



Pennsylvania Department of Environmental Protection

Rachel Carson State Office Building
P.O. Box 8461
Harrisburg, PA 17105-8461
June 30, 2008

Bureau of Mining and Reclamation

717-787-5103

Office of Surface Mining Reclamation and Enforcement
Administrative Record
Room 252—SIB
1951 Constitution Avenue, N.W.
Washington, D.C. 20240

Re: Docket ID OSM-2007-0016; Remining Incentives

Ladies and Gentlemen:

Thank you for the opportunity to provide comments on the proposed remining incentives rule published by the Office of Surface Mining Reclamation and Enforcement (OSM) on May 1, 2008, at 73 Federal Register 24120. These comments are submitted on behalf of the Pennsylvania Department of Environmental Protection.

The proposed rule for waiver of fees is unnecessarily limited in its application. Specifically, the requirement to remove all of the abandoned coal refuse in order to qualify for a waiver of fees is too restrictive. It is also unnecessary to restrict the waiver to permits that do not include reprocessing activities. The incentive must be viewed in the context of achieving the reclamation of the mine site. If a site can be properly reclaimed with unmarketable material used on-site, it should be eligible for a waiver. The remining operations anticipated under the proposed rule will be subject to the performance standards that govern active mining operations, which will ensure adequate environmental protection, regardless of whether all of the refuse material is removed. Pennsylvania recommends that OSM finalize the fee waiver rule in a form that allows for a fee waiver if an approved reclamation plan is completed for an abandoned coal refuse pile (and eliminate the requirement for total removal of a pile).

The purpose of removal of all refuse material is a laudable goal and the benefit to reclamation is obvious. However, an unintended consequence of the requirement for removal of all of the refuse material is that some abandoned refuse sites will not be eligible for the proposed remining incentive. Specifically, those abandoned refuse sites that have a portion of the refuse material located in a Section 522(e) barrier area. Section 522(e) of SMCRRA prohibits mining within the barrier for churches, public buildings, parks, etc. Because the proposed remining incentive is only available where all of the refuse material is removed, it would not be available for such sites because Section 522(e) prohibits removal of all of the refuse material.

OSM could remedy this matter by exercising its authority under Section 415 and Section 413(a) to include in the final rule a variance procedure authorizing exceptions to the 522(e) barrier. The



variance could be written so that it could only be granted after the operator published notice of the variance request in a local newspaper, there was an opportunity for a public hearing and public comment, and the regulatory authority imposed specific measures to protect the public interest. Examples of specific protective measures could include limiting hours of operation, enhanced dust control measures, prohibition of blasting, etc. By authorizing states to establish a barrier variance process, the proposed remining rule would apply to refuse material that is located within a 522(e) barrier.

Pennsylvania recognizes the difficulties faced by OSM in promulgating a regulation to provide either a nationwide bond pool or a state specific bonding program for remining. However, Pennsylvania urges OSM to reexamine its position on promulgating a rule to implement Section 415(c)(1)(B). OSM can implement Section 415 (c)(1)(B) by promulgating a rule that establishes the standards to be used by states to establish financial assurance programs for remining operations. The rule would provide states the option to participate. A state would have the option to design a financial assurance program, under the federal standards, that was tailored to the state's needs. The state would underwrite these financial assurance instruments with its Title IV funds.

Existing federal law, Section 413(a) of SMCRA, provides OSM and states the legal authority to adopt regulations to provide financial assurance for remining where the purpose is reclamation of abandoned mine land through remining. Section 413(a) provides "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 promulgation of rules and regulations, to implement and administer the provisions of this subchapter." (Emphasis added.)

A remining incentive, whose purpose is to reclaim eligible lands through remining by the use of Title IV funds to underwrite a financial guarantee that does not exceed the cost of reclaiming the abandoned mine land, falls squarely within Section 413(a). It is also a means by which OSM can give effect to Section 415 (c)(1)(B) without mandating a prescriptive nationwide rule. Instead, it provides the states the option to participate and the flexibility to develop a financial assurance program within its system that is designed to meet the circumstances of that state.

In Pennsylvania, there are three specific existing remining incentives that could be enhanced through the ability to use federal funds to support them. These remining incentives are spelled out in Pennsylvania's regulations at 25 Pa. Code Chapter 86, Subchapter J. These incentives include a remining operator assistance program, remining financial guarantees, and bond credits.

Remining Operator Assistance Program (ROAP)

This program provides funds for the preparation of portions of mining permit applications, using the well established Small Operator Assistance Program as a model. The experience in Pennsylvania is somewhat limited because of funding shortfalls. However, the limited experience has demonstrated that the ROAP program can work. OSM should promulgate regulations that would allow a state to use Title IV funds to support a ROAP program.

