

FEDERAL REGISTER: 51 FR 5490 (February 13, 1986)

DEPARTMENT OF THE INTERIOR

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

30 CFR Part 887

Abandoned Mine Land Reclamation Program

ACTION: Final rule.

SUMMARY: The Department of the Interior's fiscal year 1985 continuing appropriations resolution (H.J. Res. 648-Pub. L. 98-473) authorized the expenditure of Abandoned Mine Land (AML) Funds for the establishment of self-sustaining, individually administered programs to insure private property against damages caused by land subsidence resulting from underground coal mining in those States which have reclamation plans approved under section 405 of the SMCRA. These States are, at the present time, the following: Alabama, Arkansas, Colorado, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Missouri, Montana, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, Texas, Utah, Virginia, West Virginia, and Wyoming.

In order to implement the amendment and provide for grants to eligible States for subsidence insurance programs, the Office of Surface Mining is promulgating final rules allowing States with approved reclamation programs under Title IV of the Surface Mining Control and Reclamation Act of 1977, Pub. L. 95-87 (SMCRA) to request funds for the establishment and administration of mine subsidence insurance programs.

EFFECTIVE DATE: February 13, 1986.

FOR FURTHER INFORMATION CONTACT: Jim Fary, Office of Surface Mining, Division of Abandoned Mine Land Reclamation, 1951 Constitution Avenue, NW., Washington, DC 20240, or telephone 202-343-7960.

SUPPLEMENTARY INFORMATION:

BACKGROUND

SMCRA was enacted to establish a nationwide program to protect the environment from the adverse effects of surface coal mining activities and to promote the reclamation of mined areas left without adequate reclamation prior to August 3, 1977. The SMCRA, as formulated, is a complex, comprehensive and broadly remedial regulatory statute intended to govern the conduct and impact of present day coal mining operations.

In addition, Congress recognized that a serious problem existed because of past mining practices, and that a substantial source of funding was needed to support rehabilitation programs to reclaim vast areas of lands affected by these practices. H. Rept. 95-218, 95th Cong., 1st Sess. 135-140 (1977). The SMCRA established the Abandoned Mine Reclamation Fund, *30 U.S.C.A. 1231*, to help pay for the restoration of land harmed by past coal mining activities. The reclamation fund derives its revenue from a fee levied on current coal production. All operators of coal mining operations subject to the provisions of SMCRA must pay to the Secretary of the Interior, for deposit in the Fund, a reclamation fee of 35 cents per ton of coal produced by surface coal mining and 15 cents per ton of coal produced by underground mining or 10 per centum of the value of the coal at the mine, as determined by the Secretary, whichever is less, except that the reclamation fee for lignite coal is at a rate of 2 per centum of the value of the coal at the mine, or 10 cents per ton, whichever is less. Regulations implementing the abandoned mine land reclamation program were published on October 25, 1978 (*43 FR 49932-49952*) and revised on June 30, 1982 (*47 FR 28574-28604*) and codified in 30 CFR Chapter VII, Subchapter R.

Congress included language in section 324 of H.J. Res. 648-Pub. L. 98-473 that amended section 401(c)(1) of SMCRA. The amendatory language provides that moneys in the fund may be used for:

establishment of self-sustaining, individual State administered programs to insure private property against damages caused by land subsidence resulting from underground coal mining in those States which have reclamation plans

approved in accordance with Section 503 of this Act, provided that funds used for this purpose shall not exceed \$3,000,000 of the funds made available to any State under section 402(g)(2) of this Act.

In order to implement the Congressional direction that OSM provide for grants to eligible States for the establishment of self-sustaining, individual State administered programs to insure private property against damages caused by land subsidence from underground coal mining, OSM published proposed rules on July 25, 1985. The public comment period closed August 25, 1985. This document contains the final rules implementing Congress' amendatory language along with a discussion of all relevant comments received.

RESPONSES TO PUBLIC COMMENTS AND DISCUSSION OF FINAL RULE

FINAL PART 887 consists of the following:

SECTION 887.1 (SCOPE)

