

[FR Doc. 2010-32418 Filed 12-23-10; 8:45 am]

BILLING CODE 4310-05-P

**DEPARTMENT OF THE INTERIOR****Office of Surface Mining Reclamation and Enforcement****30 CFR Part 934**

[SATS No. ND-051-FOR; Docket ID No. OSM-2009-0013]

**North Dakota Regulatory Program****AGENCY:** Office of Surface Mining Reclamation and Enforcement, Interior.**ACTION:** Final rule; approval of amendment.

**SUMMARY:** We are approving an amendment to the North Dakota regulatory program (the “North Dakota program”) under the Surface Mining Control and Reclamation Act of 1977 (“SMCRA” or “the Act”). North Dakota proposes revisions to rules and statutes that will allow the revegetation responsibility period to be reduced from ten years to five years for lands eligible for re-mining. North Dakota intends to revise its program to be consistent with the corresponding Federal regulations and to improve operational efficiency.

**DATES:** *Effective Date:* December 27, 2010**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:**

- I. Background on the North Dakota Program
- II. Submission of the Proposed Amendment
- III. Office of Surface Mining Reclamation and Enforcement’s (OSM’s) Findings
- IV. Summary and Disposition of Comments
- V. OSM’s Decision
- VI. Procedural Determinations

**I. Background on the North Dakota Program**

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, “a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act \* \* \*; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act.” See 30 U.S.C.

1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the North Dakota program on December 15, 1980. You can find background information on the North Dakota program, including the Secretary’s findings, the disposition of comments, and conditions of approval in the December 15, 1980, **Federal Register** (45 FR 82214). You can also find later actions concerning North Dakota’s program and program amendments at 30 CFR 934.15, 934.16, and 934.30.

**II. Submission of the Proposed Amendment**

By letter dated November 12, 2009, North Dakota sent us an amendment to its program (Amendment number XXXVIII, Administrative Record Docket ID: OSM-2009-0013) under SMCRA (30 U.S.C. 1201 *et seq.*). North Dakota submitted the amendment on its own accord. The amendment reduces the reclamation liability period on previously mined areas from ten full years to five full years. The Federal regulations at 30 CFR 816.116 provide incentives for eligible re-mining operations including reduced revegetation responsibility periods (2 years in the East and 5 years in the West).

Specifically, North Dakota proposes revisions to the North Dakota Century Code at Chapter 38-14.1-24(18) (Environmental protection performance standards) and to the North Dakota Administrative Code at Article 69-05.2-09-02(14) (Permit applications—operation plans—maps and plans) and Article 69-05.2-22-07(2) and (4)(i) (Performance standards—Revegetation—Standards for success).

North Dakota proposes to reduce the reclamation liability period on previously mined areas from ten years to five years. This change will apply to the North Dakota Century Code as well as the North Dakota Administrative Code. North Dakota defines previously mined areas as “lands that were affected by coal mining activities prior to January 1, 1970.” North Dakota also proposes to require permit applications that include previously mined areas to include additional maps and information addressing potential environmental and safety problems that might occur at the mining site.

We announced receipt of the proposed amendment in the February 9, 2010, **Federal Register** (Vol. 75, No. 26, FR page number 6330). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the amendment’s adequacy

(Administrative Record Docket ID: OSM-2009-0013).

We did not receive any comments. We did not hold a public hearing or meeting because no one requested one. The public comment period ended on March 11, 2010.

**III. OSM’s Findings**

Following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. We are approving the amendment as described below.

**A. Revisions to North Dakota’s Rules and Statutes That Have the Same Meaning as the Corresponding Provisions of the Federal Regulations and/or SMCRA**

North Dakota proposed revisions to the following rules containing language that is the same as or similar to the corresponding section of the Federal regulations. North Dakota Administrative Code (NDAC) 69-05.2-22-07 (30 CFR 816.116), Performance standards—Revegetation—Standards for success.

North Dakota proposes for areas meeting the definition of previously mined area to require a five year liability period for revegetation success. All other areas in North Dakota have a ten year liability period. The Federal regulations at 30 CFR 818.116 allow the same five year period.

Because these proposed rules contain language that is the same as or similar to the corresponding Federal regulations, we find that they are no less effective than the corresponding Federal regulations and we approve it.

**B. Revisions to North Dakota’s Rules That Are Not the Same as the Corresponding Provisions of the Federal Regulations**

North Dakota Century Code Chapter (NDCC) 38-14.1-24(18) (SMCRA Section 515(20)(B)), Environmental Protection Performance Standards.

North Dakota proposes to add a definition for “previously mined areas.” The definition would adopt January 1, 1970, the effective date of North Dakota’s first reclamation law, as the cut-off eligibility date for lands eligible for re-mining. Previously mined areas are those that were mined prior to January 1, 1970. The Federal definition of previously mined areas are those mined prior to August 3, 1977, and for which investigation reveals, are not reclaimed to the standards of SMCRA. Under North Dakota’s proposed definition far fewer lands would be considered but

there is no determination as to their condition.

This date is more restrictive than SMCRA as clarified by the State. North Dakota states, “North Dakota’s definition of lands eligible for re-mining will apply to fewer lands as compared to the SMCRA provisions. Since North Dakota’s first reclamation law went into effect on January 1, 1970, we will only apply the special performance standard (the reduced revegetation liability period) to lands that were mined prior to that date. Therefore, for the purposes of re-mining under the coal regulatory program, land must have been mined prior to January 1, 1970, and be left in an inadequate reclamation status. Any lands that were mined in North Dakota between January 1, 1970, and August 3, 1977, are subject to certain reclamation standards as required by the pre-SMCRA State reclamation laws and will not be eligible for the reduced 5-year revegetation liability period. However, under the SMCRA provisions, the special re-mining standards can be applied to lands that were mined prior to August 3, 1977. We consider North Dakota’s re-mining provisions to be more stringent than SMCRA since fewer lands are eligible for the special performance standards. In North Dakota, lands mined between January 1, 1970, and August 3, 1977, that are proposed to be re-mined or re-disturbed will be subject to the 10-year revegetation liability period, whereas under SMCRA they could qualify for the 5-year liability period.”

