

FEDERAL REGISTER: 59 FR 49178 (September 27, 1994)

DEPARTMENT OF THE INTERIOR

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

30 CFR Part 756

Navajo Nation Abandoned Mine Land Reclamation (AMLR) Plan

ACTION: Final rule; approval of amendment and concurrence with certification of completion of coal reclamation.

SUMMARY: Under the Surface Mining Control and Reclamation Act of 1977 (SMCRA), OSM is approving a proposed amendment to the Navajo Nation's AMLR plan (hereinafter referred to as the "Navajo Nation plan") and, on behalf of the Secretary of the Interior, in concurring with the Navajo Nation's certification that the Navajo Nation has abated or reclaimed all coal-related AML problems on its lands under the Navajo Nation plan. The amendment, which the Navajo Nation proposed in order for its plan to meet the requirements of the Federal regulations and SMCRA, to clarify ambiguities, and to improve operational efficiency, consists of statute and rule revisions pertaining to reclamation of interim program abandoned coal mines, coal priorities, certification of completion of coal reclamation, establishment of a noncoal reclamation program subsequent to certification including the authority to undertake community impact assistance and public facilities projects, and creation of a future reclamation set-aside fund. OSM's concurrence with the Navajo Nation's certification of the completion of all coal-related problems, which was requested by the President of the Navajo Nation, means that the Navajo Nation is now authorized to use monies from the Navajo Abandoned Mine Reclamation (AMR) fund for noncoal reclamation purposes, including the construction of public facilities.

EFFECTIVE DATE: September 27, 1994.

FOR FURTHER INFORMATION CONTACT: Thomas E. Ehmet, Telephone: (505) 766-1486.

SUPPLEMENTARY INFORMATION:

I. BACKGROUND ON TITLE IV OF SMCRA

Title IV of SMCRA establishes an AMLR program for the purposes of reclaiming and restoring lands and waters adversely affected by past mining. It also provides for Tribal or State submittal to OSM of an AMLR plan. The Secretary of the Interior adopted regulations in 30 CFR 870 through 888 that implement Title IV of SMCRA. Under these regulations, the Secretary reviewed the Tribe's or State's AMLR plan and solicited and considered comments of State and Federal agencies and the public. Based upon the comments received, the Secretary determined whether a Tribe or State had the ability and necessary legislation to implement the provisions of Title IV. After making such a determination, the Secretary decided whether to approve the Tribe or State AMLR plan. Approval granted the Tribe or State exclusive authority to administer its approved plan.

Following approval of a Tribe's or State's AMLR plan by the Secretary, an application may be submitted to OSM by a Tribe or State on an annual basis for funds to be expended by that Tribe or State on specific projects necessary to implement the approved plan. Such annual grant applications are reviewed and approved by OSM in accordance with the requirements of 30 CFR 886.

The Federal Abandoned Mine Reclamation Fund (Federal Fund), which is administered by the Secretary through OSM, is financed by a reclamation fee assessed on every ton of mined coal. Expenditures from the Federal Fund are subject to appropriation by Congress. The Federal Fund is divided into Tribal or State and Federal shares with each Indian tribe or State under a federally approved reclamation program entitled to 50 percent of the reclamation fees collected from coal operations on Indian lands or within the State. Annually, the Indian tribes or States receive reclamation project construction grants and administrative grants from their share of the Federal Fund. Subject to OSM approval, Tribes and States are also authorized to create special interest-bearing Tribe or State trust accounts into which up to 10 percent of their annual grants can be deposited. These "set-aside" accounts may be used to achieve the priorities of section 403(a) of SMCRA after September 30, 1995, or be deposited into an acid mine drainage abatement and treatment fund.

Noncoal AMLR projects can be undertaken by a Tribe or State under two scenarios, both of which are subject to OSM approval in the grants process. Prior to a Tribe or State certifying in accordance with section 411(a) of SMCRA that it has completed the reclamation of all eligible abandoned coal projects, it can expend Tribal or State share monies for those noncoal projects that are a hazard to public health and safety. After a Tribe or State has certified that it has completed reclamation of all eligible abandoned coal projects, it can then use the full amount of its Tribal or State share for abandoned noncoal mine land reclamation projects. Such noncoal projects include the construction of public facilities related to the coal or minerals industry.

II. BACKGROUND ON THE NAVAJO NATION PLAN

On May 16, 1988, the Secretary of the Interior approved, with one exception, the Navajo Nation plan as originally submitted in June 1983, resubmitted on September 6, 1983, and amended in February 1988. General background information on the Navajo Nation plan, including the Secretary's findings, the disposition of comments, the decision deferring any action on the Navajo Nation's proposal to assume the emergency response authority, and the approval of the Navajo Nation plan can be found in the May 16, 1988, Federal Register (*53 FR 17186*). Approval of the Navajo Nation plan is codified at 30 CFR 756.13.

III. PROPOSED AMENDMENT AND REQUEST FOR CONCURRENCE WITH CERTIFICATION OF COMPLETION OF COAL RECLAMATION

By letters dated April 7 and 22, 1994, the Navajo Nation submitted a proposed amendment to its AMLR plan pursuant to SMCRA (administrative record Nos. NA-207, NA-208, and NA-212). The Navajo Nation submitted the proposed amendment at its own initiative with the intent of revising its AMLR plan so it could use AMR funds to reclaim remaining interim program coal sites and for noncoal reclamation purposes, including the construction of public facilities. Interim program coal sites are eligible lands and water mined after August 3, 1977, but prior to September 28, 1984 (the date the permanent Federal regulatory program took effect on Navajo Nation lands), for which available funds for reclamation or abatement pursuant to a bond or other form of financial guarantee or from any other source are not sufficient to provide for adequate abatement or reclamation at a site.

