent surety bond. Further, this commenter does not believe that the proposed rule at Section 874.12(g) is consistent with OSM's established regulation at 30 CFR 800.50(b)(2) (relating to the use of bond forfeiture funds). The commenter received notification in 1985 under 30 CFR 732.17 that its program was deficient, and subsequently revised its regulation in response to OSM's interpretation. The commenter's regulations now require permanent permit sites to be reclaimed to Title V standards; they do not allow for reclamation under Title IV requirements. If it is not OSM's intention that the relaxed reclamation standards suggested in 30 CFR 874.12(g) be extended to insolvent surety sites that were permitted and eventually forfeited under a State's approved permanent regulatory program, OSM should clarify this in the regulation.

This commenter believes that OSM could better meet its goal stated in the preamble (*56 FR 57385*), to " * * * provide the State flexibility to utilize its scarce revenues in the most efficient manner," by eliminating the restrictions on funding eligibility at 30 CFR 874.12(d) (3) and (4) pertaining to other sources of funding and the AML priority 1 and 2 criteria.

OSM has accepted these comments in part. As stated before regarding another comment, the alternative bonding system in a State would normally foreclose the AML eligibility of sites abandoned after a State achieves primacy so long as the alternative system was solvent and applicable to the remaining work. This is a matter that may require a case-by-case determination. OSM does not however, believe that it has to adopt a definition of "immediately available" to mean "in-hand". The term "immediately available" is one that may depend on State specific criteria. OSM believes that it is necessary for each State to address this issue in its legal eligibility opinion. Furthermore, if a site is reclaimed using Title IV funds, there is no requirement that the site be reclaimed to Title V standards. The State bond pool where applicable, or the operator, is still liable for meeting the full Title V standards. The State AML program may design the reclamation it believes best addresses the situation within its own budget restraints and such reclamation could, but does not have to, meet Title V standards. Finally, OSM has not accepted that part of the comment that asked for the deletion of Section 874.12(d) (3) and (4). These requirements are found directly in the language of the 1990 amendments.

One commenter stated that it was unclear whether the term "site" in 30 CFR 874.12(f) referred to the actual site where the AML funds are applied or the entire interim permit. This commenter stated that it would be more appropriate to use the term "permit" rather than "site". The proposed regulation did not appear to give the State/Indian tribe the authority to reclaim a priority 1 or 2 site within an interim permit site using AML funds and use the posted bond money, once collected, to supplement reclamation on other areas of the same permit, the commenter said. A scenario would be an interim program permit with incremental bonding that is currently under a time consuming bond forfeiture process. There is an extremely dangerous highwall requiring immediate attention on Bond Area A which has a \$75,000 bond earmarked for this reclamation. The State/Indian tribe elects to apply for and is awarded \$100,000 of AML funds to reclaim the dangerous highwall. After the highwall is reclaimed, the entire bond for all increments is collected. According to the proposed regulations, the State/Indian tribe could not retain the \$75,000 earmarked for Bond Area A to supplement the remaining reclamation, but rather must reimburse the AML Reclamation Fund for the amount expended, unless the bond money was needed to do additional work at the site that was reclaimed with AML money.

OSM has accepted this comment and has clarified the regulation to note that recovered monies need only be transferred if no further reclamation of the "permitted site" is required.

Another commenter stated that it supported including of language in subsection (f) that would require the utilization of existing monies from bond forfeitures and likewise inclusion of language in subsection (g) to prevent unjust enrichment.

The commenter believes the Act's language "available funds are insufficient to reclaim[,]" plainly suggest that those other funds must be expended on the reclamation in conjunction with the AML funds that might be dedicated to reclamation. The commenter believes that it is pivotal that the operator who defaulted on reclamation obligations remain liable, both for additional reclamation at the site where AML funds are expended in conjunction with available forfeiture funds, and further that the responsible entity be blocked from obtaining Title V permits until such time as both the site is reclaimed and all monies expended from AML awards be repaid to the State or OSM as appropriate.

In Kentucky, for example, current law allows a party who has defaulted on reclamation obligations to regain access to new mining permits on abatement of violations and restoration of the site. It is important that violations that have been written against the responsible entity not be vacated, as one commenter suggested, to avoid both unjust enrichment and subsequent mining by an entity whose failures have been offset through the use of AML funds. Repayment should be included in subsection (g).

Sections 874.12 (f) and (g) in the final regulations require the use of existing monies from bond forfeitures and avoids unjust enrichment of defaulting operators. The regulations require the permittee of a site to reimburse the AML fund for the cost of reclamation which is in excess of any bond forfeited to ensure reclamation.

Another commenter stated that in providing that neither the Secretary nor the State performing reclamation is liable for Title V violations, the rules do not properly recognize that a third party performing reclamation pursuant to a State or Federal AML contract must meet the obligations of the National Pollutant Discharge Elimination System program under the Clean Water Act. This continuing obligation to control sediment and other parameters to assure that no water quality violations occur during reclamation should be clarified in the final rule or preamble.

OSM has declined to make any changes to the regulations based on this comment. All AML programs are responsible for insuring that all Federal, State, or local permitting laws or requirements are met. There is nothing in SMCRA which relieves an AML agency from such responsibilities. This has been standard agency practice since the beginning of the AML program and is already clearly set forth in the 1980 AML reclamation guidelines.

Another commenter stated that it supported the statement in OSM's preamble to the proposed rules at page 57387 that the reclamation standards applicable to AML work on bankrupt surety sites and other post-August 3, 1977 sites are not those specified in Title V but instead are the AML program's reclamation guidelines. Any other interpretation would be inconsistent with past practice and would greatly inhibit effective AML work at these sites. OSM agrees with this comment and has made no changes to the final rules regarding reclamation guidelines.

SECTION 874.13 - RECLAMATION OBJECTIVES AND PRIORITIES

This section sets forth the reclamation priorities listed in Section 403(a) of the Act. The provisions in this regulation have been expanded and clarified. Subsection (a), like the original Section 874.13, specifies that reclamation projects, as applicable, should be accomplished in accordance with OSM's "Final Guidelines for Reclamation Programs and Projects" (45 FR 14810-14819, March 6, 1980). Subsection (b) specifies that the priorities in Section 403(a) of the Act be followed.

To implement the directive that AML resources be directed to the highest priority problems, OSM is including a new requirement in Section 874.13(b) specifying that, in general, lower priority projects (priority 3 or below) should only be undertaken if (1) All known higher priority projects either have been addressed or are in the process of being reclaimed (i.e., included in a current grant request) or (2) such lower priority projects are undertaken in conjunction with a priority 1 or 2 site. However, it must also be noted that final rule language differs from that proposed in that the word "generally" has been inserted in Section 874.13(b). This was done to expand the original proposed language to allow greater flexibility in performing lower priority reclamation work.

Two commenters questioned whether OSM would allow States to do priority 3 projects when remaining priority 1 or 2 projects are either in the process of being reclaimed or should be deferred (e.g., due to a potential for private reclamation, lack of adequate reclamation technology, lack of landowner consent, or proper grant management).

One commenter noted that the proposed Section 874.13(b) states that projects lower than a priority 2 may not be undertaken until all known high priority projects have been or are in the process of being reclaimed, are funded, or are

done in conjunction with priority 1 or 2 sites in accordance with OSM's "Final Guidelines for Reclamation Programs and Projects" (1980 Guidelines). The commenter notes that the selection criteria in the 1980 Guidelines require that the following criteria, among other things, be considered prior to selecting sites for reclamation:

Landowner consent for post reclamation maintenance

Public and/or multiple benefits

Probability of success using current technology

Future remaining potential

Post reclamation plan use benefits

In response to these comments, OSM has included the word "generally" in the final regulation in order to allow greater flexibility in performing lower priority reclamation work. Further, OSM recognizes that site-specific situations related to the criteria listed above can develop which may require postponement of priority 1 or 2 sites. If this occurs, and no other priority 1 or 2 sites are available or meet the selection criteria of the Guidelines, a State or Indian tribe may reclaim lower level priorities if it is consistent with the State or Indian tribe's approved Reclamation Plan and such work reflects the order of priorities listed in Section 403 of the Act. Likewise, there may be instances when a State or Indian tribe is aware of eligible land previously affected by coal mining but believes it does not warrant expending AML funds to restore or reclaim that area since current site conditions do not warrant consideration under the priorities established under the Act. Also, where a landowner refuses access to the property, reclamation need not be undertaken unless site conditions meet the standards established in Section 407(a) (1) and (2) and the State/Indian tribe reclamation plan provides a mechanism for implementing Section 407 at the subject site. Postponement of higher priority sites in accordance with the 1980 Guidelines, for reasons beyond the control of the administering agency, does not preclude a State/Indian tribe from utilizing State share funds for lower priority work, as long as all discretionary funds still go toward priority 1 and 2 work. The regulations have been revised to add this flexibility. The general rule, however, is that the States/Indian tribes should follow the priorities in the order stated; lower priority projects should be undertaken in conjunction with high priority projects. In addition, Federal share funds cannot be utilized to fund lower priority projects due to the specific limitations in the 1990 amendments.

Additional guidance concerning the reclamation of lower priority projects in conjunction with the reclamation of higher priority projects is found in OSM's "Final Guidelines for Reclamation Programs and Projects" (*45 FR 14810-14819*, March 6, 1980).

Although no regulatory changes have been proposed, OSM notes that the Energy Policy Act of 1992 deleted the fourth priority regarding coal research originally found in Section 403(4). OSM has notified all States that grant requests for research funding pursuant to Section 403(4) of SMCRA is no longer authorized.

SECTION 874.14 - UTILITIES AND OTHER FACILITIES

Section 874.14 sets forth the requirements for funding water projects, including the protection, repair, replacement, construction, or enhancement of facilities relating to water treatment, supply or distribution. In the 1990 amendments to SMCRA, Congress specifically recognized the severe public health hazards that are associated with water supplies contaminated by abandoned coal mine workings. As pointed out in the Committee report accompanying H.R. 2095:

For many areas of the Appalachian Region groundwater resources used for household water supply have been contaminated as a result of drainage from abandoned underground and surface mines. The Committee strongly believes that when abandoned mines have degraded groundwater quality or depleted groundwater quantity to such an extent that citizens no longer have an acceptable supply, an adverse impact on health, safety and the general welfare is self evident.

H.R. Report No. 294, 101st Congress, 1st Session 24 (1989).

To reflect the new provisions regarding the funding of water projects, OSM is promulgating a new Section 874.14. Subsection (a) provides that a State/Indian tribe not certified under Section 411(a) of the Act may expend up to 30

percent of the funds granted annually from State share or historic coal distribution share to such State or Indian tribe for the purpose of protecting, repairing, replacing, constructing, or enhancing facilities relating to water supply, including water distribution facilities and treatment plants, to replace water supplies adversely affected by past coal mining practices.

Subsection (b) implements Section 403(b)(2) of the Act by modifying the eligibility standards in 30 CFR 874.12(b) by stating that the water supply projects remain eligible if the State or Indian tribe finds in writing that the adverse effects to the water system processes are due predominately to effects of mining processes undertaken and abandoned prior to August 3, 1977.

Subsection (c) as proposed would have provided criteria for not only funding projects to repair or replace existing water facilities, but also to enhance them. In order to receive monies to enhance public facilities, States would have had to demonstrate and the Director concur in the finding that: (1) Monies from other sources are either not available or such other sources are contributing their fair share of construction funds, (2) there is an urgent need to undertake the project which gives it the same or higher priority than projects remaining, and (3) the enhancement of the facility is necessary to achieve the objectives set forth in Title IV of SMCRA. These requirements, however, have been removed from the final rules based on the comments received.

Several commenters objected to the detailed requirements set forth in proposed Section 874.14(c) regarding alternative funding sources for water projects. They state that the statutory language in Section 403(b) and its legislative history do not provide any basis for this financial information. If a State chooses to fund a water project involving water supplies predominantly contaminated prior to August 3, 1977, and that condition is a hazard to human health and safety, OSM, they believe, should have no discretion to disapprove it. The availability of other funding sources is irrelevant to the inquiry.

Some commenters objected further by stating that OSM has no authority to require documentation that the water supply is a public health hazard. Many of the typical mine drainage pollution constituents such as iron, manganese and sulphur are considered secondary recommended water quality parameters. They believe that it is almost impossible to establish a direct health hazard without extensive research that might take years to accumulate at a significant expense. Water supply loss and quantitative diminution, as well as qualitative damage to ground supplies, should be accorded the highest priorities for abatement, giving particular emphasis to the loss of or damage to private water wells where no public water supply system is available as an alternative source of water. The treatment of AML projects related to replacement of water supplies damaged in quality or quantity by past mining, as priority 5 projects, is inconsistent with the language of the Act and with the expressed legislative concern.

Two commenters agreed with OSM's conditions on the funding of projects related to the construction or enhancement of water facilities. These commenters also urge OSM to adopt further limitations which were discussed in the proposed rule preamble and to deny funding for projects when the agency cannot by clear and convincing evidence determine the extent to which problems result from past mining practices or their non-AML problems. Even priority 5 projects must involve facilities adversely affected by coal mining.

OSM has reviewed carefully all comments regarding water projects and, as urged by the vast majority of commenters, has decided to delete the requirements regarding alternative funding sources. The States and Indian tribes have been granted the exclusive responsibility to administer their AML programs. This approval carries with it the responsibility to administer the AML program in an efficient manner and to carefully consider all expenditures. States are responsible for specific funding selections; however, compliance with the State's approved reclamation plan is subject to OSM oversight. States/Indian tribes are granted only limited funds, and it is ultimately their responsibility to use such monies wisely.

