

## DEPARTMENT OF THE INTERIOR

## Office of Surface Mining Reclamation and Enforcement

## 30 CFR Part 926

[SPATS No. MT-017-FOR]

## Montana Regulatory Program and Abandoned Mine Land Reclamation Plan

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

ACTION: Final rule; approval of amendment.

**SUMMARY:** The Office of Surface Mining Reclamation and Enforcement (OSM) is approving, with certain exceptions and additional requirements, a proposed amendment to the Montana regulatory program (hereinafter, the "Montana program") and abandoned mine land reclamation plan (hereinafter, the "Montana plan") under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). Montana proposed statutory revisions pertaining to the designation of the Montana State Regulatory Authority and the reclamation agency SMCRA, statutory definitions of "Prospecting" and "Prime farmland," revegetation success criteria for bond release, prospecting under notices of intent, and permit renewal. The amendment was intended to revise the Montana program to be consistent with the corresponding Federal regulations and SMCRA, as amended by the Abandoned Mine Reclamation Act of 1990 (Pub. L. 101-508), to provide additional flexibility afforded by the revised Federal regulations, to provide additional safeguards, to clarify ambiguities, and to improve operational efficiency.

EFFECTIVE DATE: January 22, 1999.

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## SUPPLEMENTARY INFORMATION:

## I. Background on the Montana Program and Plan

On April 1, 1980, the Secretary of the Interior conditionally approved the

Montana program. General background information on the Montana program, including the Secretary's findings, the disposition of comments, and conditions of approval of the Montana program can be found in the April 1, 1980, **Federal Register** (45 FR 21560). Subsequent actions concerning Montana's program and program amendments can be found at 30 CFR 926.15, 926.16, and 926.30.

On November 24, 1980, the Secretary of the Interior conditionally approved the Montana plan as administered by the Department of State Lands. General background information on the Montana program, including the Secretary's finding, the disposition of comments, and conditions of approval of the Montana plan can be found in the October 24, 1980, **Federal Register** (45 FR 70445). Subsequent actions concerning Montana's program and program amendments can be found at 30 CFR 926.25.

## II. Proposed Amendment

By letter dated May 16, 1995, Montana submitted a proposed amendment to its program and plan (Administrative Record No. MT-14-01) pursuant to SMCRA (30 U.S.C. 1201 *et seq.*). Montana submitted the proposed amendment in response to required program amendments at 30 CFR 926.16 (f) and (g), and at its own initiative. The provisions of the Montana Code Annotated (MCA) that Montana proposed to revise were: 82-4-203, MCA (Definitions); 82-4-204, MCA (Rulemaking authority); 82-4-205, MCA (Administration by department); 82-4-221, MCA (Mining permit required); 82-4-223, MCA (Permit fee and surety bond); 82-4-226, MCA (Prospecting permit and the definition of "Prospecting"); 82-4-227, MCA (Refusal of permit); 82-4-231, MCA (Submission of and action on reclamation plan); 82-4-232, MCA (Area mining—bond—alternate plan); 82-4-235, MCA (Inspection of vegetation—final bond release); 82-4-239, MCA (Reclamation); 82-4-240, MCA (reclamation after bond forfeiture); 82-4-242, MCA (funds received by regulatory authority); 82-4-251, MCA (Noncompliance—suspension of

permits); and 82-4-254, MCA (Violation—penalty—waiver).

OSM announced receipt of the proposed amendment in the June 5, 1995, **Federal Register** (60 FR 29521), provided an opportunity for a public hearing or meeting on its substantive adequacy, and invited public comment on its adequacy (Administrative Record No. MT-14-06). Because no one requested a public hearing or meeting, none was held. The public comment period ended on July 5, 1995.