Indicates that the scope of the final rule is to set forth procedures for grants to States having approved State reclamation plans for the establishment, administration, or operation of self-sustaining individual State administered coal mine subsidence insurance programs. One commenter indicated that in several States mine subsidence problems, and mine subsidence insurance programs, exist with respect to other minerals in addition to coal. For this commenter "it is not clear whether States with programs providing coverage from damage caused by other kinds of mines (than coal) are wholly ineligible to apply for funds." The commenter suggested that OSM make moneys available for States whose insurance programs cover subsidence caused by both coal and noncoal mining, but that the States be required to "segregate and account for the grants to ensure that Federal moneys are used for coal mine subsidence." OSM's response is that Section 887.12(d) would prevent granted funds from being used to administer noncoal mine subsidence insurance programs since granted moneys may not be used for lands that are ineligible for reclamation under Title IV of the Surface Mining Control and Reclamation Act of 1977 (Pub. L. 95-87). Despite the fact that funds granted under this Part cannot be used for noncoal mine subsidence insurance programs, State programs which cover both coal and noncoal subsidence are still eligible to receive funding for the coal mine subsidence part of their programs. As the commenter suggested, in those States with both coal and noncoal subsidence coverage, funds granted under this Part must be segregated and accounted for to ensure that the granted funds are used only for coal mine subsidence programs.

SECTION 887.3 (AUTHORITY)

Provides authority for the Director of OSM to approve or disapprove applications for grants up to a total amount of \$3,000,000 for each State with an approved State reclamation plan provided that moneys are available in the State share of the Abandoned Mine Land Reclamation Fund. This provision gives the Director of OSM the flexibility of making a one-time grant of \$3,000,000 or a series of grants up to a total amount of \$3,000,000. This flexibility is necessary because some eligible States do not have sufficient funds in their State share of the AMLR Fund at the present time to support funding a grant at the \$3,000,000 level. This provision will then allow these States the latitude to request funds for subsidence insurance programs over a period of years so as not to exhaust their capacity to continue to receive grants provided for in 30 CFR Part 886 necessary to support their State AML Reclamation Programs.

SECTION 887.5 (DEFINITIONS)

Since certain essential terms used in the legislation establishing subsidence insurance programs have not been defined, OSM, in order to implement the Congressional direction, is promulgating the following definitions:

ESTABLISHMENT -- is defined to mean either the development of a subsidence insurance program or the operation or administration of a subsidence insurance program. By defining "establishment" to mean operation and administration of a program as well as development of a new program, OSM is implementing the Congressional intent found in the legislative history of the amendment. Senator Byrd, the sponsor of the amendment, indicated (Congressional Record -- Senate of October 2, 1984 at p. S 12691) that the amendment would permit States to use a portion of their AMLR funds to operate subsidence insurance programs.

PRIVATE PROPERTY -- is defined to mean any or all of the following: dwellings and improvements, commercial and industrial structures, utilities, underground structures such as sewers, pipes, wells, and septic systems, sidewalks and

driveways, and land. This inclusive definition will allow the States the greatest latitude to design subsidence insurance programs to meet their specific local and State needs. States are given the authority to specify the extent of insurance coverage needed for their specific subsidence insurance programs. The extent of the coverage provided by each State will be directly related to the type of program each State elects to operate. For example, one State may want to provide extensive coverage for land, structures, commercial, residential, and private utilities for their full replacement value. Another State may want to put in place a program that pays only for a portion of structural damage.

SELF-SUSTAINING -- means that a subsidence insurance program maintains an insurance rate structure which is designed to be actuarially sound. Actuarial soundness implies that funds are sufficient to cover expected losses and expenses including a reasonable allowance for underwriting services and contingencies. Self-sustaining shall not preclude the use of funds from other non-Federal sources. One commenter indicated that the sentence "self-sustaining shall not preclude the use of funds from other non-Federal sources" might imply that a program is self-sustaining as long as it can obtain contingency funds to cover losses as well as that a program, notwithstanding its actuarially sound structure, can also obtain additional funds from other sources. The commenter requests that OSM clarify the language to make clear the intent. OSM agrees and states that the intent of the sentence is to mean that a program, notwithstanding its actuarially sound structure, can also obtain additional funds from other sources. This interpretation is meant to ensure that mine subsidence insurance programs established in the States can have a rate structure that can be subsidized from non-Federal sources. Another commenter suggested that in order to make the State programs "self-sustaining", a requirement should be included that the State-administered programs, in order to be eligible for funding, contain clauses which require subrogation of the rights of the insured against the company or companies responsible for the subsidence occurrence to the limits of the payments made under the policy. This commenter further suggested that the State program contain procedures to obtain such recovery of payments made from the responsible company or companies consistent with the subsidence laws of that State. This commenter further argues that such a provision is necessary because only with such a provision can the subsidence insurance program "truly be self-sustaining, since the premiums paid by individuals for elective coverage in many of the coal States would be insufficient unless they were set at a prohibitively high rate, if the program were dependent entirely on premiums after the seed money was expended." OSM agrees and has added the following provision to the definition of "self-sustaining" in the final rule: "Self-sustaining requires that State subsidence insurance programs provide for recovery of payments made in settlements for damages from any party responsible for the damages under the law of the State."