The Energy Policy Act of 1992 also affected the eligibility criteria as they relate to water projects specified in Section 403(b) of SMCRA and 30 CFR 874.14 of the proposed regulations.

In 1992, as part of the Energy Policy Act amendments to Title IV, Congress extended authority to States and Indian tribes to undertake water projects on lands eligible under Section 402(g)(4) of SMCRA, that is, certain lands affected after August 3, 1977. Accordingly, projects now remain eligible for reclamation if the States or Indian tribes find that the adverse effects to the water supplies are due predominantly to effects from mining practices undertaken prior to November 5, 1990 (see dates listed in Section 402(g)(4) of SMCRA). To implement this statutory requirement, OSM has

deleted proposed paragraph (c) as discussed above and replaced it with a new paragraph (c) regarding the eligibility of water supply projects. The new language in paragraph (c) tracks the statutory requirements; no comments are therefore needed.

Finally, a new subsection (d) is added stating specifically that an enhancement of a facility or utility would include upgrades necessary to meet local, State, or Federal health, safety or other applicable code requirements. For example, access ramps for handicapped individuals would be eligible improvements. Enhancement would not include, however, any service area expansion of the utility or facility which is not necessary to address a specific AML problem. For example, if a water system is damaged by subsidence, a State could possibly increase the size of the replacement pipes for the water system and thereby increase the carrying capacity. The State, however, would not be allowed to use AML funds to extend the water system to an area or town not adversely affected by the AML problem.

SECTION 874.15 - LIMITED LIABILITY

A new Section 874.15 (Limited liability) reiterates the language of Section 405(l) of SMCRA which provides that no State or Indian tribe shall be liable under Federal law for any costs or damages as a result of any action or omitted action while carrying out an approved abandoned mine reclamation plan. This section, however, does not preclude liability for gross negligence or intentional misconduct by a State or Indian tribe. OSM intends to conduct discussions with the Environmental Protection Agency (EPA) regarding the funding of projects which may be eligible under the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA).

One commenter sought clarification of the language in 30 CFR 874.15 as to whether this provision limits liability only under SMCRA or also under other Federal laws. The statutory language limits liability under all Federal laws, not just SMCRA, in carrying out an approved State or Tribal abandoned mine reclamation plan.

SECTION 874.16 - CONTRACTOR RESPONSIBILITY

A new Section 874.16, "Contractor responsibility" has been added to the regulations. This regulation specifies that to receive AML funds every successful bidder for an AML contract must be eligible under 30 CFR 773.15(b)(1) at the time of contract award to receive a permit or conditional permit to conduct surface coal mining operations. Such eligibility must be confirmed by OSM's automated AVS.

In the proposed rules published November 8, 1991, *56 FR 57376, 57401*, OSM had proposed a similar provision as part of the state grants provisions in 30 CFR part 886. This provision would have established a grant condition requiring States, prior to contract award, to ensure that a successful bidder for a project funded by the grant is not precluded under Section 773.15(b)(1) from receiving a permit or conditional permit to conduct surface coal mining operations. To satisfy this condition, the State would have had to check OSM's automated AVS for each contract to be awarded, and verify such information with OSM. By making those who are listed as violators or linked to violators through ownership or control ineligible for AML contracts, OSM intended to deny those certain parties the opportunity to share in the utilization of public AML funds.

Due to comments regarding grant conditions and the applicability to Federal agencies, OSM decided to move the provision to Part 874-"General Reclamation Requirements". By placing the requirement in this part, OSM is able to specify that the section applies to both the Federal Government and the States/Indian tribes. If the State or Indian tribe does not now have the legal authority to implement such requirements, then pursuant to 30 CFR 884.15, the State or Indian tribe must adopt the appropriate statutory and/or regulatory authority as an AML plan amendment. OSM will cooperate with the States and Indian tribes to assist in making the required statutory and/or regulatory changes and provide a phase-in period as determined on a case specific basis that takes into account the particular regulatory process in each jurisdiction. OSM considers the implementation of these changes to be an important priority item in view of the shared OSM and State/Indian tribe commitment to implement this concept and will work to achieve prompt action.

The requirement in Section 874.16, as now formulated, stipulates that in order to receive a contract to conduct AML activities, a person must be eligible under the regulations implementing Section 510(c) of the Surface Mining Act to receive permits the regulations implementing to conduct surface coal mining activities. This provision provides a tool to OSM as well as the States/Indian tribes to help them prevent persons with outstanding violations from conducting further mining or AML reclamation activities in the State. Those persons who have outstanding violations should not be allowed

to benefit under Title IV of SMCRA while such outstanding violations exist. Preclusion of Title IV contract eligibility to persons owning and controlling surface coal mining operations encourages compliance with Title IV and V requirements by persons seeking AML contracts.

While OSM believes that there are a number of methods which might be used by a State/Indian tribe to achieve this end, it acknowledges that an "AVS check" is probably the least burdensome and time-consuming. However, such a check presupposes that the potential contractor has submitted ownership and control information and violation history information to either OSM or the State regulatory authority, for entry into the AVS. Once such data entry is accomplished, the workload and time delay impacts on the Federal Government, the State, or the potential contractor, should be minimal. OSM, through its AVS Office in Lexington, will provide assistance to any potential contractor to enter needed information into the AVS.

In order to provide information that will allow the States to meet this requirement, potential contractors may submit to either OSM or the State regulatory authority that ownership and control information enumerated at 30 CFR 778.13(c) and (d). OSM believes that it is not necessary to require other information listed in 30 CFR 778.13 and 778.14 from potential AML contractors. The AVS contains extensive information on the ownership and control relationships and violation history of a large majority of persons with outstanding violations of the Act. This information should prove sufficient, when compared to the information submitted by the potential contractor, to ensure that the contractor is eligible under Section 510(c).

Several commenters stated that OSM's proposal to deny AML contracts to successful bidders who may be listed on OSM's AVS, though appearing sensible, has serious problems which need to be addressed before a final rule is adopted.

One commenter outlined 8 problem areas. The following is a response to those highlighted problems.

1. Pre-certification process. The commenter expressed concern that AML emergency projects could be delayed for many weeks pending receipt of contractor eligibility checks from the AVS office. This commenter suggests that OSM adopt a pre-certification procedure in order to facilitate the contracting process and to prevent such delays.

OSM will be available to work with any prospective AML contractor to enter required ownership and control information into the AVS. AVS Office staff in Lexington, Kentucky, routinely work with industry to ensure that such information is complete and up-to-date. Once this information is in the system, an AVS check requires a few minutes. There is no requirement for a company to be actively seeking an AML contract before it provides such ownership and control information to OSM. Accordingly, OSM does not see any need to establish a formal pre-certification procedure, nor does it anticipate time consuming delays in achieving an AVS check.

Inquiries regarding AVS matters can be handled simply and efficiently. They can be, and generally are, made by telephone. Responses to such inquiries are routinely given in a matter of minutes, not hours or days. In order to facilitate such requests, OSM's AVS Office Program Support Branch maintains a toll free number, 1-800-643-9748, that is available to answer eligibility questions. Further, permit eligibility queries can be made by telephone, facsimile, in person, or by overnight or regular mail directly to the AVS at its Washington, DC. Headquarters, or at its Lexington, Kentucky, Field Office. All State offices have similar capabilities to process AVS checks.

OSM believes that companies bidding on projects should have the responsibility to remain eligible to receive contracts by maintaining current ownership and control information in the AVS system, and avoiding the occurrence of violations which would make them ineligible.

2. Contract mining arrangements. The commenter is concerned that companies who provide construction services to a mining company which is permit blocked might be prevented from bidding on an AML project because of their relationship to the blocked company. OSM holds entities which "own or control" operations with outstanding violations of the Surface Mining Act responsible for those violations. Depending on the specific nature of the relationship between the company seeking the AML contract and the blocked company, the AML contractor may or may not be blocked. If the AML contractor simply provided construction services to the blocked company, and was therefore not an "owner or controller" of the operation in violation, the AML contractor would not be blocked. On the other hand, if the AML contractor was an owner or controller of the operation with the violation, it would be blocked-which is the intent of this regulatory provision.

3. State contracting authority. The commenter said that OSM did not consider the impact of the regulation on State contracting systems.

OSM has considered the overall impact that complying with the requirements of the regulation would have on reclamation contracting procedures. It has concluded that the impact would be very slight. This is especially true if the burden is placed on bidders to show their eligibility early in the bidding process. (See 2 above).

4. Lack of statutory authority. A commenter said there is no authority under SMCRA to regulate construction contractors. Therefore, the regulation attempts to do what the Statute does not permit.

OSM disagrees. Section 201(c)(2) of SMCRA, *30 U.S.C. 1211(c)(2)*, authorizes the Secretary to "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this act." This grant of power is repeated in Section 413(a) of SMCRA, *30 U.S.C. 1243*, which provides that "the Secretary or the State pursuant to an approved State program, shall have the power and authority, if not granted it otherwise, to engage in any work and to do all things necessary or expedient, including the promulgation of rules and regulations, to implement and administer the provisions of this title."

OSM is of the opinion that these statutory grants of power amply support the authority of the Secretary to promulgate this regulation.

5. APA requirements. The commenter claims that 30 CFR 773.15(b)(1) was not intended to be applied to contractors bidding on AML projects. To apply it now is contrary to the Administrative Procedures Act (APA).

OSM disagrees. OSM complied with all requirements of the APA in promulgating and adopting 30 CFR 773.15(b)(1), and is complying with all such requirements in promulgating this rule. This requirement was discussed in the proposed rule published November 8, 1991 (*56 FR 57376, 57401*). OSM has received many comments on this proposed rule and after carefully considering these comments, has decided to promulgate this final rule with only slight modifications.

6. Constitutional challenge. The commenter claims that the ownership and control rules adopted October 3, 1988, are constitutionally deficient.

OSM disagrees. This question has already been raised, and is currently being considered by the United States District Court for the District of Columbia, *National Wildlife Federation v. Lujan*, No. 88-3117 (D.D.C.), (consolidated with Nos. 88-3464, 88-3470). The court has not yet ruled, nor did it enjoin OSM from enforcing the rule during the pendency of the court challenge. OSM considers its actions to be proper.

7. Innocent parties. The commenter said that innocent individuals are being prevented from pursuing their occupations simply because of their past associations.

OSM disagrees. Congress, in adopting Section 410(c) of SMCRA, *30 U.S.C. 1260*, did not believe that individuals who own or control operations with outstanding violations were "innocent" but instead should be held accountable. All such persons have an opportunity to rebut their ownership or control relationship to the violator. If they cannot rebut this relationship, OSM believes it to be appropriate, as well as consistent with Congressional intent, to prevent such individuals from mining or benefitting from mining and reclamation activities.

8. Unnecessary burden. The commenter says that adopting this rule will cause an unnecessary burden because there is no limitation on how far up or across the ownership and control chain an applicant must go in providing information.

OSM disagrees. As mentioned earlier, this rule does not impose separate information submittal requirements. In many instances, information currently contained in the AVS will suffice. OSM currently has proposed new "permit information" provisions in relationship to AVS ownership and control requirements, Proposed Rule, Use of the Applicant/Violator Computer System in Surface Coal Mining and Reclamation Permit Approval, *56 FR 45780 et seq.*, (September 6, 1991). As part of the process of considering comments on this proposal and finalizing the rule, OSM is considering issues related to the limits placed on permit information requirements.

In addition to the eight issues raised by the above commenter, other commenters stated their opposition to the proposed rule, on the basis that it would (a) be contrary to State contracting law and unenforceable; (b) be time consuming; and (c) needlessly intrude upon State sovereignty.

OSM disagrees with all these points. In addressing (a), OSM notes that States must adopt statutes and regulations that implement the Federal requirements. Accordingly, if this requirement does conflict with State contracting laws, the States will be required to remedy this situation by adopting the appropriate statutory and regulatory authority. As previously noted, OSM considers the adoption of these statutory and/or regulatory changes to be an important priority item. OSM will cooperate with the States and Indian tribes to assist in making required changes and provide a phase-in period as determined on a case specific basis that takes into account the particular regulatory process in each jurisdiction. As to (b), as OSM noted above under 1, AVS checks can be performed very rapidly. Furthermore, regarding (c), OSM does not believe this intrudes upon State sovereignty. Rather, OSM believes that this regulation represents an additional tool to be used by the States to ensure that mining and reclamation activities are conducted to the highest possible standards by the most qualified and responsible persons available.

Another commenter noted that the rule was unnecessary, since States already have the ability to prevent contractors from receiving AML contracts based on their record of past performance and other factors without mandatory AVS checks. OSM points out that this regulation requires mandatory AVS checks. That is, it requires that a successful bidder for an AML contract be eligible to receive permits to mine under 30 CFR 773.15.

PART 875 - NONCOAL RECLAMATION

GENERAL

Part 875 sets forth the requirements for reclamation of noncoal mined lands and water conducted under Title IV of SMCRA by State and Indian Reclamation Programs. OSM is altering the contents of several provisions and adding additional subsections to reflect Congress's new directive regarding the funding of noncoal projects. Sections 875.1 and 875.11 are not being revised. In essence, Congress has created a two-tiered process for addressing noncoal problems. Prior to completing all known coal problems, Congress has limited a State's/Indian tribes' ability to do noncoal work. This is shown in Section 875.12. A State/Indian tribe desiring to implement a greatly expanded noncoal reclamation program (see Sections 875.14-19), or what could be called the second tier, would first have to certify that it had completed all known coal problems and the Director would have to concur in the finding (see Section 875.13).