During its review of the amendment, OSM identified concerns relating to: 82-4-203, MCA, subsections (6), (10), and (12) (the definitions of "Board", "Commissioner", and "Director"); 82-4-205, MCA (Board rules and Administration by department); 82-4-235, MCA (Inspection of vegetation—final bond release); 82-4-203, MCA, subsection (25) and 82-4-226, MCA, subsection (8) (the definition of "Prospecting", prospecting permit and notices of intent). OSM also addressed outstanding required program amendments at 30 CFR 926.16(h), (i), and (j) as they related to prospecting. OSM notified Montana of the concerns by letter dated December 5, 1996 (Administrative Record No. MT-14-08).

Montana responded in a letter dated November 6, 1997, by submitting a revised amendment and additional explanatory information (Administrative Record No. MT-14-11). The revisions to the amendment consisted of new statutory language enacted by the 1997 Montana Legislature. Montana proposed revisions to, and additional explanatory information concerning: 82-4-203, subsections (6), (10), and (12), 2-15-111, 2-15-121, 2-15-3501, and 2-15-3502, MCA (the definitions of "Board", "Commissioner", and "Director"); 82-4-204 and 82-4-205, MCA (Board rules and Administration by department); 82-4-235, MCA (Inspection of vegetation—final bond release); 82-4-203, MCA, subsection (25) and 82-4-226, MCA, subsection (8) (the definition of "Prospecting", prospecting permit and notices of intent to prospect), and required program amendments at 30 CFR 926.16(h), (i) and (j).

Based upon the revisions to, and additional explanatory information for, the proposed program amendment submitted by Montana, OSM reopened the public comment period in the December 5, 1997, **Federal Register** (62 FR 64327; Administrative Record No. MT-14-12) and provided an opportunity for a public hearing or meeting on its substantive adequacy. Because no one requested a public hearing or meeting, none was held. The public comment period ended on December 22, 1997.

### III. Director's Findings

As discussed below, the Director finds, in accordance with SMCRA, 30 CFR 732.15, 732.17, 884.14, and 884.15, with certain exceptions and additional requirements, that the proposed program and plan amendments submitted by Montana on May 16, 1995, and as revised and supplemented with additional explanatory information on November 6, 1997, is no less effective and the corresponding Federal regulations and no less stringent than SMCRA. Accordingly, the Director approves the proposed amendment.

#### 1. Nonsubstantive Revisions to Montana's Statutes

Montana proposed revisions to the following previously-approved statutes that are nonsubstantive in nature and consist of minor editorial, punctuation, grammatical, and recodification changes (corresponding Federal regulations or SMCRA provisions are listed in parentheses):

82-4-203, MCA, subsections (1), (2), (3), (4), (7), (8), (10), (11), (13), (14), (15), (16), (17), (18), (19), (20), (21), (22), (23), (26), (27), (28), (29), (30), (31), (32), (33), (34), and (35), (SMCRA Section 701, 30 CFR 700.5 and 701.5), Definitions.

82-4-221, MCA, Subsections (2) and (3), (SMCRA Section 506(d)(3)), Mining permit required;

82-4-226, MCA, subsections (1) and (2), (30 CFR 772.12), Prospecting permit;

82-4-227, MCA, subsections (1), (2), (5), (7), (8), (9), (11), and (12), (SMCRA Section 510), Refusal of permit;

82-4-231, MCA, subsections (1) and (6), (SMCRA Sections 508, 510, 513, and 515, and 39 CFR 773), Submission of and action on reclamation plan;

82-4-232, MCA, subsection (6), (SMCRA Sections 508, 509, and 515), Area mining required—bond—alternative; and

82-4-251, MCA, subsections (6) and (7), (SMCRA Section 521), Noncompliance—suspension of permits.

Because the proposed revisions to these previously-approved statutes are nonsubstantive in nature, the Director finds that these proposed Montana statutory revisions are no less effective

than the Federal regulations and no less stringent than SMCRA. The Director approves these proposed statutory revisions.