Remining Financial Guarantees

This program provides a sum certain financial guarantee, as an alternative to a surety bond or collateral bond, for qualified mine operators who reclaim abandoned mine land during the course of their mining operations. Pennsylvania's experience with this program has been good. The program functions similar to a state-run surety program. Funds have been reserved (at a rate of 10% of the total guarantees) to underwrite the financial guarantees. Financial guarantees are currently limited to \$100,000 per permit and \$300,000 per operator in order to manage the risk. These limits can be adjusted as additional underwriting funds become available. The mine operator pays a nonrefundable annual fee (1% of the amount of the bond) which generates additional funds to support the program. After the remining and reclamation is completed, the financial guarantee is released pursuant to the bond release regulations. The funds that underwrote the released financial guarantee would then be available to underwrite a new financial guarantee for another remining permit. In the case of a default by a mine operator, the reserve funds are used to pay for the completion of the reclamation.

In addition to getting the abandoned mine land reclaimed for the minimal cost of overseeing the remining operation, this program has the added benefit of generating additional reclamation fees. These additional reclamation fees would be available for reclamation of additional abandoned mine lands. By leveraging the Title IV funds to encourage mine operators to reclaim abandoned mine lands while generating additional AML fees, this remining incentive will advance the goal of reclaiming all abandoned mine lands. The amendments to Federal SMCRA in section 415 specifically state that the incentives that may be considered for inclusion in the regulations should include the "use of amounts in the fund to provide financial assurance for remining operations in lieu of all or a part of the performance bonds required under section 509." 30 U.S.C. § 1244(c)(1)(B). The preamble states that OSM chose not to propose a rule to use monies from the Fund to provide financial assurances in lieu of all or part of required performance bonds because a nationwide rule that adds to, or modifies, existing bonding regulations would not fit well with the diversity of bonding systems employed by the States. However, it is not necessary for OSM to develop a rule that mandates use by all of the States. OSM should promulgate regulations that provide a state the option to set aside Title IV funds to back remining financial guarantees for mine sites that reclaim Title IV eligible AML.

Bond Credits

In Pennsylvania, the bond credit program is implemented through a consent order and agreement (COA) with individual mine operators. The COA specifies the reclamation the operator is required to complete to earn the bond credit. After a bond credit is earned, it can be used as an alternative to a surety or collateral bond to provide financial assurance for a mining permit. A bond credit can be used twice. Funds are reserved until the bond credit is released the second time. After the second release, the reserved funds are available to underwrite new bond credits. For bond credits, the funds are reserved at 100% of the amount of the bond credit. Pennsylvania's experience with bond credits has been very good. There have been no defaults. The bond credit program is particularly appealing since if the operator does not default, the only costs are administrative. In the worst case, with a default, the amount of money that will be spent is the face value of the bond credit to complete reclamation. The amendments to Federal

SMCRA in section 415 specifically state that the incentives that may be considered for inclusion in the regulations should include the "use of amounts in the fund to provide financial assurance for remining operations in lieu of all or a part of the performance bonds required under section 509." 30 U.S.C. § 1244(c)(1)(B). OSM should promulgate a rule that allows a state the option to use Title IV funds as a reserve for a bond credit to be earned by reclaiming Title IV eligible AML.

Public Hearing Reactions

There was a public hearing conducted on this proposed rule in Pottsville, PA on June 25, 2008. One of the recommendations provided during this hearing was that an advisory committee/work group be formed to identify and evaluate remining incentive options. Pennsylvania supports this concept. However, the final remining incentive rule should not be delayed. OSM should finalize the remining incentive rule. The advisory committee/work group can provide input on additional remining incentives for a future rulemaking.

Reclamation Incentives

While it may be beyond the scope of the proposed rule, a related topic is reclamation incentives. The concept of fee waivers or credits could be applied to Title IV reclamation projects. In a fee credit program, a mine operator could earn credits by conducting reclamation, either through remining or as a separate reclamation project. The amount of earned credit could be calculated based upon the estimated cost of design, development and construction of the reclamation project. This credit could then be used to offset reclamation fees due to be paid by the operator. One advantage of this approach is to accelerate the rate of reclamation completed. One potential obstacle to this approach exists if a mine operator completes reclamation in a different state from where the fees are due. This obstacle can be overcome by counting the credit toward a state's historic share of AML funds.

To further the additional remining incentives described above, Pennsylvania will submit, at a later date, draft model rules for OSM's consideration. Pennsylvania is also willing to work with OSM in drafting language for additional regulations for remining incentives.

Sincerely,



Joseph G. Pizarchik, Esquire
Director
Bureau of Mining and Reclamation