The Navajo Nation proposed revisions to its AMLR Code of 1987 at (1) the introduction to the Navajo AMLR Code; (2) Title I, section 101, findings, and section 102, purposes; (3) Title II, sections 201(a), (b), (c) and (d), duties of the Navajo Abandoned Mine Lands Reclamation Department (NAMLRD); and (4) Title IV, sections 401(a), (b)(5), (b)(6), (c)(5) and (c)(8), Navajo AMR fund and purposes; section 402, reclamation fee; sections 403(a) and (b), objectives of the fund; section 404, eligible lands and water; sections 405(a), (b), (c), and (f), Tribal reclamation program; section 407, acquisition and reclamation of lands within the Navajo Nation adversely affected by past mining practices; section 408, liens; section 409, filling voids and sealing tunnels; section 410, emergency powers; section 411, certification of completion of coal reclamation; section 412, fund report; section 413, miscellaneous powers; and section 414, interagency cooperation.

The Navajo Nation also proposed revisions to the Navajo Nation Rules implementing the AMLR Code of 1987 at (1) section II, Part D, subsections 1 and 2, reclamation priorities; Part L, subsections 1 and 2, general reclamation requirements; Part M, subsections 1 and 2, certification of completion of coal reclamation; Part N, subsection 1, eligible lands and water subsequent to certification; Part O, subsection 1, exclusion of noncoal reclamation sites; Part P, subsections 1, 2, and 3, utilities and other facilities, and (2) section III, Part E, subsection 1, future reclamation set-aside program.

In addition, by letter dated May 4, 1994, the President of the Navajo Nation notified the Secretary of the Interior that the Navajo Nation was certifying that it had completed all of its coal reclamation projects (administrative record No. NA-213) and stated that NAMLRD intends to complete all remaining priority 1 and 2 coal reclamation projects, including interim coal reclamation projects, as required by section 403(a) of SMCRA. Reclamation projects are funded under a priority schedule, such that "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 while "priority 2" projects concern those that involve protection of public health, safety, and general welfare from adverse effects of coal mining practices. The Navajo Nation submitted the request for the Secretary's concurrence with certification of completion of all known coal-related problems with the intent that, if the Secretary concurred with the certification, the Nation would request AMR funds to pursue projects under the provisions of section 411 of SMCRA.

OSM announced receipt of the proposed amendment and the Navajo Nation's request for the Secretary's concurrence with its certification of completion of coal reclamation in the May 18, 1994, Federal Register (59 FR 25852, administrative record No. NA-214), provided an opportunity for a public hearing or meeting and public comment on the substantive adequacy of the Navajo Nation's proposed amendment and certification, and requested information concerning any known or suspected unreclaimed lands and water resources on Navajo Nation lands that would be eligible for expenditures from the AMR fund under the provisions of the Navajo Nation's reclamation program. Because no one requested a public hearing or meeting, none was held. The public comment period ended on June 17, 1994.

IV. DIRECTOR'S FINDINGS

1. THE NAVAJO NATION PLAN

As discussed below, the Director of OSM, in accordance with SMCRA and 30 CFR 756.1, 884.15, and 884.14, finds that the proposed AMLR plan amendment submitted by the Navajo Nation on April 7 and 22, 1994, meets the requirements of SMCRA and the Federal regulations at 30 CFR 884.14. Accordingly, the Director approves the proposed amendment.

a. NONSUBSTANTIVE REVISIONS TO THE NAVAJO NATION AMLR CODE OF 1987

The Navajo Nation proposed revisions to the following previously-approved provisions of its code that are nonsubstantive in nature and consist of (1) minor editorial, grammatical, and punctuation changes, (2) recodification, (3) using the term "Nation" rather than "Tribal" or "Tribe of Indians" when referring to the Navajo Nation and the terms "Navajo Abandoned Mine Reclamation Program" and "Navajo Abandoned Mine Reclamation Plan" for the Navajo Nation's reclamation program and plan, and (4) clarifying the duties and responsibilities of NAMLRD, Division of Natural Resources, and Office of Navajo Land Administration in administering the AMLR plan for the Navajo Nation (corresponding SMCRA provisions are listed in parentheses):

Introduction (introduction of SMCRA),

Title I, section 101, Findings (Title I, section 101 of SMCRA),

Title I, section 102, Purposes (Title I, section 102 of SMCRA),

Title II, sections 201(a), (c) and (d), Duties of NAMLRD (Title II, section 201 and Title IV, section 405(1) of SMCRA),

Title IV, sections 401(a) and (b)(6), Navajo Abandoned Mine Reclamation Fund and Purposes (Title IV, sections 401(a) and (b) of SMCRA),

Title IV, section 402, Reclamation Fee (Title IV, section 402 of SMCRA),

Title IV, sections 403(a)(4), (5) and (6), Objectives of Fund (Title IV, section 403(a) of SMCRA),

Title IV, sections 405(a), (b), (c), and (f), Tribal Reclamation Program (Title IV, sections 405(b), (e), and (i) of SMCRA),

Title IV, sections 407(a), (c), (c)(3), and (d) through (h), Acquisition and Reclamation of Lands Within the Navajo Nation Adversely Affected by Past Mining Practices (Title IV, section 407 of SMCRA),

Title IV, section 408(a), Liens (Title IV, section 408 of SMCRA),

Title IV, sections 409(a) and (d), Filling Voids and Sealing Tunnels (Title IV, sections 409(a) and (e) of SMCRA),

Title IV, section 412, Fund Report (Title IV, section 412 of SMCRA), and

Title IV, sections 413(b) through (e), Miscellaneous Powers (Title IV, section 413 of SMCRA).

Because the proposed revisions to these previously-approved provisions of the code are nonsubstantive in nature, the Director finds that the proposed revisions meet the requirements of SMCRA. Accordingly, the Director approves the proposed revisions to these provisions of the Navajo Nation AMLR Code of 1987.

b. SUBSTANTIVE REVISIONS TO THE NAVAJO NATION AMLR CODE OF 1987 AND NAVAJO NATION RULES IMPLEMENTING THE CODE THAT ARE SUBSTANTIVELY IDENTICAL TO THE CORRESPONDING PROVISIONS OF SMCRA AND THE FEDERAL REGULATIONS

The Navajo Nation proposed revisions to the following sections of its code and rules that are substantive in nature and contain language that is substantively identical to the requirements of the corresponding SMCRA and Federal regulation provisions (listed in parentheses).