STATE ADMINISTERED -- is defined to mean a subsidence insurance program administered either directly by a State agency or for a State through a State authorized commission, board, contractor, such as an insurance company, or other entity subject to State direction. This grant program is intended only to provide seed money for the creation of State programs which will be administered solely by the participating States. Neither the establishment or operation of these programs will give rise to any further Federal responsibility. One commenter noted that the Congressional direction (in establishing the program) indicates that the program may only cover those damages caused by land subsidence "resulting from underground coal mining." The commenter asked if there is a need to define the broadness of the phrase "resulting from underground coal mining". The commenter further asked if the phrase could include land subsidence which is indirectly related to underground mine voids? The commenter also asked how conclusive must the facts be to support a claim that the damage was a result of an underground mine void? For this commenter, it is "often, without extensive testing, hard to affirmatively conclude that damage is mine subsidence related." The commenter asks "should your office (OSM) provide direction on this point?" OSM's response is that it does not have to provide direction on the issue because the party which asserts damage bears the burden of proof of such damage and that such damage be directly related to past coal mining practices. The nature and adequacy of such proof will necessarily vary on a case-by-case basis.

SECTION 887.11 (ELIGIBILITY FOR GRANTS)

Provides that only States with approved reclamation plans under 30 CFR Part 884 are eligible to receive grants for subsidence insurance programs provided the State has sufficient funds in its State share of the AMLR Fund.

SECTION 887.12 (COVERAGE AND AMOUNT OF GRANTS)

Paragraph (a) provides that moneys granted may be used to cover costs to the grantee agency for services and materials obtained from other State and Federal agencies or local jurisdictions according to OMB Circular A-87. One commenter expressed concern that proposed paragraph (a) does not permit use of the funds to pay claims, to pay adjusters, and for administrative costs involved with issuing policies under a program. The commenter asserts that these

costs often are billed to the State program directly by a private contractor and will not necessarily be charged by "State or Federal agencies or local jurisdictions." For this commenter, it is preferable for the granted funds to be used for a broad range of purposes. The commenter concluded that "if OSM interprets the Act to forbid use of these funds to pay claims, it should consider allowing these funds to be used for other expenses, such as payments to claim adjusters and administrative expenses." OSM's response is that the commenter is reading section (a) too narrowly. The intent of section (a) was to authorize the grantee agency to use moneys to cover costs to that agency for services and materials obtained from other State, Federal or local agencies. The intent was not to exclude payments to other persons or entities.

Moreover, it is clearly the intent of the Congressional amendment and these implementing rules to allow granted funds to be used to pay for administrative costs associated with the establishment and operation of subsidence insurance programs.

One commenter indicated that it is "stated (in the proposed rule) that the grant monies may be used to cover capitalization requirements and initial reserve requirements if allowed by law or Federal regulations." The commenter requested clarification with respect to the phrase "if otherwise allowed by law or Federal regulation." OSM's response is that the phrase was included in the proposed rules because pending enabling legislation to set up subsidence insurance programs in some States contained capitalization or initial reserve requirements. OSM wanted to assist the establishment of such programs by allowing granted funds to be utilized for capitalization or initial reserve requirements as mandated by any enabling State legislation. In reviewing the proposed rule, OSM does not know of any applicable Federal regulation on the issue of capitalization or initial reserve requirements. OSM has, therefore, modified the language in the final rule to clarify the issue by deleting the phrase "if otherwise allowed by law or Federal regulation" so that the final rule now reads: "Moneys granted may be used to cover capitalization requirements and initial reserve requirements mandated by State law provided use of such moneys is consistent with OMB Circular A-102." To comply with OMB Circular A-102, grant funds may be identified in the letter of credit as being used to meet capitalization or reserve requirements. However, such funds must remain in the Federal letter of credit until the time they are needed for expenditure. Funds may not be withdrawn from the letter of credit and deposited in State accounts prior to their being needed.

Paragraph (b) provides that grant applications must contain narrative statements describing how the subsidence insurance program is "State administered" and how the funds requested will achieve a self-sustaining individual State administered program to insure private property against subsidence resulting from underground coal mining. These narrative statements are necessary in order to evaluate the grant application's objectives relative to the purposes for which the subsidence insurance program was established. One commenter indicated that proposed paragraph (b) lacks sufficient level of detail in the requirement that a State demonstrate that the State insurance program will be self-sustaining. For this commenter, the State should provide a "reasoned analysis of the insurance risk under the proposed State program, including an assessment of the historical and projected magnitude of the subsidence program and the population at risk, the projected level of participation and premium costs involved, and other factors necessary for a reasoned and informed OSM projection that the program will truly be self-sustaining beyond the seed funding." OSM's response is that it declines to specify what particular elements need to go into the narrative statement describing how the funds requested will achieve a self-sustaining individual State administered program. OSM will review each narrative on its merits and determine if the statement is reasonable and justifiable since it believes the requirements for "self-sustaining" will vary from State-to-State.