North Dakota’s explanation that the special performance standard (the 5-year revegetation liability period) will only apply to lands that were mined prior to January 1, 1970, but not to those lands mined between January 1, 1970, and August 3, 1977, that are proposed to be re-mined or re-disturbed, clarifies which lands qualify for the shorter responsibility period under its revised statute at NDCC Chapter 38, Section 14.1–24, subsection 18. North Dakota’s adoption of the January 1, 1970, date rather than August 3, 1977, (the effective date of SMCRA) renders its definition no less stringent than the Act and we approve it.

#### *C. Revisions to North Dakota’s Rules With No Corresponding Federal Regulation*

NDAC 69–05.2–09–02, Permit applications—Operation plans—Maps and plans.

This addition to North Dakota’s rules does not have a Federal Counterpart. It requires the permit application under the re-mining provision to include potential environmental and safety hazards that could be reasonably

anticipated to occur as well as include the mitigative measures that will be taken to ensure that the applicable reclamation requirements can be met. It is more stringent than the Federal rules since the Federal rules have no such requirement and we approve it.

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

##### *Public Comments*

We asked for public comments on the amendment (Administrative Record Docket ID: OSM–2009–0013), but did not receive any.

##### *Federal Agency Comments*

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the North Dakota program (Administrative Record Docket ID: OSM–2009–0013).

##### *Environmental Protection Agency (EPA) Concurrence and Comments*

Under 30 CFR 732.17(h)(11)(i) and (ii), we are required to get concurrence from EPA for those provisions of the program amendment that relate to air or water quality standards issued under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*).

We note that none of the proposed changes relate to air or water quality standards. Nevertheless, under 30 CFR 732.17(h)(11)(ii), OSM requested comments on the amendment from EPA (Administrative Record Docket ID: OSM–2009–0013). EPA did not respond to our request.

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

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and ACHP on amendments that may have an effect on historic properties. On November 25, 2009, we requested comments on North Dakota’s amendment (Administrative Record Docket ID: OSM- 2009–0013), but neither responded to our request.

#### **V. OSM’s Decision**

Based on the above findings, we approve North Dakota’s November 12, 2009, amendment.

To implement this decision, we are amending the Federal regulations at 30 CFR Part 934, which codify decisions concerning the North Dakota program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that the State’s

program demonstrates that the State has the capability of carrying out the provisions of the Act and meeting its purposes. Making this regulation effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

#### **VI. Procedural Determinations**

##### *Executive Order 12630—Takings*

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulation.

##### *Executive Order 12866—Regulatory Planning and Review*

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

##### *Executive Order 12988—Civil Justice Reform*

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 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 State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR parts 730, 731, and 732 have been met.

##### *Executive Order 13132—Federalism*

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to “establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.” Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be “in accordance with” the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations “consistent with” regulations issued by the Secretary pursuant to SMCRA.

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

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally recognized Indian Tribes and have determined that the rule does not have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal government and Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian Tribes. The rule does not involve or affect Indian Tribes in any way.

*Executive Order 13211—Regulations That Significantly Affect the Supply, Distribution, or Use of Energy*

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

*National Environmental Policy Act*

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C) *et seq.*).

*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. 3501 *et seq.*).

*Regulatory Flexibility Act*

The Department of the Interior certifies 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 State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

*Small Business Regulatory Enforcement Fairness Act*

This rule is not a major rule under 5 U.S.C. 804(2), of the Small Business Regulatory Enforcement Fairness Act. This rule:

- a. Does not have an annual effect on the economy of \$100 million.
- b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.
- c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises. This determination is based upon the

fact that the State submittal which is the subject of this rule is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

*Unfunded Mandates*

This rule will not impose an unfunded Mandate on State, local, or tribal governments or the private sector of \$100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

**List of Subjects in 30 CFR Part 934**

Intergovernmental relations, Surface mining, Underground mining.

Dated: August 12, 2010.

**Allen D. Klein,**

*Regional Director, Western Region.*

- For the reasons set out in the preamble, 30 CFR part 934 is amended as set forth below:

**PART 934—NORTH DAKOTA**

- 1. The authority citation for part 934 continues to read as follows:

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

- 2. Section 934.15 is amended in the table by adding a new entry in chronological order by “Date of Final Publication” to read as follows:

**§ 934.15 Approval of North Dakota regulatory program amendments**

\* \* \* \* \*

Original amendment submission date	Date of final publication	Citation/description
* * * * *	* * * * *	* * * * *
November 12, 2009 .....	December 27, 2010 .....	NDCC 38–14.1–24(18). NDAC 69–05.2–09–2. 2NDAC 69–05.2–22–07.

[FR Doc. 2010–32414 Filed 12–23–10; 8:45 am]  
BILLING CODE 4310–05–P

**DEPARTMENT OF THE INTERIOR**

**Office of Surface Mining Reclamation and Enforcement**

**30 CFR Part 943**

[SATS No. TX–059–FOR; Docket No. OSM–2010–0001]

**Texas Regulatory Program**

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

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

**SUMMARY:** We, the Office of Surface Mining Reclamation and Enforcement (OSM), are approving an amendment to the Texas regulatory program (Texas program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Texas proposed revisions to its regulations regarding annual permit fees. Texas revised its