Navajo Nation AMLR Code of 1987:

Title II, section 201(b), Duties of NAMLRD (Title II, section 201 of SMCRA),

Title IV, sections 401(c)(5) and (8), Navajo Abandoned Mine Reclamation Fund and Purposes (Title IV, section 401(c) of SMCRA),

Title IV, sections 403(a) and (b) and deletion of (a)(4), Objectives of Fund (Title, sections 403(a) and (c) of SMCRA),

Title IV, section 404, Eligible Lands and Water (Title IV, section 404 of SMCRA),

Title IV, section 409(b), Filling Voids and Sealing Tunnels (Title IV, section 409(c) of SMCRA), and

Title IV, section 411, Certification [of Completion of Coal Reclamation] (Title IV, section 411 of SMCRA).

Navajo Nation Rules:

II(D)(1) and (2), Reclamation Priorities (Title IV, sections 403(a) and 411(c) of SMCRA and 30 CFR 874.13 and 875.15),

II(L)(1)(a) through (c) and (e) through (g) and (2), General Reclamation Requirements (Title IV, sections 404 and 411(b) of SMCRA and 30 CFR 874.12 and 875.12),

II(M)(1) and (2), Certification of Completion of Coal Reclamation (Title IV, Sections 411(a) and (f) of SMCRA and 30 CFR 875.13 and 875.15),

II(N)(1), Eligible Lands and Water Subsequent to Certification (Title IV, section 411(b) of SMCRA and 30 CFR 875.14),

II(O)(1), Exclusion of Noncoal Reclamation Sites (Title IV, section 411(d) of SMCRA and 30 CFR 875.16),

II(P)(1), (2), and (3), Utilities and Other Facilities (Title IV, section 411(e) of SMCRA and 30 CFR 875.15), and

III(E)(1), Future Reclamation Set-Aside Program (Title IV, section 402(g)(6) of SMCRA and 30 CFR 873.12).

Because the proposed revisions to these sections of the code and rules are substantively identical to the corresponding provisions of SMCRA and the Federal regulations, the Director finds that the proposed revisions meet the requirements of SMCRA and the implementing Federal regulations. Accordingly, the Director approves the proposed revisions to these sections of the Navajo Nation AMLR Code of 1987 and the implementing Navajo Nation Rules.

c. TITLE IV, SECTION 401(b)(5) - INTEREST CREDITED TO THE AMR FUND

The Navajo Nation proposed new language in its AMLR Code of 1987 at Title IV, section 401(b)(5) to provide that the Navajo AMR Fund shall consist, in part, of amounts derived from "interest credited to the fund under subsection (e) of section 401 of SMCRA."

Section 401(e) of SMCRA provides that interest can be earned on that portion of the Federal AMR Fund (administered by the Secretary) not required to meet current withdrawals. Interest earned on the invested portion of the Federal Fund is distributed only to the Secretarial share of the Federal Fund. Therefore, none of the interest earned on the invested portion of the Federal Fund is distributed to any portion of the Tribal or State share of the Federal Fund which each Tribe or State receives in annual grants as provided at 30 CFR 886. Section 401(e) of SMCRA does not restrict a Tribe or State from earning interest on the AMR fund created by a Tribe or State as part of its AMLR program.

Title IV, section 401(b)(5) of the Navajo Nation AMLR Code of 1987 is interpreted to mean that the interest credited to the Navajo AMR fund is not the interest earned on the Federal Fund but is limited to interest credited from the deposit of other monies as provided in the Navajo Nation AMLR Code of 1987 by sections 401(b)(2), (3), (4), and (6) which include reclamation fees, user charges, donations, recovered monies, and other reclamation fees lawfully imposed by the Navajo Nation. The Director approves proposed section 401(b)(5) of the Navajo Nation AMLR Code of 1987 with the understanding that the interest earned is limited to the aforementioned monies deposited to the Navajo AMR fund.

d. TITLE IV, SECTION 410 - EMERGENCY POWERS

The Navajo Nation proposed deletion of its emergency powers provisions at Title IV, section 410 of its AMLR Code of 1987. Deletion of these provisions is consistent with the approval of the Navajo Nation's AMLR plan (*53 FR 17186, 17190*; May 16, 1988) where the Secretary deferred decision on the emergency response program pending additional documentation addressing the specific criteria concerning assumption of emergency response authority. Because the Navajo Nation did not submit such additional documentation, the emergency powers program was never approved. The Director, therefore, approves deletion of the provisions for emergency powers at section 410 of the Navajo Nation AMLR Code of 1987 and notes that it is the Navajo Nation's intent to delete all references to emergency powers within its AMLR Code of 1987.

e. TITLE IV, SECTION 414 - INTERAGENCY COOPERATION

The Navajo Nation proposed new language in its AMLR Code of 1987 at Title IV, section 414 to provide for interagency cooperation in implementing and administering the provisions of the Navajo Nation plan "where such cooperation does not conflict with existing Navajo Nation and/or applicable federal laws." Section 413(a) of SMCRA provides, in part, that a Tribe has the authority to engage in any work and to do all things necessary or expedient to implement and administer the provisions of Title IV. Therefore, the limitation of interagency cooperation to instances where no conflict with existing Navajo Nation or applicable Federal laws occur meets the requirements of section 413 of SMCRA. Accordingly, the Director approves section 414 of the Navajo Nation AMLR Code of 1987.