Section 409 of SMCRA, as enacted in 1977, authorized States and Indian tribes to undertake noncoal reclamation activities if: (a) the Governor of a State or the Chairman of an Indian tribe requested funding and the State had either completed all known coal reclamation objectives or (b) if coal problems remained, the project for which funding was requested was necessary to protect the public health and safety. The Secretary has no independent authority to undertake noncoal reclamation activities, and only the States and Indian tribes, utilizing AML funds allocated pursuant to Section 402(g)(2) (as amended in 1990, this section is now Section 402(g)(1)), could carry out such tasks.

In 1982 OSM established the eligibility criteria for noncoal projects utilizing its rulemaking authority under Section 412(a) of SMCRA. Essentially, the eligibility criteria that applied to coal were also applied to noncoal. OSM had reviewed the legislative history of Section 409 and concluded that Congress intended the eligibility requirements for noncoal reclamation be consistent with the statutory eligibility requirements contained in Section 404 of SMCRA that applied to coal mined lands and waters. Since the source of the funds for all reclamation conducted under Title IV of SMCRA comes from a fee collected from coal mine operators, less stringent requirements for noncoal reclamation cannot be logically justified in fairness to the coal mine operators. Moreover, there is no basis in the legislative history of Section 409 (*30 U.S.C. 1239*) to justify a conclusion that Congress intended to allow funding for reclamation on noncoal mineral lands and water abandoned after August 3, 1977.

The noncoal regulations did not contain a definition of what constituted a threat to the public health and safety (i.e. in order to receive funding for a noncoal project prior to the completion of all coal problems) nor did they explicitly establish a formal procedure to follow regarding the transition from a coal reclamation program to a noncoal reclamation program.

As to the issue of what constituted a threat to the public health and safety, OSM did establish a policy providing that: (a) There must be a clearly definable threat; (b) the threat must present a danger that results in a high probability of serious physical harm to the health or safety of people; (c) the threat cannot await resolution until all coal projects have been completed; (d) the project must be necessary and appropriate to abate, control, or prevent the threat; and (e) there is no private party legally responsible under any other Federal or State law to abate, control, or prevent the threat.

Similarly, in regard to a State's transition to a noncoal program, OSM established a procedure requiring a specific review of a State's finding prior to funding noncoal projects. The significant features of the procedure were: (1) Coordination with the State regarding its finding that all coal problems had been addressed; (2) notification of the public, through publication in the Federal Register, regarding the State's finding of the completion of all coal problems and/or specific request for comments; and (3) assuring no known coal problems are unaddressed and an agreement with the State that if eligible coal problems occur in the future, the State would give such projects its highest funding priority.

OSM has in the past provided flexibility to the States in making the finding that all known coal problems have been addressed. This was done in two specific ways. First, OSM did not order an independent analysis of the State's certification since such an analysis would not only be time consuming and costly, but it could cause an unnecessary disruption of the efficient distribution of funds to the State (i.e. no monies would be granted to a State until a study had been completed). Second, the Secretary did not require that all coal projects actually be completed; rather, it was sufficient that all coal problems had either been addressed or were in the process of being addressed through a current grant application. Again, the rationale for not waiting until the coal projects were completed was to avoid, as much as possible, an interval where the State's administrative staff would be idle awaiting the completion of one final project. OSM believes this process was in accord with the Congressional mandate in Section 405(d) granting the State "exclusive responsibility and authority to implement the provisions of its approved program."

Such flexibility, OSM believed, was warranted since it provided for the efficient utilization of funds and personnel and did not jeopardize the State's ability to address any coal problems which might have been missed or might arise in the future. In order to obtain the Secretary's concurrence that all known coal problems had been addressed, a State or Indian tribe would have to agree to give any coal problem which might arise in the future its top funding priority. Thus, the transition from a coal program to a noncoal program did not jeopardize funding future coal reclamation and allowed States flexibility in how they utilized their funds and planned for the transition.

The amendments to Title IV enacted in 1990 significantly affect how and when a State/Indian tribe undertakes noncoal reclamation activities. There are eight major provisions.

First, prior to the completion of all coal problems, a State or Indian tribe now can undertake only noncoal projects which protect the public health, safety, general welfare, and property from the extreme danger of the adverse effects of mining practices. In other words, a priority 1 type of project (see Section 403(a) of SMCRA).

Second, the amendments specifically adopt the same eligibility requirements that are applicable to coal reclamation work.

Third, following certification by a State or Indian tribe of the completion of all known coal problems and the Secretary's concurrence, the State or Indian tribe may establish a noncoal reclamation program which utilizes the top three priorities applied to coal projects (extreme danger, danger, and environmental-Section 411(c)); establishes eligibility criteria for lands and water which are similar in most respects to the criteria originally enacted in Section 404 of SMCRA in Public Law 95-87; and utilizes the same lien requirements and land acquisition authorities that would be applicable to coal.

Fourth, Congress specifically expanded the scope of funding involving projects relating to the protection, repair, replacement, or enhancement of facilities utilized by the public which are affected by coal or noncoal mining activities.

Fifth, Congress adopted language which would allow the Secretary to approve funding for projects where the Governor of a State or the head of a governing body of an Indian tribe determined there is a need for activities or construction of specific buildings or facilities related to coal or mineral industry in States or on Indian lands impacted by coal or minerals development.

Sixth, Congress specifically prohibited funding for projects which are designated for remedial action pursuant to the Uranium Mill Tailings Control Act of 1978 (*42 U.S.C. 7901*) or which have been listed for remedial action pursuant to the Comprehensive Environmental Response Compensation and Liability Act of 1980 (*42 U.S.C. 9601*).

Seventh, Congress enacted limited immunity for States and Indian tribes under any provision of Federal law for any costs or damages as a result of action taken or omitted in the course of carrying out an approved abandoned mine reclamation plan.

Eighth, Congress provided that nothing in the amendments should be construed to affect the certifications made by the States of Wyoming, Montana, and Louisiana.

To explain these eight major revisions to the noncoal reclamation authority in SMCRA, OSM has made several amendments to part 875.

DISCUSSION

SECTION 875.10 - INFORMATION COLLECTION

OSM added a Section 875.10 which deals with the information collection requirements contained in part 875. This section contains a list of the information collection requirements contained in part 875, the OMB clearance number, the estimated reporting burden per respondent for complying with the information collection requirements and the OSM and OMB addresses where comments regarding the information collection requirements may be sent.

SECTION 875.12 - ELIGIBLE LANDS AND WATER PRIOR TO CERTIFICATION

OSM has established two eligibility sections. The first, Section 875.12, reflects Congress' directive to limit expenditures for noncoal projects until a State had certified that all known coal problems had been addressed. Subsection 875.12 specifically limits funding prior to certification to lands which were mined and abandoned prior to August 3, 1977; when there is no continuing reclamation responsibility; and when the project relates to the protection of the public health, safety, general welfare, and property from extreme danger of adverse effects of noncoal mining practices (i.e., a priority 1 project-see Section 403(a) of SMCRA). SMCRA as enacted in 1977 was broader in scope and had allowed States to undertake noncoal projects, prior to completing all coal projects, if the noncoal project related to the protection of the public health and safety. OSM has tried to treat States and Indian tribes similarly. Thus, the language in Section 875.12 would provide that the Governor of a State or the equivalent head of an Indian tribe would have to request the noncoal funding.

Congress directed the limiting language of Section 409 due to a perception that OSM had been lax in allowing the States to use funds for noncoal purposes prior to their certifying the completion of all known coal projects. By limiting noncoal projects to a priority 1 type problem (extreme danger), Congress intended to limit the use of AML monies for noncoal projects in States which had not completed all abandoned coal mine projects. H.R. Report No. 294, 101st Congress, 1st Session 32 (1977).

The second eligibility section is Section 875.14 which greatly expands the noncoal reclamation capabilities of the States and Indian tribes and is only applicable after a State or Indian tribe has met the certification requirements set out in Section 875.13. This subsection is discussed after Section 875.13.

One commenter stated the preference that noncoal AML reclamation be allowed as long as all known coal projects are completed or have been funded by OSM and the State/Indian tribe is in the process of certification. This would be in keeping with past practices and would allow the proper transition to noncoal reclamation.

Another commenter stated that States/Indian tribes should be required to certify the completion of all coal problems prior to obtaining certification and the right to proceed to noncoal reclamation activities.

OSM has decided not to place new limitations when noncoal projects can be initiated by the States/Indian tribes. Noncoal projects may be funded when all AML coal projects have either been accomplished or funds have been granted to carry out the remaining coal projects. If States/Indian tribes had to wait until the last coal projects were actually

completed, the State AML staff might be idle for two or three years. Nothing would be gained by such a delay. OSM currently requires that if coal projects are identified, such projects must be given top priority by the States/Indian tribes. Thus, even though States/Indian tribes may be allowed to move on to noncoal projects prior to the actual completion of all coal reclamation activities, OSM is confident that coal work, whenever it is identified, will be given top priority. Moreover, given the certification review process, OSM believes that if known abandoned coal lands still exist, they will be identified through this review process. Once identified and brought to the State's/Indian tribe's attention, such coal projects would then have to be addressed before certification could be finalized.

SECTION 875.13 - CERTIFICATION OF COMPLETION OF COAL SITES

This section sets forth the requirements necessary for a State/Indian tribe to fully implement a noncoal reclamation program. In order to fully implement a noncoal reclamation program as set forth in Section 411 of SMCRA, a Governor of a State or the equivalent head of an Indian tribe would have to certify to the Secretary, who has delegated this certification authority to the Director of OSM, that the State/Indian tribe had achieved all known coal related reclamation objectives (i.e., priorities 1 to 5). Section 875.13(a) provides the requirements for this certification. Briefly, a State/Indian tribe has to provide a discussion regarding the process and rationale for its certification, along with an analysis of the public involvement process it used and any public comments. These materials would assist the Director in his concurrence finding and ensure that the State/Indian tribe properly canvassed the public to ascertain whether, indeed, all coal problems had been addressed.

Subsection (b) describes the Director's review of the certification process. At a minimum the Director would prepare a Federal Register notice informing the public of the State's/Indian tribe's proposed certification. After a review of the public comments and any other relevant information, the Director would publish a final notice regarding his decision. If the Director concurs in the State's/Indian tribe's finding, such concurrence would be premised on the State's/Indian tribe's pledge to immediately give the highest priority to any coal problems which thereafter arise. If a coal problem does occur, the State/Indian tribe would carry out the coal reclamation activity under the State/Indian tribe authorities relating to coal and not pursuant to the noncoal authority in Section 411 of SMCRA.

SECTION 875.14 - ELIGIBILITY OF LANDS AND WATER SUBSEQUENT TO CERTIFICATION

This is the second eligibility section for noncoal. This subsection marks the beginning of the provisions relating to a State's/Indian tribe's noncoal reclamation program, a program which is only implemented after the requirements set forth in Section 875.13 have been met.

The new eligibility requirements allow funding for lands, waters, and facilities which were mined and abandoned in an inadequate reclamation status prior to August 3, 1977, and for which there is no continuing reclamation responsibility under State or other Federal laws. In determining eligibility under this subsection, for Federal lands, waters, and facilities under the jurisdiction of the Forest Service or Bureau of Land Management, in lieu of the August 3, 1977 date, the applicable dates are August 28, 1974 and November 26, 1980, respectively. As noted in H.R. Report 294, these dates refer to the promulgation of surface management regulations for Mining Law of 1972 operations by these agencies. H.R. Report No. 294, 101st Congress, 1st Session 34 (1989).

A subsection (b) has also been included in section 875.14 to clarify that if a coal problem is found or occurs after certification a State/Indian tribe is required to address this problem utilizing State/Indian tribe share monies no later than the next grant cycle. No Federal share monies will be distributed to a certified State/Indian tribe regardless of whether coal problems occur. In addition, States/Indian tribes would be required to address the coal problems utilizing its coal authority; that is, the State/Indian tribe plan provisions relating to Sections 401 through 410 of SMCRA.

SECTION 875.15 - RECLAMATION PRIORITIES FOR NONCOAL PROGRAM

This section establishes the reclamation priorities applicable to a State/Indian tribe noncoal reclamation program following the certification of all known coal problems. Reclamation projects involving the restoration of lands and water adversely affected by past mineral mining, as well as projects involving the protection, repair, replacement, construction, or enhancement of utilities, such as those relating to water supply, roads and other such facilities serving the public adversely affected by mineral mining and processing practices and the construction of public facilities in communities impacted by coal or other mineral mining, would have to reflect three priorities.

The first priority is the protection of public health and safety and general welfare from the extreme danger of adverse effects of mineral mining processes. The second priority is the protection of public health, safety, and general welfare from the adverse effects of mineral mining. The third priority is the restoration of lands and waters previously degraded by the adverse effects.

OSM notes that Section 411(c) of SMCRA only contains three priorities. There was some confusion, therefore, expressed by commenters regarding a fourth priority set forth in OSM's proposed rule. Based on comments received, and its review of the statutory language OSM has decided to delete this fourth priority in the final rule.