Section (c) provides that grants cannot exceed a total of \$3,000,000 per State. This provision allows each State the flexibility to request grant funds as needed or as available in its State share of the AMLR Fund up to a total of \$3,000,000. Grant funds can be used for all eligible and necessary expenses related to establishment, administration, and operation of a subsidence insurance program, including payments to other State agencies for services provided in establishing and administering the Program.

Paragraph (d) provides that moneys granted may not be used for lands that are ineligible for reclamation funding under Title IV of SMCRA. Specifically, this provision excludes payments from granted funds for subsidence damage caused by all active mining, mines abandoned or inadequately reclaimed after August 3, 1977, and noncoal mining. In addition, granted funds cannot be used to pay for the actual construction costs of housing or for damages to public property.

Paragraph (e) provides that insurance premiums shall be considered program income and must be used to further eligible subsidence insurance program objectives in accordance with the Uniform Administrative Requirements for Grants to States and Local Governments, OMB Circular A-102, attachment E. The purpose of this Subsection is to clarify for

the States how to account for moneys received as insurance premiums. The insurance premiums, however, will only be considered program income during the existence of the grant. Once the grant is closed out, there are no further obligations on the State. One commenter expressed a preference that "income to a subsidence insurance program as premiums not be treated as program income under A-102." For this commenter, the "accounting, reporting and possible threat of return of premiums could impact the overall objective of establishing self-sustaining programs in States needing these programs." OSM's response is that the treatment of insurance premiums as program income is required under OMB Circular A-102 and program income must be used to further eligible subsidence insurance program objectives.

SECTION 887.13 (GRANT PERIOD)

Establishes the grant funding period to be no longer than eight years. Eight years was chosen in order to allow sufficient time for granted funds to be utilized in operating the subsidence insurance program.

SECTION 887.13 (GRANT ADMINISTRATIVE REQUIREMENTS AND PROCEDURES)

Cross references the rules applicable to State reclamation grants. This cross reference provides for consistency and uniform treatment of grants under the AMLR program. One commenter indicated that the grant of funds should be subject to the same provision for termination or suspension where it appears that they are being utilized inconsistently with amended section 401 of SMCRA. OSM's response is that by cross referencing the rules applicable to State reclamation grants, provisions governing termination or suspension of subsidence insurance grants are addressed (see 30 CFR 886.18).

PROCEDURAL MATTERS

Executive Order 12291 and the Regulatory Flexibility Act

The Department of the Interior has determined that this document is not a major rule under E.O. 12291 and certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (*5 U.S.C. 601 et seq.*).

These rules will not result in significant adverse effects on competition, employment, investment, productivity, innovation or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or foreign markets; nor would they increase costs or prices for consumers, individual industries, Federal, State, Tribal or local governmental agencies or geographic regions.

There would be no significant demographic effects, direct costs, indirect costs, nonquantifiable costs, competitive effects, enforcement costs or aggregate effects on small entities.

Since the information collection requirement contained in the rules involve fewer than 10 respondents annually, it is exempt from the requirements of the Paperwork Reduction Act (*44 U.S.C. 3501 et seq.*) and does not require clearance by OMB.

National Environmental Policy Act

With respect to the National Environmental Policy Act of 1969 (*42 U.S.C. 4321 et seq.*), OSM has prepared an environmental assessment (EA) on this final rule and has determined that this rule will not significantly affect the quality of the human environment. The EA and finding of no significant impact are on file in the OSM Administrative Record, Room 5124B, 1100 L Street, NW, Washington, DC.

Under *5 U.S.C. 553(d)*, good cause exists to make this rule effective immediately upon publication. The legislative mandate for use of AML moneys for establishing insurance programs was passed in 1984 and must be fully implemented. At least one state has informed OSM that it intends to submit its subsidence insurance program for approval as soon as this rule is made final. The immediate implementation of this rule will assist in providing essential protection to citizens who may be affected by coal mine-related subsidence.

LIST OF SUBJECTS IN 30 CFR PART 887

Coal mining, Intergovernmental relations, Surface mining, Underground mining.

Accordingly, 30 CFR Chapter VII, Subchapter R is amended by adding part 887.