OSM notes that the Navajo Nation plan provides the authority for the Tribe to conduct a reclamation program on Navajo (Indian) lands as that term is defined in section 701(9) of SMCRA. Indian lands occur within and outside traditional reservation boundaries. Although there may be jurisdictional limitations to the Navajo Nation's authority to undertake certain reclamation actions outside the reservation, the Navajo Nation plan presents a variety of reclamation procedures and activities which would allow the Tribe to undertake its reclamation program without violating the jurisdictional rights of other parties. Because certain lands within the boundaries of the Navajo Nation Reservation are "disputed lands" and other lands are under the control of the Office of the Navajo and Hopi Indian Relocation, it is understood by OSM that any reclamation or abatement action proposed by the Navajo Nation will be coordinated with and due consideration given to concerns raised by all parties asserting ownership of these lands.

f. NAVAJO NATION II(L)(1)(d) - INTERIM PROGRAM COAL SITES

The Navajo Nation proposed the addition of provisions in its Navajo Nation Rules at II(L)(1)(d) that address interim program coal sites.

Section 402(g)(4) of SMCRA provides for the reclamation of interim coal program sites and further provides that sections 403(a) (1) and (2) of SMCRA determine which sites to reclaim.

The Navajo Nation does not have a statutory requirement that addresses reclamation of interim program coal sites. OSM acknowledges that the Navajo Nation has submitted a grant application in accordance with the provisions of 30 CFR 886 to fund reclamation of all remaining priority 1 and 2 abandoned coal mine sites, including interim program coal reclamation projects, as required by section 403(a) of SMCRA. The Navajo Nation has also demonstrated to OSM's satisfaction that the Navajo Nation AMR fund contains enough monies in reserve to address reclamation of the remaining sites. On this basis and upon approval of the proposed plan amendment that is the subject of this notice, OSM will begin reviewing the pending grant application. OSM also understands that the Navajo Nation is in the process of revising its AMLR Code of 1987 to provide for the reclamation of interim program coal sites. The Director, therefore, approves the Navajo Nation's proposed rule at section II, Part L, subsection 1(d) addressing interim program coal reclamation.

2. REQUEST FOR CONCURRENCE WITH CERTIFICATION OF COMPLETION OF COAL RECLAMATION

The President of the Navajo Nation notified the Secretary of the Interior that the Navajo Nation certifies to the completion of all its coal reclamation projects. Section 411(a) of SMCRA provides that the head of an Indian tribe may certify to the Secretary that all of the priorities stated in section 403(a) of SMCRA for eligible lands and water have been achieved and that the Secretary, after notice in the Federal Register and opportunity for public comment, shall concur with such certification if the Secretary determines that such certification is correct.

Since the Secretary's approval of the Navajo Nation plan, the Navajo Nation has conducted reclamation to correct or mitigate problems caused by past coal mining. The Navajo Nation has completed this reclamation in the order of priority set forth in section 403(a) of SMCRA. OSM acknowledges that there are remaining priority 1 and 2 abandoned coal mine sites yet to be reclaimed by the Navajo Nation, but upon approval of the grant application submitted by the Navajo Nation in accordance with 30 CFR 886 and as discussed in finding No. 1.e. above, the Navajo Nation will have addressed all known remaining pre-SMCRA and interim program abandoned coal mine lands.

Based upon the Navajo Nation's May 4, 1994, certification, and the absence of any known unreclaimed coal-related impacts, the Director of OSM, on behalf of the Secretary, concurs with the Navajo Nation's certification that all coal-related abandoned mine land problems have been abated or reclaimed, and finds that the Navajo Nation has satisfied the requirements of section 403 of SMCRA. If a coal problem occurs or is identified in the future, the Navajo Nation would have to seek immediate funding to reclaim the coal-related problem. Concurrence with the Navajo Nation's certification of completion of coal reclamation means that the Navajo Nation may now use annual grants made available under section 402(g)(1) of SMCRA to carry out activities or construction of specific public facilities related to the coal or minerals industry in accordance with section 411(f) of SMCRA.

IV. SUMMARY AND DISPOSITION OF COMMENTS

Following are summaries of all substantive written comments on the proposed amendment that were received by OSM, and OSM's responses to them.

1. PUBLIC COMMENTS

Pursuant to section 411 of SMCRA and 30 CFR 884.15(a) and 884.14(a)(1), OSM invited public comment and provided an opportunity for a public hearing on the Navajo Nation's proposed amendment and certification of completion of coal reclamation (administrative record No. NA-214). No public comments were received, and because no one requested an opportunity to testify at a public hearing, no hearing was held.

2. AGENCY COMMENTS

Pursuant to 30 CFR 884.15(a) and 884.14(a)(2), OSM solicited comments on the proposed amendment and request for concurrence with the Navajo Nation's certification of completion of coal reclamation from Federal, State, and Tribal agencies with an actual or potential interest in the Navajo Nation plan (administrative record Nos. NA-209 and NA-215).

NAVAJO ENVIRONMENTAL PROTECTION ADMINISTRATION (NAVAJO EPA)

Navajo EPA stated that the proposed amendment of the Navajo Nation plan differed from SMCRA and provided comments in a letter dated May 27, 1994 (administrative record No. NA-219), including editorial comments pertaining to the specific language proposed in the plan amendment and suggestions on how to improve such language. These editorial comments are available in the administrative record for this amendment, and a copy has been provided to the Navajo Nation. However, because these comments are nonsubstantive in nature, OSM has not addressed them below.

(1) Navajo EPA stated that the title of the Navajo Nation plan should be changed to the "Navajo Abandoned Mine Lands Reclamation Plan" to clarify that the plan refers only to abandoned mine land reclamation, and not to any active mines, over which NAMLRD has no jurisdiction. OSM responds that the Navajo Nation's Reclamation Plan is approved under Title IV, Abandoned Mine Reclamation, of SMCRA and not under Title V, Control of the Environmental Impacts of Surface Coal Mining, which provides the authority for States to administer coal mining regulatory programs. No legislation exists granting Indian tribes the authority to regulate coal mining on Indian lands.