OSM agrees with the commenters that the best way to deal with community impact assistance issues is not to create a fourth priority, but rather to follow the explicit language of the amendments to Title IV of the Act and to relate these projects back to one of the three priorities listed in Section 411(c) of SMCRA. Accordingly, OSM has deleted the reference to a fourth priority in the final rules. If a State wishes to undertake a project relating to community impact assistance pursuant to Section 411(e) of SMCRA, then it must prioritize such a project based on the priority language specified in Section 411(c) of the Act.

Subsection 875.15(c) addresses the issue of "enhancement." The noncoal reclamation priorities provide for projects which protect, repair, replace, or "enhance" facilities or utilities that may be adversely affected by mining processes or practices. In order to provide some parameters involving the scope and size of "enhancement" projects, OSM's proposed rules contained detailed criteria relating to the availability of alternative funding sources. This information would have been used to assess the necessity for funding these types of projects. In response to comments received on the proposed rule, however, OSM has elected to drop these criteria. They are not mandated by SMCRA, and they could infringe upon the Congressional directive in Section 405(d) of SMCRA that States are to be given the exclusive responsibility and authority to implement the provisions of the approved program.

States and Indian tribes will be allowed to enhance facilities or utilities in order to meet local, State, or Federal public health, safety or other applicable code requirements but would not be able to use AML funds to expand the service area of a utility or facility service to another area under Section 875.15(a), (b) or (c) if it is not necessary to address an AML problem. For example, although a State may replace and upgrade (enhance) a waterline damaged by past mining, it would not be able to use the authority in Section 411(e) regarding "enhancement" to use AML funds to extend the waterline to a nearby community not impacted by the AML problem. We note, however, that such an extension might be authorized under the provisions of Section 411(f).

Subsection (d) addresses a new provision in SMCRA (Section 411(f)) which allows a State to request funding notwithstanding the priorities in Section 411(e) for a public facility if a Governor of a State or the head of a governing body of an Indian tribe determines there is a need for the construction of the public facility related to the coal or minerals industry in States or on Tribal lands impacted by coal or minerals development.

The proposed rules had required extensive public review and detailed accounting of alternative funding sources. Many commenters objected to such requirements as being unauthorized by SMCRA and an intrusion into their "exclusive responsibility" to administer their approved program. Section 411(f) requires that where a State/Indian tribe determines there is a need for activities or construction, the Secretary must concur in that need prior to the funding of such activities or construction. It is clear that the State/Indian tribe must first justify a need and then OSM must concur. OSM is concerned that the AML Program, which is financed by a tax on coal production, not be "side tracked" from its primary mission to reclaim lands and waters damaged by coal and noncoal mining processes. Accordingly, prior to approval, projects involving the construction of facilities pursuant to Section 411(f) of SMCRA would be given extensive public review.

Subsection (e) would specify that each State grant application for funding under Section 411(f) of SMCRA would have to include information regarding (1) the need or urgency of the activity or facility; (2) the expected impact on the mining industry in the State; (3) the availability of funding from other sources; (4) the impact on the State if the activity or facilities is not undertaken; (5) the reason why the project was selected over other projects related to the public health and safety or to the environment; (6) the extent of the public involvement in the State's decision, and (7) funding decisions made by other local, State, and Federal agencies with oversight for such facilities.

These requirements would assist the Director in determining whether a "need" exists, whether the public has been fully appraised and informed of the request, and whether other Federal and State agencies with primary responsibility for such facilities or activities have been contacted and involved in the project design and funding request.

Several commenters objected to the requirements regarding the submission of information on alternative funding sources for the construction or enhancement of public facilities relating to Section 411(f) of SMCRA. The information is either not available or is irrelevant, they argued. The State or Indian tribe need only meet the requirements set out in Section 411 of SMCRA in order to qualify for funding. Other commenters questioned how the "availability of funds" from other sources could ever be documented. These commenters believed that all conditions other than those expressed in Part 411 of SMCRA should be deleted.

OSM disagrees with this comment and has decided to retain requirements regarding the submission of alternative funding sources for the reasons discussed above. Since Congress has specifically directed that the Secretary concur in any State decision regarding the requirements set forth in Section 411(f) of SMCRA, OSM believes that this information is necessary to carry out such responsibilities.

Commenters also stated that OSM needs to clarify the distinction between eligible assistance under Sections 411(e) and (f).

OSM sees no need to provide further regulatory language clarifying the difference between Sections 411(e) and (f). Section 411(f) is clearly outside the normal reclamation priorities and may be utilized at any time after certification by the Governor of a State or head of a governing body of a Indian tribe if the criteria in Section 411(f) are met. OSM has not included detailed information requirements for public facilities funding provided pursuant to Section 403(b) or 411(e) of SMCRA. These sections specifically deal with facilities which have been adversely affected by past mining abuses. SMCRA does not require any concurrence by the Secretary for funding such projects. The scope of public facilities funded under Section 411(f) of SMCRA, however, is much greater. These projects are not related to any physical damage from past mining. Rather they relate solely to situations where the Governor of a State or equivalent head of an Indian tribe believes there is a need for the facility and the facility is related in some way to the coal or minerals industry in the State or Indian tribe. Under such circumstances, the Secretary must concur. OSM views this requirement and this situation as being distinct from other public facility funding.

One commenter stated that neither Title IV nor the proposed AML rule defines the term "minerals industry" as it is used in Section 411(f) of SMCRA. The commenter states that OSM should make it clear whether the definition is the same as that found in Title V of the Act.

OSM agrees with the commenter. The term "minerals industry" as used in section 411(f) of SMCRA refers to the same minerals as are specified in Section 701(14) of SMCRA. However, no new regulatory provisions are required.

A commenter stated that they did not believe that congress intended to allow for the construction of public facilities under Section 411(f) prior to reclamation of all adverse effects of past mining activities. Accordingly, the agency should include language mandating the completion of the priorities in Section 411(c) prior to approving any such funding.

OSM disagrees with this comment and has made no changes to the final regulations as suggested. As stated previously, OSM interprets the language in Section 411(f) as being independent of the priorities specified in Section 411(c) of SMCRA. That is, a State Governor or head of a governing body of an Indian tribe may request funding for activities pursuant to Section 411(f) at any time after certification. There is no requirement that a State or Indian tribe complete all known noncoal reclamation before utilizing this authority. The commenters' premise is based on the original statutory language of Section 402(g)(2) as enacted in 1977. This section provided that once a state had completed all of its coal and noncoal reclamation, it could utilize AML funds for community impact assistance. This old statutory scheme was deleted, and OSM can find no references in the legislative history which supports the commenter's position. Indeed, if the commenter's position were proper, logic would dictate that Congress would have merely made the language in Section 411(f) the last priority specified in Section 411(c) of SMCRA. This was not done, however, and there is no reference to the priority section. In the absence of restricting language in Section 411(f) or qualifying language in Section 411(c),

OSM believes the proper interpretation is to permit States and Indian tribes to utilize the authority in Section 411(f) without regard to the completion of the priorities specified in Section 411(c).

In line with the preceding rationale, OSM also declines to add the additional language urged by the commenter. This language does not specifically add any additional guidance that is not already available to the States and Indian tribes.

Other commenters stated that they agreed generally with the need to establish criteria for funding noncoal construction projects, as set forth in proposed Section 875.15(d). However, they urged OSM to include a provision that would prohibit any funding from AML sources to the extent that funding is available from other State or Federal sources. Otherwise, the State will have not made the requisite showing of "need" to construct such facilities. Insertion of such a limitation would avoid using funds inappropriately for projects entirely unrelated to correcting environmental problems from past mining practices.

OSM has declined to implement this comment. OSM does not interpret the language in Section 411(f) as narrowly as the commenters suggest. "Need" does not necessarily mean that there are no other possible sources of funds. How could one ever say that a certain government has no available funds? Monies can always be transferred, or taxes raised. The term "need" refers instead to the need for construction or the need to undertake a specific activity. The allocation of State funds is an internal State matter in which the Federal Government should not be involved. The State has the responsibility to allocate its limited AML funds in order to carry out the purposes of Title IV. This program is but one small component of a much larger State budget system. When reviewing a State or Indian tribe request for funding OSM will not look at alternative funding sources but instead will confine its review to analyzing the "need" identified by the State or Indian tribe.

One commenter noted that OSM plans to conduct discussions with EPA regarding the funding of projects which may be eligible under CERCLA. This commenter questioned whether States should check all potential Title IV noncoal projects to ensure that they have not been listed on EPA's National Priority List.

As stated in the rule, sites listed for remedial action under the CERCLA are ineligible for funding under SMCRA. OSM believes therefore that the States should take whatever measures they deem necessary to ensure that this requirement is met.

SECTION 875.16 - EXCLUSION OF CERTAIN NONCOAL RECLAMATION SITES

This section sets forth noncoal reclamation sites which Congress has specifically excluded from the coverage of SMCRA. Monies cannot be used for the reclamation of sites designated for remedial action pursuant to the Uranium Mill Tailings Radiation Control Act of 1978 (*42 U.S.C. 7901 et seq.*) or the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA) (*42 U.S.C. 9601 et seq.*). OSM interprets this provision as allowing reclamation activities to proceed on any noncoal site which is not listed on EPA's National Priority List pursuant to Section 105 of CERCLA, *42 U.S.C. 9605(a)(8)(B)*.

SECTION 875.17 - LAND ACQUISITION AUTHORITY - NONCOAL

This section makes the land acquisition provisions set out in Section 407 of SMCRA and 30 CFR parts 877 and 879 of the Secretary's regulations applicable to a State's/Indian tribe's noncoal reclamation program. This section implements the provisions set forth in Section 411(g) of SMCRA.

SECTION 875.18 - LIEN REQUIREMENTS

Section 875.18 makes the lien provisions of Section 408 of SMCRA and 30 CFR part 882 of the Secretary's regulations applicable to a State's/Indian tribe's noncoal reclamation program. This provision does not alter OSM's original regulations in 30 CFR part 882 which holds the lien requirements applicable to all reclamation on private land regardless of whether it was mined for coal or noncoal purposes. Monies recovered through the satisfaction of liens filed against privately owned lands will continue to be handled in accordance with 30 CFR 872.12.

SECTION 875.19 - LIMITED LIABILITY

This section reiterates the language in Section 405(e) of SMCRA which provides that no State or Indian tribe shall be liable under Federal law for any costs or damages as a result of any action or omitted action while carrying out an

approved abandoned mine reclamation plan. This section does not preclude liability for gross negligence or intentional misconduct.

SECTION 875.20 - CONTRACTOR RESPONSIBILITY

A new Section 875.20, "Contractor responsibility" has been added to the regulations. This regulation specifies that to receive AML funds every successful bidder for an AML noncoal contract must be eligible under 30 CFR 773.15(b)(1) at the time of contract award to receive a permit or conditional permit to conduct surface coal mining operations. Such eligibility must be confirmed by OSM's automated AVS. This section is being added to assure consistency between coal and noncoal reclamation programs.

The reader is referred to Section 874.16 for a parallel discussion of this requirement. Comments received concerning the contractor responsibility requirement may be found in the discussion of that section and are applicable to both coal and noncoal reclamation.

PART 876 - ACID MINE DRAINAGE TREATMENT AND ABATEMENT PROGRAM

GENERAL

Because thousands of miles of Appalachian streams and numerous waterways have been degraded and the biological life significantly impaired or destroyed by acid mine drainage, Congress acknowledge a need to engage in an abatement and treatment program for acid mine damage through the Abandoned Mine Reclamation Act of 1990.

In response to the mandate by Congress, OSM promulgated Part 876. Part 876 is an optional program for States/Indian tribes having an approved abandoned mine land program. Up to ten percent of the funds a State/Indian tribe receives through its annual grants, both from the State/Indian tribe share and from amounts based on historical coals production, may be deposited in a special interest-bearing fund and used, without regard to lapsing of fund authority, for the purpose of acid mine drainage treatment and abatement projects in qualified hydrologic units. Plans for the use of this acid mine drainage treatment and abatement fund, which must be authorized by State law, are subject to approval by the Secretary who had delegated this authority to the Director of OSM.

The acid mine drainage abatement and treatment plan is encouraged to be developed in coordination with SCS. OSM will ask SCS and the Director of the Bureau of Mines to comment on each proposed plan. The intent of this coordination is to encourage joint efforts with projects initiated by SCS under the Rural Abandoned Mine Program. This will allow States/Indian tribes to address acid mine drainage problems on a broader basis, i.e. qualified hydrologic units, instead of a more restricted site specific approach. Through this joint approach it is anticipated that more environmentally sound and cost effective methods will be utilized. Projects to address acid mine drainage problems in hydrologic units as defined as Section 870.5 are independent of the order of priorities for projects under Section 403(a) of SMCRA.

DISCUSSION

The term "qualified hydrologic unit" has been defined at section 870.5. OSM has interpreted the statutory language to mean those lands and waters which are (1) eligible pursuant to Section 404 and include any of the first three priorities as stated in Section 403(a), or (2) proposed to be the subject of expenditures by the State/Indian tribe (from amounts available from the forfeiture of bonds required under Section 509 or from other State/Indian tribe sources) to mitigate acid mine drainage. Based upon the legislative history, it was apparent that the intent was to make both categories independently eligible for funding.