2. MCA 82-4-203(6) and (12) and MCA 2-15-3502, Definitions of "Board" and "Department"; MCA 2-15-3501, Definition of "Director"; and MCA 82-4-204 and 82-4-205, Board Rules and Administration by Department

Montana Senate Bill 234 (SB 234) proposes to revise the environmental and natural resource functions of the state government to, among other things, replace the former Board of Land Commissioners with the new Board of Environmental Review at MCA 82-4-203(6), and transfer the rulemaking powers of the former Board of Land Commissioners to the Board of Environmental Review. All other powers of the former Board of Land Commissioners would go the renamed Department of Environmental Quality.

Montana proposes to limit the Board of Environmental Review at MCA 82-4-204 to adopting general rules pertaining to strip mining and underground mining; and adopting rules relating to the filing of reports, issuance of permits, monitoring, and other administrative and procedural matters.

At MCA 82-4-205, Montana proposes to give the Department of Environmental Quality, three duties previously held by the Board of State Lands, in addition to retaining duties previously assigned to the former Department of State Lands. Those new duties are: (1) The issuance of orders requiring an operator to adopt remedial measures necessary to achieve compliance; (2) the issuance of a final order revoking a permit for failure to comply with a notice of noncompliance, an order suspension, or an order requiring remedial measures; and (3) conducting hearings on the provisions or rules adopted by the board.

The effect is that the newly created Department of Environmental Quality will increase its responsibilities for the Montana coal mining and reclamation program over those previously held by the former Department of State Lands. In contrast, the newly created Board of Environmental Review would retain diminished responsibilities over those previously held by the Board of State Lands.

In revising the Montana statutes to reflect the reorganized duties of the Board of Environmental Review and the Department of Environmental Quality, Montana has changed the terminology in its statutes to delete the reference to "Commissioner" and insert, as appropriate, "Board", "Department", or

"Director." Specifically, Montana proposed to delete the definition of "Commissioner" at former MCA 82-4-203(10) and use the term "Director." Montana proposed to change the statutory definition of "Department" at recodified MCA 82-4-203(12) to refer to the Department of Environmental Quality, instead of the former Department of State Lands. The cross-reference to "Article X, section 4, of the constitution of this state" in the definition of "Board" at MCA 82-4-203(6) was changed to "section 21". The cross-reference to "Title 2, chapter 15, part 32" in the definition of "Department" at proposed MCA 82-4-203(12) was changed to "section 20". Statutes which were revised to reflect these changes were: MCA 82-4-223(2) and (3), 82-4-226(8), 82-4-227(3) and (4), 82-4-231(9) and (10), 82-4-232(7), 82-4-240, 82-4-242, 82-4-251(1), (2), (3), (4), (5), and (8), and 82-4-254(1), (2), and (3).

In response to these proposed statutory revisions, OSM sent Montana an issue letter dated December 5, 1996 (Administrative Record No. MT-14-08), which requested: (1) copies of referenced sections 20 and 21; (2) clarification and additional information on the State's reorganization as required by 30 CFR 732.17(b), specifically those items mentioned at 30 CFR 731.14(d), (e), (f), and (g), and 732.15; and (3) a definition of "Director."

In its response to OSM's issue letter, Montana submitted revised statutes at MCA 2-15-3501 defining the "Department of environmental quality", MCA 2-15-3502 defining the "Board of environmental review", MCA 2-15-111 describing the appointment and qualifications of department heads, and MCA 2-15-121 describing the administrative allocation for agencies under the various departments in Montana (Administrative Record No. MT-14-11). With respect to item #1 of the issued letter, Montana deleted the previously referenced sections 20 and 21, and changed the references to MCA 2-15-3501 and 2-15-3502, respectively. Montana also submitted MCA 2-15-111, cross-referenced in MCA 2-15-3501, to further explain the duties of the department heads. MCA 2-15-121, cross-referenced in MCA 2-15-3502, addresses the administrative allocations of agencies under departments in Montana. In response to item #3 in the issue letter, Montana provided MCA 2-15-3501 to define "Director."