(2) Navajo EPA indicated that the plan amendment did not incorporate standards to be used by NAMLRD for air, water, soil, radioactivity, and other topics, when deciding whether a site has been completely reclaimed. Title IV of SMCRA and the implementing Federal regulations do not require specific reclamation standards. OSM, during field reviews, provides the necessary oversight to ensure that projects funded using AMR funds meet the goals established when funding was approved.

(3) Navajo EPA suggested that section II(D)(1)(a-e) of the Navajo Nation Rules concerning reclamation priorities may need a clarifying statement to indicate that "Priority A" is the same as "priority 1," and so forth, as used in SMCRA and by NAMLRD (to designate priorities of eligible lands and water for expenditures from the Navajo AMR fund). OSM agrees that a clarifying statement would be helpful, but the dual designations are not so confusing as to affect their implementation.

(4) Navajo EPA expressed concern that section II(L)(1) of the Navajo Nation Rules pertaining to general reclamation requirements does not state that the eligibility requirements are set under SMCRA and were not devised by the Navajo Nation. OSM responds that, while the Navajo Nation Rules do not specifically reference SMCRA in this section, these rules implement the Navajo Nation AMLR Code of 1987 which is the Navajo Nation's counterpart to SMCRA. The eligibility requirements established by these rules are consistent with section 404 of SMCRA. Therefore, a specific reference to this SMCRA citation is not necessary.

(5) Navajo EPA stated that because it had found no indication that any "State" has held a reclamation bond for mining activities conducted within the Navajo Nation, the word "State" in the Navajo Nation Rules at section II(L)(2)(b)(3) concerning reclamation bonds should be deleted. This is an editorial comment, and the implication that the State may hold a bond for reclamation activities on Navajo Nation lands is immaterial.

(6) Navajo EPA commented that section II(M)(2) of the Navajo Nation Rules, which states that "[f]ollowing the concurrence by the Director [with the Navajo Nation's certification of completion of coal reclamation], the Nation may implement a noncoal reclamation program pursuant to the provisions of section 411 of SMCRA," should be revised to clarify that the "Director" is the Director of OSM. While Navajo EPA's comment is consistent with section 411 of SMCRA, which indicates that the Secretary (in this case, the Director of OSM for the Secretary) has the authority to concur with a Tribe's or State's certification, OSM does not find it necessary to require the Navajo Nation to revise this rule. In requesting the Secretary's concurrence on the Director of NAMLRD's certification of completion of coal reclamation, the Navajo Nation has complied with section 411 of SMCRA.

(7) Navajo EPA stated that the reference to "the Act" in section II(P)(1)(c) of the Navajo Nation Rules concerning utilities and other facilities is unclear. OSM interprets the term "the Act" as used in this rule to be the Navajo Nation AMLR Code of 1987 and does not agree with the statement by Navajo EPA that such term is unclear.

(8) Navajo EPA felt that section III(E) of the Navajo Nation Rules pertaining to creation of a future reclamation set-aside program did not clearly indicate what happens to Navajo AMR funds after all known coal reclamation has been completed. Navajo EPA asked whether the monies will become general funds, subject then to reappropriation by the Navajo Nation Council and whether the funds can be used for purposes other than coal reclamation. As discussed in

finding No. 2 above, upon concurrence by the Director of OSM with the Navajo Nation's certification of completion of coal reclamation, the Navajo Nation may, in accordance with section 411(f) of SMCRA, request AMR grant monies from OSM to pursue public facilities projects related to coal or mineral development. The Navajo Nation cannot reappropriate these monies for uses other than what has been approved by OSM.

(9) Navajo EPA stated that because NAMLRD had already received Council approval for the revised code, its review seems after the fact unless suggested revisions are also put through the SAS (signature approval sheet) process and presented to the Council. As required by 30 CFR 884.15 and 884.14, OSM must approve the Navajo Nation plan amendment, of which the Navajo Nation AMLR Code of 1987 is a part, before it is effective. If Navajo EPA identified inconsistencies between the code and SMCRA and the implementing Federal regulations, OSM would require the Navajo Nation to revise its AMLR Code of 1987.

(10) Navajo EPA expressed concern that although NAMLRD prepares all environmental documents required under Federal law, the documents are only reviewed by OSM, but none of the documents are reviewed by Navajo EPA, as required. This comment concerns Tribal policy and procedures, which are not inconsistent with the requirements of SMCRA and the Federal regulations.

(11) Navajo EPA noted that Title II, section 201(d) of the Navajo Nation AMLR Code of 1987 provides that NAMLRD shall be protected from suite by sovereign immunity, and that no employee can waive this immunity. However, Navajo EPA suggested that this right may be abrogated by the Federal government as provided in section 405(1) of SMCRA. Section 405(1) of SMCRA provides for Tribe or State immunity from lawsuits except those resulting from gross negligence or intentional misconduct by the Tribe or State, so to the extent that the Tribe or State is liable under Federal law, it is held liable. Therefore, OSM responds that the sovereign immunity claimed by the Navajo Nation extends to all liability situations except those involving gross negligence or intentional misconduct by the Navajo Nation.

(12) Title IV, section 401(b)(2) of the Navajo Nation AMLR Code of 1987 indicates that the Navajo AMR fund shall consist of monies deposited in the fund from sources including any user charges imposed by the Navajo Nation on or for land reclaimed pursuant to the code, after expenditures for maintenance have been deducted. Navajo EPA asked that the type of user charges be clarified, because the code does not specify if these charges refer to grazing or other non-mining activities, whether fees are already appropriated to other departments, what maintenance expenditures are being referred to, and who will conduct said maintenance. Navajo EPA stated that this section was copied directly from SMCRA and may have limited relevance as applied to the Navajo Nation. Specific criteria pertaining to the type of user charges, appropriation of fees, and maintenance are not addressed in Title IV of SMCRA or the implementing Federal regulations. Therefore, decisions made by the Navajo Nation regarding user charges it imposes under its AMLR program are limited only to the extent that they are not inconsistent with SMCRA. Because this provision of the Navajo Nation AMLR Code of 1987 is substantively identical to section 401(b)(2) of SMCRA, it meets the requirements of SMCRA.