Five comments were received regarding this interpretation. The comments to a large degree merely pointed out the difference between an "and" found in Section 402(g)(7) of SMCRA and the "or" used in OSM's proposed regulations. The issue is whether this term should be limited to those units which contain both eligible Title IV and Title V sites or

whether it should also encompass units where only Title IV sites exist or eligible Title V sites. OSM believes that Congress contemplated all situations. OSM believes its definition for qualified hydrologic unit is within the intent of Congress to provide a broad comprehensive approach to the problem of acid mine drainage. A qualified hydrologic unit under a strict reading of the statute would have to contain both Title IV and Title V AML sites contributing acid mine drainage. Under the proposed and final rule, either Title IV lands contributing acid mine drainage or Title V lands contributing acid mine drainage could qualify. Adoption of this interpretation does not preclude a combination of Title IV and Title V sites and thus allows States significant discretion in setting priorities and focusing on the most serious acid mine drainage problems within their boundaries. The goal of the legislation is to contain and abate acid mine drainage problems. To artificially limit this authority to only those units which contain both Title IV and Title V sites appears unduly restrictive and illogical and therefore not in furtherance of Congress' intended goal.

One commenter raised the concern that the independent eligibility of either Title IV or Title V sites provided in the proposal would allow States to use the Fund to supplement inadequate Title V bonding systems. This cannot be done. Bonding and bond pool requirements have no relationship to the Fund and its objective to deal with acid mine drainage on a comprehensive basis. While it is true that the eligibility of Title V sites, in part, is tied to the bond forfeiture sites by the definition of qualified hydrologic unit found at 870.5, this is not intended to provide authority in any way to use the Fund to supplement inadequate bonding systems. OSM wishes, however, to stress that other Title IV funds or existing bond pool funds, or both, can be used to address acid mine drainage problems under this program.

The same commenter asked for clarification for the reference to "other State sources" in the definition of qualified hydrologic unit relative to qualified Title V units. OSM believes Congress' intent was for State/Indian tribes to share a financial commitment to the acid mine drainage problem associated with Title V activities while at the same time providing ample flexibility to the State/Indian tribes. Many sources of funding beyond bond forfeitures would be acceptable provided there is a direct connection between the funding and the qualified hydrologic unit.

It is noted that, with the exception of Section 876.1, the numerical designations of the sections of part 876 have been revised in the final regulation to reflect a more concise sequence.

SECTION 876.1 - SCOPE

This paragraph describes the scope of the program to address acid mine drainage treatment and abatement. No comments were received on this paragraph which is adopted as proposed.

SECTION 876.10 - INFORMATION COLLECTION

This section deals with information collection requirements. Since there were no comments, this section is being adopted as proposed.

SECTION 876.12 - ELIGIBILITY

This section establishes eligibility criteria for States/Indian tribes to receive funds and authorizes such funds to be deposited in either an interest-bearing special fund established under State/Tribal law or an acid mine drainage treatment and abatement fund established under State/Tribal law.

One comment was received dealing with Section 876.12(b) and recommended that States and Indian tribes have the authority to consult directly with SCS and, at the option of the State or Indian tribe, with or without OSM involvement. OSM wishes to clarify that it has no planned involvement at the planning or implementation stages. OSM's involvement is limited to approval of acid mine drainage abatement and treatment plans by the Director prior to implementation. By statutory mandate, however, the Director must give priority to those plans which will be implemented in coordination with measures undertaken by the Secretary of Agriculture under RAMP. The Director's action does not preclude the States or Indian tribes from consulting with SCS during development of the plan. Such coordination would have tangible benefits and is encouraged.

The section is being adopted as proposed with one minor change to Section 876.12(b). The reference to the Secretary approving plans in the proposal is being changed to the Director in the final rulemaking. This change is consistent with

Section 876.14 of the proposal which provides authority for approving plans to the Director and also reflects that such program authorities in the past have commonly been delegated through rulemaking to the Director for efficiency.

SECTION 876.13 - PLAN CONTENT

This section outlines the major components of the State plans for the comprehensive abatement of the causes and treatment of the effects of acid mine drainage affected by coal mining practices.

No comments were received on this section. The section is being adopted as proposed.

SECTION 876.14 - PLAN APPROVAL

This section sets forth that the Director's process for approving plans, obtaining comments from the Director of the U.S. Bureau of Mines (BOM) with regard to acid mine drainage abatement and treatment measures and associated costs and giving priority to plans that complement efforts under RAMP.

One commenter raised concern with the perceived role of the SCS in plan approval based on its limited expertise for this purpose. The commenter also wished to work directly with SCS at the State level in the development and approval of the plans with limited involvement of OSM and SCS headquarters. OSM wishes to clarify that SCS at either the State or National level has no direct responsibility for plan approval. This responsibility rests exclusively with the Director of OSM. As mentioned previously, however, coordination with RAMP efforts and SCS at the State level is encouraged. This is expected to have the added benefit of providing a basis for the Director to assign priority for those plans that complement RAMP efforts as required Section 876.14.

The same commenter believed BOM was better suited than SCS to have a lead role in plan approval. For the reasons explained above, BOM has no direct role in plan approval. The BOM role has been limited by Congress to a technical supporting role of providing comments on abatement and treatment measures and associated costs for each plan as needed by the Director of OSM in order to analyze the plans.

PART 886 - STATE RECLAMATION GRANTS

GENERAL

This part sets forth procedures for grants to States having an approved State reclamation plan for the reclamation of eligible lands and water and others activities necessary to carry out the plan as approved.

DISCUSSION

OSM set forth a grant condition in the proposed rules requiring States, prior to grant award, to ensure that a successful bidder for an AML project funded by the grant is not precluded under 30 CFR 773.15(b)(1) from receiving a permit or conditional permit to conduct surface coal mining operations. OSM has decided in the final rules to retain this language. This requirement, however, will not be a grant condition but rather has been placed in 30 CFR 874.16 and 875.20, "Contractor responsibility," as an AML program requirement. For a discussion of this rule and responses to comments, refer to 874.16 and 875.20 in this preamble.

SECTION 886.16 - GRANT AGREEMENTS

A new provision was proposed for Section 886.16(a). OSM has decided to move this proposed section in the final rule to "Contractor responsibility" in Sections 874.16 and 875.20. For further discussion regarding contractor responsibility see Sections 874.16 and 875.20 of the regulation and the associated preamble discussion. For consistency, all comments regarding contractor responsibility and the AVS are discussed in Section 874.16.

SECTION 886.23 - REPORTS

In section 886.23, a new paragraph (c) has been added to incorporate the reporting requirement under State and Indian tribe reclamation grants that, upon project completion, States and Indian tribes are required to submit to OSM a

completed Form OSM-76 (Problem Area Description Forms) for any completed coal and noncoal project. The OSM-76 is used to provide the data for the Abandoned Mine Land Inventory System. Instructions for completing and processing the completed Form OSM-76 are available in the National Abandoned Mine Lands Inventory Problem Area Description Manual. This requirement is necessary so that the Secretary may provide an updated inventory of abandoned mine land problems to Congress on an annual basis as required by Section 403(c) of the Act. Also, the information is necessary to track and report on accomplishments of the AML Program. For the purposes of updating the National Inventory, completed projects are defined as those AML construction projects funded through an approved reclamation grant, where on-the-ground reclamation has been completed and the cost figures represent final funding on the project. In promulgating this rule, OSM acknowledges that because of the nature of grant funded projects, preliminary cost figures given prior to grant closeout may be revised at a later time.

Several commenters agreed that the Secretary should provide updated AML information to Congress on an annual basis. However, they asserted, Form OSM-76 needs further modification before it can provide Congress with more accurate AML accomplishments by States and Indian tribes.

Form OSM-76 itself is not a subject of this rulemaking. In 1990, OSM conducted a separate outreach effort to solicit State and Tribal views on proposed changes to Form OSM-76. OSM deemed that changes to Form OSM-76 were essential in order to collect the additional information needed so as to note on the inventory, as required by Section 403(c) of SMCRA, those projects completed under Title IV. Form OSM-76 has been approved by OMB and was distributed to the States and Indian tribes in April 1992 for their use.

One State commenter suggested that Form OSM-76 only be submitted to OSM, pursuant to funding activity, when a project is completed. The information, it believes, submitted at the time of grant application or at any other time prior to project completion is only an estimate and may result in confusing data as well as generating a burdensome amount of paper work with very little value.

The comment is accepted in part. The regulation is revised to clarify that this rulemaking deals only with reporting requirements for approved reclamation projects. However, it must be noted that Section 403(c) of SMCRA requires the Secretary to maintain an inventory of priority 1 and 2 coal problems. In order to place sites on the OSM inventory, States and Indian tribes submit a Form OSM-76 for new problem areas, and for such new problems that occur on problem areas already in the inventory. OSM realizes that the inventory necessarily will contain estimated costs for unfunded problems and not yet completed reclamation projects. However, OSM believes that sufficient guidance and flexibility in factors to consider when making reclamation costs estimates has already been provided to States and Indian tribes through the AML reclamation program final guidelines (*45 FR 14810*, March 6, 1980), and the instructions for Form OSM-76.

Another commenter stated regarding Section 886.23(c) that the language should be modified to exclude interim program and insolvent surety bond forfeiture projects done under Section 874.12(d). The commenter believes that these sites are specifically excluded from the AML inventory per the preamble discussion on page 57387.

The comment cannot be accepted. Although interim program and insolvent surety sites need not be inventoried prior to actual funding of a reclamation project, OSM is required to update the inventory so as to reflect all projects completed under Title IV. That requirement includes interim program and insolvent surety bond forfeiture projects. For this reason, States/Indian tribes need to submit a Form OSM-76 whenever activities funded under those programs are completed in order for OSM to update the inventory.

Another commenter stated that the AML inventory has continued to serve an important role in the AML program. In order to keep the inventory current, however, OSM would provide computer print-outs semi-annually which track the status of each State's inventory.

OSM is committed to maintaining the inventory current as required by Section 403(c). While the commenter's suggestion is not directly related to the rule, OSM agrees with its intent and will work on an informal basis with the States and Indian tribes to ensure that information from the inventory is readily available.

IV. PROCEDURAL MATTERS

Federal Paperwork Reduction Act

The collections of information contained in this rule have been approved by OMB under *44 U.S.C. 3501* et seq. and assigned clearance numbers 1029-0054, 1029-0061, 1029-0063, 1029-0090, 1029-0103 and 1029-0104.

Author

The principal author of this rule is Norman J. Hess, Division of Abandoned Mine Land Reclamation, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue NW., Washington, DC 20240; Telephone: 202-208-2949.

Executive Order 12866

This final rule has been reviewed under Executive Order 12866.

Regulatory Flexibility Act

The Department of the Interior has determined, pursuant to the Regulatory Flexibility Act, *5 U.S.C. 601* et seq., that the final rule will not have a significant economic impact on a substantial number of small entities. The legislation enacted by Congress extends an existing program, and the resulting costs to the regulated industry and to consumers are not expected to vary from current levels. Further, the provisions in the legislation and the regulations changing the threshold for qualifying as a small operator from less than 100,000 tons per year of coal produced to less than 300,000 tons per year is expected to increase the number of coal operators that will qualify as small operators and thereby be eligible for economic assistance under SOAP.

Executive Order 12778 on Civil Justice Reform

This rule has been reviewed under the applicable standards of Section 2(b)(2) of Executive Order 12778, Civil Justice Reform (*56 FR 55195*). In general, the requirements of Section 2(b)(2) of Executive Order 12778 are covered by the preamble discussion of this rule. Additional remarks follow concerning individual elements of the Executive Order:

A. What is the preemptive effect, if any, to be given to the regulation?

This rule will have no preemptive effect on State/Indian tribal laws or regulations. However, while States/Indian tribes will have to amend their programs to take advantage of the additional authority provided by these regulations, the decision to do so is at their sole discretion.

B. What is the effect on existing Federal law or regulation, if any, including all provisions repealed or modified?

This rule modifies the implementation of SMCRA as described herein, and is not intended to modify the implementation of any other Federal statute. The preceding discussion of this rule specifies the Federal regulatory provisions that are affected by this rule.

C. Does the rule provide a clear and certain legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction?

The standards established by this rule are as clear and certain as practicable, given the complexity of the topics covered and the mandates of SMCRA.

D. What is the retroactive effect, if any, to be given to the regulation?

This rule is not intended to have retroactive effect.

E. Are administrative proceedings required before parties may file suit in court? Which proceedings apply? Is the exhaustion of administrative remedies required?

No administrative proceedings would be required before parties may file suit in court challenging the provisions of this rule under section 526(a) of SMCRA, *30 U.S.C. 1276(a)*. Prior to any judicial challenge to the application of the rule to

private parties, however, exhaustion of administrative procedures may be required. Applicable administrative procedures may be found at 43 CFR part 4.

F. Does the rule define key terms, either explicitly or by reference to other regulations or statutes that explicitly define those items?

Terms which are important to the understanding of this rule are set forth in 30 CFR 700.5, 701.5, 795.3 and 870.5.

G. Does the rule address other important issues affecting clarity and general draftsmanship of regulations set forth by the Attorney General, with the concurrence of the Director of the OMB, that are determined to be in accordance with the purposes of the Executive Order?

The Attorney General and the Director of the Office of Management and Budget have not issued any guidance on this requirement.

National Environmental Policy Act

OSM has prepared an environmental assessment (EA), and has made a finding that this rule will not significantly affect the quality of the human environment under Section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C). The EA and finding of no significant impact are on file in the OSM Administrative Record, room 660, 800 N. Capitol St., NW., Washington, DC.