Dated: January 21, 1986.

James E. Cason, Deputy Assistant Secretary, Land and Minerals Management.

1. Part 887 is added as follows:

PART 887 -- SUBSIDENCE INSURANCE PROGRAM GRANTS

Section

887.1	Scope.
887.3	Authority.
887.5	Definitions.
887.10	Information collection.
887.11	Eligibility for grants.
887.12	Coverage and amount of grants.
887.13	Grant period.
887.15	Grant administration requirements and procedures.

Authority: Section 401(c)(1), Pub. L. 95-87, 91 Stat. 456, as amended by Pub. L. 98-473, 98 Stat. 1875 (*30 U.S.C. 1231*).

SECTION 887.1 - SCOPE.

This part sets forth procedures for grants to States having an approved State reclamation plan for the establishment, administration and operation of self-sustaining individual State administered programs to insure private property against damages caused by land subsidence resulting from underground coal mining.

SECTION 887.3 - AUTHORITY.

The Director is authorized to approve or disapprove applications for grants up to a total amount of \$3,000,000 for each State with an approved State reclamation plan provided moneys are available under Section 872.11(b)(2) of this chapter and section 402(g)(2) of Pub. L. 95-87 (*30 U.S.C. 1232*).

SECTION 887.5 - DEFINITIONS.

As used in this part --

ESTABLISHMENT -- means either the development of a subsidence insurance program or the administration or operation of a subsidence insurance program.

PRIVATE PROPERTY -- means any or all of the following: dwellings and improvements, commercial and industrial structures, utilities, underground structures such as sewers, pipes, wells and septic systems, sidewalks and driveways, and land.

SELF-SUSTAINING -- means maintaining an insurance rate structure which is designed to be actuarially sound. Self-sustaining requires that State subsidence insurance programs provide for recovery of payments made in settlement for damages from any party responsible for the damages under the law of the State. Actuarial soundness implies that funds are sufficient to cover expected losses and expenses including a reasonable allowance for underwriting services and contingencies. Self-sustaining shall not preclude the use of funds from other non-Federal sources.

STATE ADMINISTERED -- means administered either directly by a State agency or for a State through a State authorized commission, board, contractor, such as an insurance company, or other entity subject to State direction.

SECTION 887.10 - INFORMATION COLLECTION.

Since the information collection requirement contained in 30 CFR 887.12 has fewer than 10 respondents per year, it is exempt from the requirements of the Paperwork Reduction Act (*44 U.S.C. 3501 et seq.*) and does not require clearance by OMB.

SECTION 887.11 - ELIGIBILITY FOR GRANTS.

A State is eligible for grants under this part if it has a State reclamation plan approved under Part 884 of this Chapter and if it has funds available under Section 872.11(b)(2) of this Chapter and section 402(g)(2) of Pub. L. 95-87 (*30 U.S.C. 1232*).

SECTION 887.12 - COVERAGE AND AMOUNT OF GRANTS.

(a) An agency may use moneys granted under this Part to develop, administer, and operate a subsidence insurance program to insure private property against damages caused by subsidence resulting from underground coal mining. The moneys may be used to cover costs to the agency for services and materials obtained from other State and Federal agencies or local jurisdictions according to OMB Circular A-87. Moneys granted may be used to cover capitalization requirements and initial reserve requirements mandated by applicable State law provided use of such moneys is consistent with OMB Circular A-102.

(b) The grant application shall contain the following:

- (1) A narrative statement describing how the subsidence insurance program is "State administered," and
- (2) A narrative statement describing how the funds requested will achieve a self-sustaining individual State administered program to insure private property against subsidence resulting from underground coal mining.

(c) Grants funded under this Part cannot exceed a total of \$3,000,000 per State.

(d) Moneys granted may not be used for lands that are ineligible for reclamation funding under Title IV of the Surface Mining Control and Reclamation Act of 1977 (Pub. L. 95-87).

(e) Insurance premiums shall be considered program income and must be used to further eligible subsidence insurance program objectives in accordance with the Uniform Administrative Requirements for Grants to States and Local Governments, OMB, Circular A-102, attachment E.

SECTION 887.13 - GRANT PERIOD.

The grant funding period shall not exceed eight years from the time the grant is approved by OSM. Unexpended funds remaining at the end of any grant period shall be returned according to OMB Circular A-102, attachment E.

SECTION 887.15 - GRANT ADMINISTRATION REQUIREMENTS AND PROCEDURES.

The requirements and procedures for grant administration set forth for State reclamation grants in Part 886 of this chapter shall be used for subsidence insurance grants.

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