(13) Title IV, section 401(b)(6) of the Navajo Nation AMLR Code of 1987 indicates that the AMR fund shall consist of monies deposited in the fund from sources including "all other reclamation fees lawfully imposed by the Navajo Nation." Navajo EPA expressed concern that the statement "all other reclamation fees" is extremely broad, and wondered if it is meant to include reclamation fees for active coal and non-coal mines, for sand and gravel, or oil and gas activities; whether it applies only to reclamation bonds held by the Nation, or by Federal agencies; and suggested that it is in direct conflict with regulations outlining how those fees are held and allocated. Section 402 of SMCRA provides for payment of a reclamation fee on mined coal to be deposited in the Federal AMR Fund. SMCRA and the implementing Federal regulations do not require the payment of any additional fees and do not restrict a Tribe or State from collecting other kinds of reclamation fees. Therefore, for these reasons and for the same reasons discussed in comment No. 12 above, OSM finds this provision of the Navajo Nation AMLR Code of 1987 to be consistent with section 401(b) of SMCRA.

(14) Navajo EPA pointed out a typographical error in Title IV, section (401)(c)(1) of the Navajo Nation AMLR Code of 1987. The phrase "prevent abatement" should be "prevention, abatement * * *" as in the counterpart section 401(c)(1) of SMCRA. OSM agrees with Navajo EPA in its comment and recommends that the Navajo Nation review its plan amendment to correct grammatical, punctuation, and typographical errors and inconsistencies.

(15) Navajo EPA stated that it would be in the Navajo Nation's best interests if NAMLRD inventoried and listed their priority 3, 4, 5, and 6 projects, since that would include all public facilities projects. This comment was not made in reference to a specific provision of the Navajo Nation AMLR Code of 1987 or the Navajo Nation Rules; however, the

comment appears to be directed at noncoal reclamation and having NAMLRD complete an inventory and list of public facilities projects. A Tribe or State is required only to inventory priority 1 and 2 coal sites in accordance with section 403(a) of SMCRA. NAMLRD, in accordance with section 403(c) of SMCRA, has already inventoried priority 1 and 2 coal sites. Navajo EPA also stated that it is interested in receiving a copy of the inventory of priority 1 and 2 sites to assist it in ongoing abandoned uranium mine joint reclamation projects. OSM suggests that Navajo EPA request the information from NAMLRD or contact OSM's Albuquerque Field Office.

(16) Navajo EPA suggested that since section 405(f)(7) of SMCRA requires NAMLRD to report to OSM annually on projects funded under the previous year's grant, Title IV, section 405(f) of the Navajo Nation AMLR Code of 1987 should be revised to require that the same kind of information be provided to the Division of Natural Resources and the Navajo Nation Council at the same time such information is reported as required under SMCRA. OSM responds that the Navajo Nation is complying with SMCRA reporting requirements, and if Navajo EPA requires information contained in the documentation provided by NAMLRD to OSM on an annual basis, then Navajo EPA should request this information directly from NAMLRD.

(17) Navajo EPA expressed concern that Title IV, section 407 of the Navajo Nation AMLR Code of 1987 pertaining to acquisition and reclamation of lands adversely affected by past mining practices does not clearly state whether its provisions apply only to private lands within the Navajo Nation boundaries, or to lands such as homesite leases, and individual allotments. Section 407 of SMCRA does not specify the applicability of its provisions as they relate to Indian lands. However, the Navajo Nation's jurisdiction over Navajo Nation lands was clearly defined in the approval of the Navajo Nation plan (*53 FR 17186, 17187*; May 16, 1988) and is addressed in finding No. 1.e.

(18) Navajo EPA stated that Title IV, section 411(a) of the Navajo Nation AMLR Code of 1987 should be changed to be consistent with the Navajo Nation Rules and provide that the Navajo Nation President will certify completion of coal reclamation rather than the Director of NAMLRD. Section 411(a) of SMCRA provides that the head of an Indian tribe will certify to the completion of coal reclamation. The request from the Navajo Nation for the Secretary's concurrence with its certification of completion of coal reclamation was made by the President of the Navajo Nation, which meets the requirements of section 411(a) of SMCRA and which is the tribal authority Navajo EPA asserted should make the certification. Therefore, although consistency between the Navajo Nation AMLR Code of 1987 and Navajo Nation Rules is desirable, it is not an issue in this instance.

(19) Navajo EPA stated that agreements for cooperative projects by the Navajo Nation with any Federal or State agency should be entered into with the advice of the Navajo Nation Department of Justice and the Division of Natural Resources, in addition to the Intergovernmental Relations Committee and Resources Committee of the Navajo Nation Council already indicated in Title IV, section 413(b) of the Navajo Nation AMLR Code of 1987. SMCRA does not require Tribes or States to conform to a specific administrative process but does provide the power and authority to engage in cooperative projects. (See finding No. 1.e.) OSM reviews any cooperative projects during its annual oversight of the Navajo Nation plan and AMLR grant program and determines at that time whether such projects are conducted in a manner that meets the requirements of SMCRA and the implementing Federal regulations.

(20) Navajo EPA stated that Title IV, section 413(d) of the Navajo Nation AMLR Code of 1987 should require that NAMLRD will turn over management and operation of water treatment facilities to the appropriate Tribal department, which will have the continuing staffing and expertise to run said facilities in perpetuity. This provision of the code is substantively identical to section 413(d) of SMCRA. SMCRA does not require that the management and operation of such a treatment plant be turned over to another agency for continued management and operation. The administration of the Navajo Nation's AMLR program is addressed during OSM's annual oversight and any deficiencies in the program are handled through the oversight process. If, during oversight, OSM determines that a problem exists with effective management of any part of the program, OSM would require resolution of the problem.