LIST OF SUBJECTS

30 CFR Part 795

Grant programs-natural resources, Reporting and recordkeeping requirements, Small businesses, Surface mining, Technical assistance, Underground mining.

30 CFR Part 870

Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 872

Indian-lands, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 873

Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 874

Indian-lands, Surface mining, Underground mining.

30 CFR Part 875

Indians-lands, Surface mining, Underground mining.

30 CFR Part 876

Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 886

Grant programs-natural resources, Reporting and recordkeeping requirements, Surface mining, Underground mining.

Dated: April 14, 1994.

Bob Armstrong, Assistant Secretary for Land and Minerals Management.

Accordingly, 30 CFR Parts 795, 870, 872, 873, 874, 875, 876, and 886 are amended as set forth below.

PART 795 - PERMANENT REGULATORY PROGRAM-SMALL OPERATORS ASSISTANCE PROGRAM

1. The authority citation for part 795 continues to read as follows:

Authority: Sections 201, 501, 502, and 507, Pub. L. 95-87, 91 Stat. 445 (30 U.S.C. 1201 et seq.).

2. Section 795.3, the definition of "qualified laboratory", is revised to read as follows:

SECTION 795.3 -- DEFINITIONS.

* * * * *

QUALIFIED LABORATORY means a designated public agency, private firm, institution, or analytical laboratory that can provide the required determination of probable hydrologic consequences or statement of results of test borings or core samplings or other services as specified at Section 795.9 under the Small Operator Assistance Program and that meets the standards of Section 795.10.

3. Section 795.4 is revised to read as follows:

SECTION 795.4 -- INFORMATION COLLECTION.

The collections of information contained in part 795 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 et seq. and assigned clearance number 1029-0061. The information will be used to determine if the applicants meet the requirements of the Small Operator Assistance Program. Response is required to obtain a benefit in accordance with Public Law 95-87. Public reporting burden for this information is estimated to average 24.2 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, room 640 N.C., 1951 Constitution Avenue NW., Washington, DC 20240 and the Office of Management and Budget, Paperwork Reduction Project (1029-0061), Washington, DC 20503.

4. Section 795.6 is amended by revising the introduction text of paragraph (a)(2) and paragraphs (a)(2) (i) and (ii) to read as follows:

SECTION 795.6 -- ELIGIBILITY FOR ASSISTANCE.

(a) * * *

(1) * * *

(2) Establishes that his or her probable total attributed annual production from all locations on which the operator is issued the surface coal mining and reclamation permit will not exceed 300,000 tons. Production from the following operations shall be attributed to the applicant:

(i) The pro rata share, based upon percentage of ownership of applicant, of coal produced by operations in which the applicant owns more than a 10 percent interest;

(ii) The pro rata share, based upon percentage of ownership of applicant, of coal produced in other operations by persons who own more than 10 percent of the applicant's operation;

* * * * *

5. Section 795.9 is amended by revising paragraphs (a) and (b) to read as follows:

SECTION 795.9 -- PROGRAM SERVICES AND DATA REQUIREMENTS.

(a) To the extent possible with available funds, the program administrator shall select and pay a qualified laboratory to make the determination and statement and provide other services referenced in paragraph (b) of this section for eligible operators who request assistance.

(b) The program administrator shall determine the data needed for each applicant or group of applicants. Data collected and the results provided to the program administrator shall be sufficient to satisfy the requirements for:

(1) The determination of the probable hydrologic consequences of the surface mining and reclamation operation in the proposed permit area and adjacent areas, including the engineering analyses and designs necessary for the determination in accordance with Sections 780.21(f), 784.14(e), and any other applicable provisions of this chapter;

(2) The drilling and statement of the results of test borings or core samplings for the proposed permit area in accordance with Sections 780.22(b) and 784.22(b) and any other applicable provisions of this chapter;

(3) The development of cross-section maps and plans required by Sections 779.25 and 783.25;

(4) The collection of archaeological and historic information and related plans required by Sections 779.12(b) and 783.12(b) and Sections 780.31 and 784.17 and any other archaeological and historic information required by the regulatory authority;

(5) Pre-blast surveys required by Section 780.13; and

(6) The collection of site-specific resources information, the production of protection and enhancement plans for fish and wildlife habitats required by Sections 780.16 and 784.21, and information and plans for any other environmental values required by the regulatory authority under the act.

* * * * *

6. Section 795.12 is amended by revising paragraphs (a) introductory text, (a)(2) and (a)(3) to read as follows:

SECTION 795.12 -- APPLICANT LIABILITY.

(a) A coal operator who has received assistance pursuant to Section 795.9 shall reimburse the regulatory authority for the cost of the services rendered if:

(1) * * *

(2) The program administrator finds that the operator's actual and attributed annual production of coal for all locations exceeds 300,000 tons during the 12 months immediately following the date on which the operator is issued the surface coal mining and reclamation permit; or

(3) The permit is sold, transferred, or assigned to another person and the transferee's total actual and attributed production exceeds the 300,000 ton production limit during the 12 months immediately following the date on which the permit was originally issued. Under this paragraph the applicant and its successor are jointly and severally obligated to reimburse the regulatory authority.

* * * * *

PART 870 - ABANDONED MINE RECLAMATION FUND-FEE COLLECTION AND COAL PRODUCTION REPORTING

7. The authority citation for part 870 continues to read as follows:

Authority: 30 U.S.C. 1201 et seq., as amended; and Pub. L. 100-34.

8. Section 870.5 is amended by revising the definitions for "eligible lands and water" and "left or abandoned in either an unreclaimed or inadequately reclaimed condition," and adding alphabetically new definitions for "mineral owner" and "qualified hydrologic unit" as follows:

SECTION 870.5 -- DEFINITIONS.

* * * * *

ELIGIBLE LANDS AND WATER means land and water eligible for reclamation or drainage abatement expenditures which were mined for coal or which were affected by such mining, wastebanks, coal processing, or other coal mining processes and left or abandoned in either an unreclaimed or inadequately reclaimed condition prior to August 3, 1977, and for which there is no continuing reclamation responsibility. Provided, however, that lands and water damaged by coal mining operations after that date and on or before November 5, 1990, may also be eligible for reclamation if they meet the requirements specified in 30 CFR 874.12 (d) and (e). Following certification of the completion of all known coal problems, eligible lands and water for noncoal reclamation purposes are those sites that meet the eligibility requirements specified in 30 CFR 874.14. For additional eligibility requirements for water projects, see 30 CFR 874.14, and for lands affected by remaining operations, see Section 404 of the Act.

* * * * *

LEFT OR ABANDONED IN EITHER AN UNRECLAIMED OR INADEQUATELY RECLAIMED CONDITION means lands and water:

- (a) Which were mined or which were affected by such mining, wastebanks, processing or other mining processes prior to August 3, 1977, or between August 3, 1977 and November 5, 1990, as authorized pursuant to Section 402(g)(4) of the Act, and on which all mining has ceased;
- (b) Which continue, in their present condition, to degrade substantially the quality of the environment, prevent or damage the beneficial use of land or water resources, or endanger the health and safety of the public; and
- (c) For which there is no continuing reclamation responsibility under State or Federal Laws, except as provided in Sections 402(g)(4) and 403(b)(2) of the Act.

* * * * *

MINERAL OWNER means any person or entity owning 10 percent or more of the mineral estate for a permit. If no single mineral owner meets the 10 percent rule, then the largest single mineral owner shall be considered to be the mineral owner. If there are several persons who have successively transferred the mineral rights, information shall be provided on the last owner(s) in the chain prior to the permittee, i.e. the person or persons who have granted the permittee the right to extract the coal.

* * * * *

QUALIFIED HYDROLOGIC UNIT means a hydrologic unit:

- (a) In which the water quality has been significantly affected by acid mine drainage from coal mining practices in a manner that adversely impacts biological resources; and
- (b) That contains lands and waters which are:
 - (1) Eligible pursuant to Section 404 and include any of the first three priorities stated in Section 403(a); or
 - (2) Proposed to be the subject of the expenditures by the State (from amounts available from the forfeiture of a bond required under Section 509 or from other State sources) to mitigate acid mine drainage.

* * * * *

9. Section 870.10 is revised to read as follows:

SECTION 870.10 -- INFORMATION COLLECTION.

The collections of information contained in part 870 and the Form OSM-1 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 et seq. and assigned clearance numbers 1029-0090 and 1029-0063 respectively. The information will be used by the Office of Surface Mining Reclamation and Enforcement to determine whether coal mine operators are reporting accurate production figures and paying proper fees. Response is mandatory in

accordance with Public Law 95-87. Public reporting burden for this collection of information is estimated to average 2 hours (1029-0090) and 16 minutes (1029-0063) per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, room 640 N.C., 1951 Constitution Avenue NW., Washington, DC 20240 and the Office of Management and Budget, Paperwork Reduction Project (1029-0063) or (1029-0090), Washington, DC 20503.

10. Section 870.12 is amended by adding paragraph (d) to read as follows:

* * * * *

SECTION 870.12 -- RECLAMATION FEE.

* * * * *

(d) The reclamation fee shall be paid after the end of each calendar quarter beginning with the calendar quarter starting October 1, 1977, and ending September 30, 2004.

11. Section 870.15 is amended by revising paragraph (b) and the penultimate sentence of paragraph (c) to read as follows:

SECTION 870.15 -- RECLAMATION FEE PAYMENT.

* * * * *

(b) Each operator shall use mine report Form OSM-1 (or any approved successor form) to report tonnage of coal sold, used or transferred, as well as the name and address of any person or entity who, in a given quarter, is the owner of 10 percent or more of the mineral estate for a given permit, and any entity or individual who, in a given quarter, purchases ten percent or more of the production from a given permit during the applicable quarter. If no single mineral owner or purchaser meets the 10 percent rule, then the largest single mineral owner and purchaser shall be reported. If several persons have successively transferred the mineral rights, information shall be provided on the last owner(s) in the chain prior to the permittee, i.e. the person or persons who have granted the permittee the right to extract the coal. At the time of reporting, a submitter may designate such information as confidential.

(c) * * * All operators who receive a Coal Sales and Reclamation Fee Report (Form OSM-1), including those with zero sales, uses, or transfers, must submit a completed Form OSM-1, as well as any fee payment due. * * *

* * * * *

12. Section 870.17 is revised to read as follows:

SECTION 870.17 -- COMPLIANCE AUTHORITY.

The Secretary or any duly designated officer, employee, or representative of the Secretary may conduct such audits of coal sales, transfers, and use, and the payment of AML fees as may be necessary to ensure compliance with the provisions of the Act, and for such purposes shall, at all reasonable times, upon request, have access to, and may copy, all books, papers, and other documents of any person involved in a coal transaction, including without limitation, permittees, operators, brokers, purchasers, and persons operating preparation plants and tipples, and any recipients of royalty payments for the coal.

PART 872 - ABANDONED MINE RECLAMATION FUNDS

13. The authority citation for Part 872 is revised to read as follows:

Authority: *30 U.S.C. 1201*, et seq., as amended.

14. Section 872.10 is revised to read as follows:

SECTION 872.10 -- INFORMATION COLLECTION.

The collections of information contained in part 872 have been approved by the Office of Management and Budget under *44 U.S.C. 3501* et seq. and assigned clearance number 1029-0054. The information will be used by OSM to determine whether delays by States/Indian tribes in use of allocated and granted funds were due to unavoidable delays in program approval. Response is required to obtain a benefit in accordance with Public Law 95-87. Public reporting burden for this information is estimated to average one hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, room 640 N.C., 1951 Constitution Avenue NW., Washington, DC, 20240, and the Office of Management and Budget, Paperwork Reduction Project (1029-0054), Washington, DC, 20503.

15. Section 872.11 is amended by adding new paragraph (a)(6); revising paragraphs (b)(1) through (5); and adding paragraphs (b)(6) through (8) to read as follows:

SECTION 872.11 -- ABANDONED MINE RECLAMATION FUND.

(a) * * *

(6) Interest and any other income earned from investment of the Fund. Such interest and other income shall be credited only to the Federal share. In addition, an amount equal to the interest earned after September 30, 1992, shall be available pursuant to Section 402(h) of the Act for possible future transfer to the United Mine Workers of America Combined Benefit Fund.

(b) * * *

(1) An amount equal to 50 percent of the reclamation fees collected from within a State shall be allocated at the end of the fiscal year to the State in which they were collected. Reclamation fees collected from Indian lands shall not be included in the calculation of amounts to be allocated to a State. If a State advises OSM in writing that it does not intend to submit a State reclamation plan, no monies shall be allocated to the State. Amounts granted to a State that have not been expended within three years from the date of grant award shall be available to the Director for other purposes under paragraph (b)(5) of this section. Such funds may be withdrawn from the State if the Director finds in writing that the amounts involved are not necessary to carry out the approved reclamation activities.

An amount equal to 50 percent of the reclamation fees collected from Indian lands shall be allocated to the Indian tribe or tribes having an interest in those lands. This shall occur at the end of the fiscal year in which the fees were collected. If an Indian tribe advises OSM in writing that it does not intend to submit an Indian reclamation plan, no monies shall be allocated to that Indian tribe. Amounts granted to an Indian tribe that have not been expended within three years from the date of grant award shall be available to the Director for other purposes under paragraph (b)(5) of this section. Such funds may be withdrawn from the Indian tribe if the Director finds in writing that the amounts involved are not necessary to carry out the approved reclamation activities.

An amount equal to the 10 percent of the monies collected and deposited in the Fund annually, as well as 20 percent of the interest and other miscellaneous receipts to the Fund, if such amount is not necessary pursuant to Section 402(h) of the Act for transfer to the United Mine Workers of America Combined Benefit Fund, shall be allocated by the Secretary for transfer to the U.S. Department of Agriculture's Rural Abandoned Mine Program.

An amount equal to 40 percent of the monies deposited in the Fund annually, including interest, if not required to satisfy the provisions of Section 402(h) of the Act, shall be allocated for use by the Secretary to supplement annual grants to States and Indian tribes after making the allocations referred to in paragraphs (b)(1) and (2) of this section.

States and Indian tribes eligible for supplemental grants under this provision are those that have not certified the completion of all coal-related reclamation under Section 411(a) of the Act and that have not achieved the priorities stated in paragraphs (1) and (2) of Section 403(a) of the Act. The allocation of these monies by the Secretary to eligible States and Indian tribes shall be through a formula based upon the amount of coal historically produced prior to August 3, 1977, in the State or from the Indian lands concerned. Funds to be granted to specific States or Indian tribes under this paragraph may be reduced or curtailed under the following two conditions:

(i) If State or Indian tribal share funds to be granted in a year are sufficient to address all remaining eligible priority 1 or 2 coal sites in the State or on Indian lands, no additional funds under this paragraph will be provided during that year; or

(ii) If the cost to reclaim all remaining priority 1 or 2 coal sites in a specific State or on a specific Indian tribe's land exceeds the amount of State or Indian tribal share funds to be granted in a year to that State or Indian tribe pursuant to Section 402(g)(1) of the Act, but is less than the total amount of funds to be granted to the State or Indian tribe in that year utilizing State or Indian tribe and Federal funds under paragraphs (b) (1), (2), (3), and (4) of this section, the Federal funds granted under this paragraph will be reduced to that amount needed to fully fund all remaining priority 1 or 2 coal sites after utilizing all available State or Indian tribe share funds.

(5) Amounts available in the Fund that are not allocated pursuant to paragraphs (b) (1), (2), (3), and (4) of this section are authorized to be expended by the Secretary for any of the following:

(i) The Small Operator Assistance Program under Section 507(c) of the Act (not more than \$10,000,000 annually).

(ii) Emergency projects under State, Indian tribal, and Federal programs under Section 410 of the Act.

(iii) Nonemergency projects in States and on Indian tribal lands that do not have an approved abandoned mine reclamation program pursuant to Section 405 of the Act.

(iv) Administration of the Abandoned Mine Land Reclamation Program by the Secretary.

(v) Projects authorized under Section 402(g)(4) in States and on Indian lands that do not have an approved abandoned mine reclamation program pursuant to Section 405 of the Act.

(6) If necessary to achieve the priorities stated in paragraphs 403(a) (1) and (2) of the Act, the Secretary, subject to the provision below, shall grant annually not less than \$2,000,000 for expenditure in each State and Indian tribe having an approved abandoned mine land program, provided however, that annual State or Indian tribe share funds are utilized first, and that supplemental funds granted under this paragraph and paragraph (b)(4) of this section shall not exceed the costs of reclaiming all remaining priority 1 or 2 coal sites in a State or on Indian tribal land.

(7) Funds allocated or expended annually by the Secretary under Sections 402(g) (2), (3), or (4) of the Act for any State or Indian tribe shall not be deducted from funds allocated or granted annually to a State or Indian tribe under the authority of Sections 402(g) (1), (5), or (8) of the Act.

(8) The Secretary shall expend funds pursuant to the authority in Section 402(g)(3)(C) of the Act only in States or on Indian lands where the State or Indian tribe does not have an abandoned mine reclamation program approved under Section 405 of the Act.

* * * * *

16. Part 873 is added to read as follows:

PART 873 - FUTURE RECLAMATION SET-ASIDE PROGRAM

Section

873.1 Scope.

873.11 Applicability.

873.12 Future set-aside program criteria.

Authority: Pub. L. 95-87, (*30 U.S.C. 1201 et seq.*); and Pub. L. 101-508.

SECTION 873.1 -- SCOPE.

This part provides requirements for the award of grants to States or Indian tribes for the establishment of special trust accounts that will provide funds for coal reclamation purposes after September 30, 1995.

SECTION 873.11 -- APPLICABILITY.

The provisions of this part apply to the granting of funds pursuant to Section 402(g)(6) of the Act and their use by the States or Indian tribes for coal reclamation purposes after September 30, 1995.

SECTION 873.12 -- FUTURE SET-ASIDE PROGRAM CRITERIA.

(a) Any State or Indian tribe may receive and retain without regard to the three-year limitation referred to in Section 402(g)(1)(D) of the Act, *30 U.S.C. 1232*, up to 10 percent of the total of the grant funds made annually to such State or Indian tribe pursuant to the authority in Sections 402(g) (1) and (5) of the Act, if such amounts are deposited into either of the following: (1) A special fund established under State or Indian tribal law pursuant to which such amounts (together with all interest earned on such amounts) are expended by the State or Indian tribe solely to achieve the priorities stated in Section 403(a) of the Act, *30 U.S.C. 1233*, after September 30, 1995; or (2) An acid mine drainage abatement and treatment fund pursuant to 30 CFR part 876.

(b) Prior to receiving a grant pursuant to this part, a State or Indian tribe must:

- (1) Establish a special fund account providing for the earning of interest on fund balances; and
- (2) Specify that monies in the account may only be used after September 30, 1995, by the designated State or Indian tribal agency to achieve the priorities stated in Section 403(a) of the Act, *30 U.S.C. 1233*.

(c) After the conditions specified in paragraphs (a) and (b) of this section are met, a grant may be approved and monies deposited into the special fund account. The monies so deposited, together with any interest earned, shall be considered State or Indian tribal monies.

PART 874 - GENERAL RECLAMATION REQUIREMENTS

17. The authority citation for part 874 is revised to read as follows:

Authority: *30 U.S.C. 1201* et seq., as amended.

18. Section 874.1 is revised to read as follows:

SECTION 874.1 -- SCOPE.

This part establishes land and water eligibility requirements, reclamation objectives and priorities, and reclamation contractor responsibility.

19. Section 874.11 is revised to read as follows:

SECTION 874.11 -- APPLICABILITY.

The provisions of this part apply to all reclamation projects carried out with monies from the AML Fund.

20. Section 874.12 is amended by adding paragraphs (d), (e), (f), (g) and (h) to read as follows:

SECTION 874.12 -- ELIGIBLE COAL LANDS AND WATER.

* * * * *

(d) Notwithstanding paragraphs (a), (b), and (c) of this section, coal lands and waters in a State or on Indian lands

damaged and abandoned after August 3, 1977, by coal mining processes are also eligible for funding if the Secretary finds in writing that:

- (1) They were mined for coal or affected by coal mining processes; and
- (2) The mining occurred and the site was left in either an unreclaimed or inadequately reclaimed condition between August 4, 1977, and:

- (i) The date on which the Secretary approved a State regulatory program pursuant to Section 503 of the Act (*30 U.S.C. 1253*) for a State or September 28, 1994, for an Indian tribe, and that any funds for reclamation or abatement that are available pursuant to a bond or other form of financial guarantee or from any other source are not sufficient to provide for adequate reclamation or abatement at the site; or

- (ii) November 5, 1990, that the surety of the mining operator became insolvent during such period and that, as of November 5, 1990, funds immediately available from proceedings relating to such insolvency or from any financial guarantee or other source are not sufficient to provide for adequate reclamation or abatement at the site; and

- (3) The site qualifies as a priority 1 or 2 site pursuant to Section 403(a)(1) and (2) of the Act. Priority will be given to those sites that are in the immediate vicinity of a residential area or that have an adverse economic impact upon a community.

(e) Any State or Indian tribe may expend funds may available under paragraphs 402(g)(1) and (5) of the Act (*30 U.S.C. 1232(g)(1) and (5)*) for reclamation and abatement of any site eligible under paragraph (d) of this section, if the State or Indian tribe, with the concurrence of the Secretary, makes the findings required in paragraph (d) of this section and the State or Indian tribe determines that the reclamation priority of the site is the same or more urgent than the reclamation priority for the lands and water eligible pursuant to paragraphs (a), (b) or (c) of this section that qualify as a priority 1 or 2 site under Section 403(a) of the Act (*30 U.S.C. 1233(a)*).

(f) With respect to lands eligible pursuant to paragraph (d) or (e) of this section, monies available from sources outside the Abandoned Mine Reclamation Fund or that are ultimately recovered from responsible parties shall either be used to offset the cost of the reclamation or transferred to the Abandoned Mine Reclamation Fund if not required for further reclamation activities at the permitted site.

(g) If reclamation of a site covered by an interim or permanent program permit is carried out under the Abandoned Mine Land Program, the permittee of the site shall reimburse the Abandoned Mine Land Fund for the cost of reclamation that is in excess of any bond forfeited to ensure reclamation. Neither the Secretary nor a State or Indian tribe performing reclamation under paragraph (d) or (e) of this section shall be held liable for any violations of any performance standards or reclamation requirements specified in Title V of the Act nor shall a reclamation activity undertaken on such lands or waters be held to any standards set forth in Title V of the Act.

(h) Surface coal mining operations on lands eligible for remining pursuant to Section 404 of the Act shall not affect the eligibility of such lands for reclamation activities after the release of the bonds or deposits posted by any such operation as provided by Section 800.40 of this chapter. If the bond or deposit for a surface coal mining operation on lands eligible for remining is forfeited, funds available under this title may be used if the amount of such bond or deposit is not sufficient to provide for adequate reclamation or abatement, except that if conditions warrant the Secretary shall immediately exercise his/her authority under Section 410 of the Act.

21. Section 874.13 is revised to read as follows:

SECTION 874.13 -- RECLAMATION OBJECTIVES AND PRIORITIES.

(a) Reclamation projects should be accomplished in accordance with OSM's "Final Guidelines for Reclamation Programs and Projects" (*45 FR 14810-14819*, March 6, 1980).

(b) Reclamation projects shall reflect the priorities of Section 403(a) of the Act (*30 U.S.C. 1233*). Generally, projects lower than a priority 2 should not be undertaken until all known higher priority coal projects either have been accomplished, are in the process of being reclaimed, or have been approved for funding by the Secretary, except in those instances where such lower priority projects may be undertaken in conjunction with a priority 1 or 2 site in accordance with OSM's "Final Guidelines for Reclamation Programs and Projects."

22. Section 874.14 is added to read as follows:

SECTION 874.14 -- UTILITIES AND OTHER FACILITIES.

(a) Any state or Indian tribe that has not certified the completion of all coal-related reclamation under Section 411(a) of the Act, *30 U.S.C. 1241(a)*, may expend up to 30 percent of the funds granted annually to such State or Indian tribe pursuant to the authority in Sections 402(g) (1) and (5) of the Act for the purpose of protecting, repairing, replacing, constructing, or enhancing facilities relating to water supplies, including water distribution facilities and treatment plants, to replace water supplies adversely affected by coal mining practices.

(b) If the adverse effect on water supplies referred to in this section occurred both prior to and after August 3, 1977, the project shall remain eligible, notwithstanding the criteria specified in 30 CFR 874.12(b), if the State or Indian tribe finds in writing, as part of its eligibility opinion, that such adverse effects are due predominately to effects of mining processes undertaken and abandoned prior to August 3, 1977.

(c) If the adverse effect on water supplies referred to in this section occurred both prior to and after the dates (and under the criteria) set forth under Section 402(g)(4)(B) of the Act, the project shall remain eligible, notwithstanding the criteria specified in 30 CFR 874.12(b), if the State or Indian tribe finds in writing, as part of its eligibility opinion, that such adverse effects are due predominately to the effects of mining processes undertaken and abandoned prior to those dates.

(d) Enhancement of facilities or utilities under this section shall include upgrading necessary to meet any local, State, or Federal public health or safety requirement. Enhancement shall not include, however, any service area expansion of a utility or facility not necessary to address a specific abandoned mine land problem.

23. Section 874.15 is added to read as follows:

SECTION 874.15 -- LIMITED LIABILITY.

No State or Indian tribe shall be liable under any provision of Federal law for any costs or damages as a result of action taken or omitted in the course of carrying out an approved State or Indian tribe abandoned mine reclamation plan. This section shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or Indian tribe. For purposes of this section, reckless, willful, or wanton misconduct shall constitute gross negligence or intentional misconduct.

24. Section 874.16 is added to read as follows:

SECTION 874.16 -- CONTRACTOR RESPONSIBILITY.

To receive AML funds, every successful bidder for an AML contract must be eligible under 30 CFR 773.15(b)(1) at the time of contract award to receive a permit or conditional permit to conduct surface coal mining operations. Bidder eligibility must be confirmed by OSM's automated Applicant/Violator System for each contract to be awarded.

PART 875 - NONCOAL RECLAMATION

25. The authority citation for part 875 is revised to read as follows:

Authority: *30 U.S.C. 1201 et seq.*, as amended.

26. Section 875.10 is added to read as follows:

SECTION 875.10 -- INFORMATION COLLECTION.