U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA)

EPA responded on June 13, 1994, with the following comments (administrative record No. NA-220).

(1) EPA commented that the Navajo Nation plan does not address or reference environmental requirements that may be applicable under the National Environmental Policy Act (NEPA) and that sites found to pose an environmental problem should be coordinated through NEPA to identify the appropriate clean up remedies and standards. OSM

responds, as it did at comment No. 2 of the Navajo EPA comments, that Title IV of SMCRA and the implementing Federal regulations do not require specific reclamation standards. Prior to the Navajo Nation initiating AMLR construction projects, OSM complies with the requirements of NEPA to identify environmental impacts and mitigation measures.

(2) EPA commented that the authority for certifying the completion of coal reclamation resides with the President of the Navajo Nation but that section 411(a) of the Navajo Nation AMLR Code of 1987 assigned the authority for the certification to the Director of NAMLRD. As stated in response to the same comment by Navajo EPA (comment No. 18), OSM responds that the request for concurrence with the Navajo Nation's certification was actually submitted by the President of the Navajo Nation in compliance with section 411(a) of SMCRA and in conformance with EPA's comment on which tribal authority should make the certification.

(3) EPA expressed concern that the Navajo Nation AMLR Code of 1987 does not provide for the Secretary's concurrence with the certification of completion of coal reclamation. SMCRA provides that the Secretary shall concur with a Tribe's or State's certification of completion of coal reclamation. Therefore, OSM responds that the Navajo Nation plan does not require revision for an action taken by the Secretary.

(4) EPA stated that it had understood that NAMLRD's Reclamation Plan would be revised to include work at priority 3 abandoned uranium mine sites, meaning NAMLRD would conduct work on abandoned uranium mine sites that exhibited environmental hazards and degradation. EPA stated further that it appeared no priority had been assigned to uranium sites in the Navajo Nation Rules at II(D)(2), pertaining to noncoal reclamation priorities prior to certification.

Section 403(a) of SMCRA provides, prior to certification of completion of coal reclamation, that "priority 3" is the restoration of lands and water and the environment previously degraded by adverse effects of coal mining practices. After certification, section 411(c) of SMCRA provides that priority 3 is the restoration of lands and water and the environment previously degraded by the adverse effects of mineral mining and processing practices. Title IV of SMCRA does not prioritize noncoal commodities, and sections 411 (e) and (f) of SMCRA provide that community impact assistance and public facilities projects may be undertaken as they relate to the priorities for noncoal reclamation. In this notice, OSM found that the Navajo Nation plan has been revised to meet the requirements of SMCRA and the implementing Federal regulations for noncoal reclamation subsequent to certification. OSM is aware that EPA, among others, continues to work with the Navajo Nation to develop a plan to address abandoned uranium mine sites.

(5) EPA asked that the Navajo Nation clarify provisions of its AMLR Code of 1987 and the Navajo Nation Rules to provide that the Nation's President has the authority to undertake action at a noncoal site before certification of completion of coal reclamation. The rules provide that this authority resides with the President of the Navajo Nation, but the code allows the Director of NAMLRD to conduct reclamation activities and take other remedial actions on noncoal sites. This comment is immaterial in light of the Secretary's concurrence in this notice with the Navajo Nation's certification of completion of coal reclamation on Navajo Nation lands.

(6) In a related manner, EPA suggested that the community participation process for reclamation at noncoal sites is not consistent between provisions of the Navajo Nation AMLR Code of 1987 and the Navajo Nation Rules. Specifically, EPA asked what mechanism ensures that a request for noncoal reclamation to the Director of NAMLRD will reach the President who has authority to request reclamation at noncoal sites and what feedback mechanism existed to inform the community of what actions will be taken. OSM, in approving the proposed Navajo Nation plan amendment that is the subject of this notice, has determined that the Tribe's public participation process for determining the priority of community assistance projects meets the requirements of SMCRA and the implementing Federal regulations.

(7) Finally, EPA stated that there appear to be no check-and-balance systems between NAMLRD and Navajo EPA, NAMLRD and the Division of Natural Resources, and NAMLRD and OSM. EPA feels systems are needed to ensure inter- and intra-governmental consistency and harmony within the Navajo Nation's various programs. SMCRA does not require coordination between Tribal agencies but does provide for interagency cooperation at section 414. The Navajo Nation AMLR Code of 1987 provides a similar provision at section 414. Therefore, OSM responds that it is up to the Navajo Nation itself to determine how its various departments will interact, coordinate, and establish and maintain relationships that are conducive to meeting the requirements of the Navajo Nation plan. Coordination between the Tribe and OSM already occurs as required by SMCRA and the Federal regulations. OSM also responds that it provides input into these relationships through oversight of the Navajo Nation's AMLR program.

OTHER AGENCIES

By letter dated May 5, 1994, the Utah State Historical Society provided the concurrence of the Utah Preservation Office with the determination that no part of the amendment pertains to cultural resources (administrative record No. NA-216).

The Arizona State Historic Preservation Office (SHPO) responded on June 1, 1994, that it assumed OSM had the concurrence of the Navajo Nation Historic Preservation Department (NNHPD) as to a determination of no effect on cultural resources under the National Historic Preservation Act of 1966 with respect to the consultation requirements of 36 CFR Part 800. Therefore, it would defer the determination of no effect on the NNHPD (administrative record No. NA-218).

Based upon the Arizona SHPO response, OSM contacted NNHPD on June 28, 1994. NNHPD stated it had elected not to respond and presumed that OSM would proceed as if a determination of no effect was in place (administrative record No. NA-221). OSM is not aware of any adverse effects on cultural resources that would result from the proposed amendment and certification of completion of coal reclamation, and on this basis, OSM is proceeding with its decision on the Navajo Nation submission.

V. DIRECTOR'S DECISION

Based on the above findings, the Director approves the Navajo Nation's proposed amendment as submitted on April 7 and 22, 1994.