The collection of information contained in part 875 have been approved by the Office of Management and Budget under *44 U.S.C. 3501* et seq. and assigned clearance number 1029-0103. The information will be used to determine if noncoal reclamation is being accomplished according to legislative mandate. Response is required to obtain a benefit in accordance with Public Law 95-87. Public reporting burden for this information is estimated to average 32 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, room 640 N.C., 1951 Constitution Avenue NW., Washington, DC 20240 and the Office of Management and Budget, Paperwork Reduction Project (1029-0103), Washington, DC 20503.

27. Section 875.12 is revised to read as follows:

SECTION 875.12 -- ELIGIBLE LANDS AND WATER PRIOR TO CERTIFICATION.

Noncoal lands and water are eligible for reclamation if:

- (a) They were mined or affected by mining processes;
- (b) They were mined and left or abandoned in either an unreclaimed or inadequately reclaimed condition prior to August 3, 1977;
- (c) There is no continuing responsibility for reclamation by the operator, permittee, or agent of the permittee under statutes of the State or Federal Government or by the State as a result of bond forfeiture. Bond forfeiture will render lands or water ineligible only if the amount forfeited is sufficient to pay the total cost of the necessary reclamation. In cases where the forfeited bond is insufficient to pay the total cost of reclamation, monies sufficient to complete the reclamation may be sought under parts 886 or 888 of this chapter;
- (d) The reclamation has been requested by the Governor of the State or equivalent head of the Indian tribe; and
- (e) The reclamation is necessary to protect the public health, safety, general welfare, and property from extreme danger of adverse effects of noncoal mining practices.

28. Section 875.13 is revised to read as follows:

SECTION 875.13 -- CERTIFICATION OF COMPLETION OF COAL SITES.

- (a) The Governor of a State, or the equivalent head of an Indian tribe, may submit to the Secretary a certification of completion expressing the finding that the State or Indian tribe has achieved all existing known coal-related reclamation objectives for eligible lands and waters pursuant to Section 404 of the Act (*30 U.S.C. 1234*), or has instituted the necessary processes to reclaim any remaining coal related problems. In addition to the above finding, the certification of completion shall contain:
 - (1) A description of both the rationale and the process utilized to arrive at the above finding for the completion of all coal-related reclamation pursuant to Section 403(a) (1) through (5).
 - (2) A brief summary and resolution of all relevant public comments concerning coal-related impacts, problems, and reclamation projects received by the State or Indian tribe prior to preparation of the certification of completion.
 - (3) A State or Indian tribe agreement to acknowledge and give top priority to any coal-related problem(s) that may be found or occur after submission of the certification of completion and during the life of the approved abandoned

mine reclamation program.

(b) After review and verification of the information contained in the certification of completion, the Director shall provide notice in the Federal Register and opportunity for public comment. After receipt and evaluation of all public comments and a determination by the Director that the certification is correct, the Director shall concur with the certification and provide final notice of such concurrence in the Federal Register. This concurrence shall be based upon the State's or Indian tribes commitment to give top priority to any coal problem which may thereafter be found or occur.

(c) Following concurrence by the Director, a State or Indian tribe may implement a noncoal reclamation program pursuant to provisions in Section 411 of SMCRA.

29. Section 875.14 is added to read as follows:

SECTION 875.14 -- ELIGIBLE LANDS AND WATER SUBSEQUENT TO CERTIFICATION.

(a) Following certification by the State or Indian tribe of the completion of all known coal projects and the Director's concurrence in such certification, eligible noncoal lands, waters, and facilities shall be those-

(1) Which were mined or processed for minerals or which were affected by such mining or processing, and abandoned or left in an inadequate reclamation status prior to August 3, 1977. In determining the eligibility under this subsection of Federal lands, waters, and facilities under the jurisdiction of the Forest Service or Bureau of Land Management, in lieu of the August 3, 1977, date, the applicable date shall be August 28, 1974, and November 26, 1980, respectively; and

(2) For which there is no continuing reclamation responsibility under State or other Federal laws.

(b) If eligible coal problems are found or occur after certification under Section 875.13, a State or Indian tribe must address the coal problem utilizing State or Indian tribe share funds no later than the next grant cycle, subject to the availability of funds distributed to the State or Indian tribe in that cycle. The coal project would be subject to the coal provisions specified in Sections 401 through 410 of SMCRA.

30. Section 875.15 is added to read as follows:

SECTION 875.15 -- RECLAMATION PRIORITIES FOR NONCOAL PROGRAM.

(a) This section applies to reclamation projects involving the restoration of lands and water adversely affected by past mineral mining; projects involving the protection, repair, replacement, construction, or enhancement of utilities (such as those relating to water supply, roads, and other such facilities serving the public adversely affected by mineral mining and processing practices); and the construction of public facilities in communities impacted by coal or other mineral mining and processing practices.

(b) Following certification pursuant to Section 875.13, the projects and construction of public facilities identified in paragraph (a) of this section shall reflect the following priorities in the order stated:

(1) The protection of public health, safety, general welfare and property from the extreme danger of adverse effects of mineral mining and processing practices;

(2) The protection of public health, safety, and general welfare from the adverse effects of mineral mining and processing practices; and

(3) The restoration of land and water resources and the environment previously degraded by the adverse effects of mineral mining and processing practices.

(c) Enhancement of facilities or utilities shall include upgrading necessary to meet local, State, or Federal public health or safety requirements. Enhancement shall not include, however, any service area expansion of a utility or facility not necessary to address a specific abandoned mine land problem.

(d) Notwithstanding the requirements specified in paragraph (a) of this section, where the Governor of a State or the equivalent head of an Indian tribe, after determining that there is a need for activities or construction of specific public

facilities related to the coal or minerals industry in States or on Tribal lands impacted by coal or minerals development, submits a grant application as required by paragraph (d) of this section and the Director concurs in such need, as set forth in paragraph (e) of this section, the Director may grant funds made available under section 402(g)(1) of the Act, 30 U.S.C. 1232, to carry out such activities or construction.

(e) To qualify for funding pursuant to the authority in paragraph (c) of this section, a State or Indian tribe must submit a grant application that specifically sets forth:

- (1) The need or urgency for the activity or the construction of the public facility;
- (2) The expected impact the project will have on the coal or minerals industry in the State or Indian tribe;
- (3) The availability of funding from other sources and, if other funding is provided, its percentage of the total costs involved;
- (4) Documentation from other local, State, and Federal agencies with oversight for such utilities or facilities regarding what funding resources they have available and why this specific project is not being fully funded by their agency;
- (5) The impact on the State or Indian tribe, the public, and the minerals industry if the activity or facility is not funded;
- (6) The reason why this project should be selected before a priority project relating to the protection of the public health and safety or the environment from the damages caused by past mining activities; and
- (7) An analysis and review of the procedures used by the State or Indian tribe to notify and involve the public in this funding request and a copy of all comments received and their resolution by the State or Indian tribe.

(f) After review of the information contained in the application, the Director shall prepare a Federal Register notice regarding the State's or Indian tribe's submission and provide for public comment. After receipt and evaluation of the comments and a determination that the funding meets the requirements of the regulations in this part and is in the best interests of the State or Indian tribe AML program, the Director shall approve the request for funding the activity or construction at a cost commensurate with its benefits towards achieving the purposes of the Surface Mining Control and Reclamation Act of 1977.

31. Section 875.16 is added to read as follows:

SECTION 875.16 -- EXCLUSION OF CERTAIN NONCOAL RECLAMATION SITES.

Money from the Fund shall not be used for the reclamation of sites and areas designated for remedial action pursuant to the Uranium Mill Tailings Radiation Control Act of 1978 (42 U.S.C. 7901 et seq.) or that have been listed for remedial action pursuant to the Comprehensive Environmental Response Compensation and Liability Act of 1980 (42 U.S.C. 9601 et seq.).

32. Section 875.17 is added to read as follows:

SECTION 875.17 -- LAND ACQUISITION AUTHORITY-NONCOAL.

The requirements specified in Parts 877 (Rights of Entry) and 879 (Acquisition, Management and Disposition of Lands and Water) shall apply to a State's or Indian tribe's noncoal program except that, for purposes of this section, the references to coal shall not apply. In lieu of the term coal, the word noncoal should be used.

33. Section 875.18 is added to read as follows:

SECTION 875.18 -- LIEN REQUIREMENTS.

The lien requirements found in Part 882-Reclamation on Private Land shall apply to a State's or Indian tribe's noncoal reclamation program under Section 411 of the Act, except that for purposes of this section, references made to coal shall not apply. In lieu of the term coal, the word noncoal should be used.

34. Section 875.19 is added to read as follows:

SECTION 875.19 -- LIMITED LIABILITY.

No State or Indian tribe shall be liable under any provision of Federal law for any costs or damages as a result of action taken or omitted in the course of carrying out an approved State or Indian tribe abandoned mine reclamation plan. This section shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or Indian tribe. For purposes of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence or intentional misconduct.

35. Section 875.20 is added to read as follows:

SECTION 875.20 -- CONTRACTOR RESPONSIBILITY.

To receive AML funds for noncoal reclamation, every successful bidder for an AML contract must be eligible under 30 CFR 773.15(b)(1) at the time of contract award to receive a permit or conditional permit to conduct surface coal mining operations. Bidder eligibility must be confirmed by OSM's automated Applicant/Violator System for each contract to be awarded.

36. Part 876 is added to read as follows:

PART 876 - ACID MINE DRAINAGE TREATMENT AND ABATEMENT PROGRAM

Section	
876.1	Scope.
876.10	Information collection.
876.12	Eligibility.
876.13	Plan content.
876.14	Plan approval.

Authority: *30 U.S.C. 1201* et seq., as amended.

SECTION 876.1 -- SCOPE.

This part establishes the requirements and procedures for the preparation, submission and approval of State or Indian tribe Acid Mine Drainage Treatment and Abatement Programs.

SECTION 876.10 -- INFORMATION COLLECTION.

The collections of information contained in part 876 have been approved by the Office of Management and Budget under *44 U.S.C. 3501* et seq. and assigned clearance number 1029-0104. The information will be used to determine if the State's or Indian tribe's Acid Mine Drainage Abatement and Treatment Programs are being established according to legislative mandate. Response is required to obtain a benefit in accordance with Public Law 95-87. Public reporting burden for this information is estimated to average 1,040 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, room 640 N.C., 1951 Constitution Avenue NW., Washington, DC 20240 and the Office of Management and Budget, Paperwork Reduction Project (1029-0104), Washington, DC 20503.

SECTION 876.12 -- ELIGIBILITY.

(a) Any State or Indian tribe having an approved abandoned mine land program may receive and retain, without regard to the three-year limitation set forth in Section 402(g)(1)(D) of the Act, up to 10 percent of the total of the grants made under Section 402(g) (1) and (5) of the Act to such State or Indian tribe for the purpose of abandoned mine land reclamation if such amounts are deposited into either:

(1) A special fund established under State or Indian tribal law pursuant to which such amounts (together with all interest earned) are expended by the State or Indian tribe solely to achieve the priorities stated in Section 403(a) after September 30, 1995; or

(2) An acid mine drainage abatement and treatment fund established under State or Indian tribal law.

(b) Any State or Indian tribe may establish under State or Indian tribal law an acid mine drainage abatement and treatment fund from which amounts (together with all interest earned on such amounts) are expended by the State or Indian tribe to implement, in consultation with the Soil Conservation Service, acid mine drainage abatement and treatment plans approved by the Director.

SECTION 876.13 -- PLAN CONTENT.

Acid Mine Drainage Abatement Plans shall provide for the comprehensive abatement of the causes and treatment of the effects of acid mine drainage within qualified hydrologic units affected by coal mining practices. The plan shall include, but shall not be limited to, each of the following:

(a) An identification of the qualified hydrologic unit;

(b) The extent to which acid mine drainage is affecting the water quality and biological resources within the hydrologic unit;

(c) An identification of the sources of acid mine drainage within the hydrologic unit;

(d) An identification of individual projects and the measures proposed to be undertaken to abate and treat the causes or effects of acid mine drainage within the hydrologic unit;

(e) The cost of undertaking the proposed abatement and treatment measures;

(f) An identification of existing and proposed sources of funding for such measures; and

(g) An analysis of the cost-effectiveness and environmental benefits of abatement and treatment measures.

SECTION 876.14 -- PLAN APPROVAL.

The Director may approve any plan under Section 876.13(b) only after determining that such plan meets the requirements of Section 876.13. In conducting an analysis of the items referred to in Section 876.13(d), (e) and (g), the Director shall obtain the comments of the Director of the U.S. Bureau of Mines. In approving plans under this section, the Director shall give priority to those plans which will be implemented in coordination with measures undertaken by the Secretary of Agriculture under the Rural Abandoned Mine Program.

PART 886 - STATE RECLAMATION GRANTS

37. The authority citation for part 886 is revised to read as follows:

Authority: Pub. L. 95-87; 30 U.S.C. 1201 et seq.; and Pub. L. 101-508.

SECTION 886.23 -- [Amended]

38. Paragraph 886.23(b)(2)(ii) is amended to remove the word "and" at the end of the paragraph.

39. Paragraph 886.23(b)(2)(iii) is amended to revise the period at the end of the sentence to a semicolon followed by the word "and".

40. A new paragraph (c) is added to Section 886.23 to read as follows:

SECTION 886.23 -- REPORTS.

* * * * *

(c) A Form OSM-76, "Abandoned Mine Land Problem Area Description," shall be submitted upon project completion to report the accomplishments achieved through the project.

[FR Doc. 94-12566 Filed 5-27-94; 8:45 am]
BILLING CODE 4310-05-M