As discussed in finding No. 1.a., the Director approves nonsubstantive revisions to the Navajo Nation AMLR Code of 1987 at sections 101, 102, 401, 402, 403, 405, 407, 408, 409, 412, and 413.

As discussed in finding Nos. 1.b., c., d., and e., the Director approves substantive revisions to the Navajo Nation AMLR Code of 1987 at sections 201, 401, 403, 404, 409, 410, 411, and 414.

As discussed in finding Nos. 1.b and f., the Director approves substantive revisions to the Navajo Nation Rules at Section II, Parts D, L, M, N, O, and P, and Section III, Part E.

The Director approves the proposed revisions of the Navajo Nation AMLR Code of 1987 and Navajo Nation Rules implementing the code with the provision that they be fully promulgated in identical form to the code and rules submitted to and reviewed by OSM and the public.

The Director of OSM, on behalf of the Secretary, also concurs with the Navajo Nation's certification, as submitted by the Nation on May 4, 1994, that all abandoned coal mine related problems have been abated or reclaimed under its AMLR plan in accordance with Title IV of SMCRA.

The effect of the Director's concurrence with the Tribe's certification is to allow the Navajo Nation to use its AMR funds for community impact assistance and construction of public facilities in areas of the Navajo Nation lands impacted by coal or minerals development, mining, or processing as provided in section 411 of SMCRA.

The Director is codifying this AMLR plan decision and concurrence with the Navajo Nation's certification of completion of coal reclamation at 30 CFR Part 756.14. The Director is also taking this opportunity to revise the addresses at 30 CFR 756.13 for OSM and the Navajo Nation.

VII. PROCEDURAL DETERMINATIONS

1. Executive Order 12866

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866 (Regulatory Planning and Review).

2. Executive Order 12778

The Department of the Interior has conducted the reviews required by section 2 of Executive Order 12778 (Civil Justice Reform) and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of Tribal AMLR plans and revisions thereof since each such plan is drafted and promulgated by a specific Tribe, not by OSM. Decisions on proposed Tribal AMLR plans and revisions thereof submitted by a Tribe are based on a determination of whether the submittal meets the requirements of Title IV of SMCRA (30 U.S.C. 1231-1243) and the applicable Federal regulations at 30 CFR Parts 884 and 888.

3. National Environmental Policy Act

No environmental impact statement is required for this rule since agency decisions on proposed Tribal AMLR plans and revisions thereof are categorically excluded from compliance with the National Environmental Policy Act (42 U.S.C. 4332) by the Manual of the Department of the Interior (516 DM 6, appendix 8, paragraph 8.4B(29)).

4. Paperwork Reduction Act

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

5. Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). The Tribal submittal which is the subject of this rule is based upon Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements established by SMCRA or previously promulgated by OSM will be implemented by the Tribe. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions in the analyses for the corresponding Federal regulations.

VIII. LIST OF SUBJECTS IN 30 CFR PART 756

Abandoned mine land reclamation program, Indian lands.

Dated: September 15, 1994.

Russell F. Price, Acting Assistant Director, Western Support Center.

For the reasons set out in the preamble, Title 30, Chapter VII, Subchapter E of the Code of Federal Regulations is amended as set forth below:

PART 756 - NAVAJO NATION

1. The authority citation for Part 756 continues to read as follows:

Authority: 30 U.S.C. 1201 et seq. and Pub. L. 100-71.

2. With the exception of the first sentence, Section 756.13 is revised to read as follows:

SECTION 756.13 -- APPROVAL OF THE NAVAJO NATION'S ABANDONED MINE LAND PLAN.

* * * * *

Copies of the approved plan are available at:

Albuquerque Field Office, Office of Surface Mining, Reclamation and Enforcement, 505 Marquette Avenue, NW., Suite 310, Albuquerque, New Mexico 87102, Telephone: (505) 766-1486.

The Navajo Nation, Navajo Abandoned Mine Land Reclamation Department, P.O. Box 308, Window Rock, Arizona 86515, Telephone: (602) 871-4941.

3. Section 756.14 is added to read as follows:

SECTION 756.14 -- APPROVAL OF AMENDMENTS TO THE NAVAJO NATION'S ABANDONED MINE LAND PLAN.

(a) Revisions to the following provisions of the Navajo Nation AMLR plan, as submitted to OSM on April 7 and 22, 1994, are approved effective September 27, 1994:

Navajo Nation Abandoned Mine Land Reclamation Code of 1987: Introduction

Section 101-Findings

Section 102-Purposes

Section 201-Duties of Navajo Abandoned Mine Lands Reclamation Department

Section 401-Navajo Abandoned Mine Reclamation Fund and Purposes

Section 402-Reclamation Fees

Section 403-Objectives of Fund

Section 404-Eligible Lands and Water

Section 405-Reclamation Program

Section 407-Acquisition and Reclamation of Lands Within the Navajo Nation Adversely Affected by Past Mining Practices

Section 408-Liens

Section 409-Filling Voids and Sealing Tunnels

Section 410-Deletion of Emergency Powers

Section 411-Certification of Completion of Coal Reclamation

Section 412-Navajo Abandoned Mine Reclamation Fund Report

Section 413-Miscellaneous Powers, and

Section 414-Interagency Cooperation

Navajo Nation Rules

II(D) (1) and (2)-Reclamation Priorities

II(L) (1) and (2)-General Reclamation Requirements

II(M) (1) and (2)-Certification of Completion of Coal Reclamation

II(N) (1)-Eligible Lands and Water Subsequent to Certification

II(O) (1)-Exclusion of Noncoal Reclamation Sites

II(P) (1), (2), and (3)-Utilities and Other Facilities, and

III(E) (1)-Future Reclamation Set-Aside Program

(b) The Director concurs with the Navajo Nation's May 4, 1994, certification of completion of coal reclamation effective September 27, 1994.

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