Montana stated, in response to item #2 of the December 5, 1996, issue letter, that:

During the reorganization, the Coal and Uranium Bureau was removed from the Reclamation Division, Montana Department of State Lands and transferred intact to the Permitting and Compliance Division, Department of Environmental Quality. The Coal and Uranium Bureau and the Open-cut Bureau were then combined to form a new bureau—Industrial and Energy Minerals Bureau (organization chart attached). In the formation of the new bureau, the staff and functions of the coal and uranium mining program remained intact and similar to what existed prior to the reorganization. Since the program was moved intact, the civil penalty assessment and collection authority and provisions for the administrative and judicial review of State program actions were maintained in the Montana Code Annotated and the Administrative Rules of Montana. Therefore, no changes to these provisions were made.

SMCRA and its implementing regulations do not require that a primacy State organize its regulatory agency in any specific manner as long as the State regulatory authority has sufficient authority to implement and enforce the State program. The reconfiguration of the Montana coal mining program under the renamed Department of Environmental Quality is substantially the same as that under the former Department of State Lands, which was in existence when the Montana coal program was approved on April 1, 1980.

OSM finds these statutory revisions, as explained by the cross-referenced statutes subsequently submitted, to adequately clarify the Montana reorganizations of its environmental and natural resource departments in SB 234. Therefore, the Director finds that the revised and recodified statutes are no less effective than the corresponding Federal regulations at 30 CFR Chapter VII and 43 CFR Part 4. The Director approves the proposed amendment, specifically the revised statutes at: MCA 2-15-3501; 2-15-3502; 82-4-203 (6) and (12); 82-4-204; 82-4-205; 82-4-223(2) and (3); 82-4-226 (8); 82-4-227(3) and (4); 82-4-231 (9) and (10); 82-4-232(7); 82-4-240; 82-4-242; 82-4-251 (1), (2), (3), (4), (5), and (8); and 82-4-254 (1), (2), and (3).

### 3. MCA 82-4-203 (24), Definition of "Prime Farmland"

Montana proposes to revise the definition of "Prime farmland" by deleting the list of criteria to be taken into consideration by the U.S. Secretary of Agriculture in part (a), and instead referencing 7 CFR Part 657 in the **Federal Register** (Vol. 4, No. 21) which defines the same criteria. At part (b), Montana proposes to delete the reference to the aforementioned **Federal Register** notice and to reference land

that "historically has been used for intensive agricultural purposes."

The Federal definition of "Prime farmland" at 30 CFR 701.5 and SMCRA Section 701 (20) is similar to the Montana definition in that both consider criteria prescribed by the U.S. Secretary of Agriculture at 7 CFR Part 657 to define "Prime farmland." However, where the proposed Montana definition references land that "historically has been used for intensive agricultural purposes", the Federal definition references lands which have been "Historically used for cropland." The Montana program does not define the phrase "historically has been used for intensive agricultural purposes." When the Montana program was approved with this phrase, part (b) also reference the criteria of 7 CFR Part 657 as contained in the **Federal Register** notice (Vol. 4, No. 21). With the proposed removal of the **Federal Register** criteria in part (b), the interpretation of part (b) of the Montana definition of "Prime farmland" becomes unclear.

The Montana program does define the phrase "Historically used for cropland" at ARM 26.4.301(52), although this phrase is not used in the definition of "Prime farmland." Both ARM 26.4.301(52), the definition of "Historically used for cropland" and 30 CFR 701.5, the Federal definition of "Historically used for cropland" contain the same two "Prime farmland" criteria: (1) Lands used for prime farmland for any 5 of the 10 years immediately preceding acquisition for coal mining; and (2) a regulatory authority determination based on additional cropland history. However, the Montana program does not contain the third part of the Federal definition, which states "lands that would have likely been used as cropland for any 5 out of the last 10 years, immediately preceding such acquisition but for the same fact of ownership or control of the land unrelated to the productivity of the land."

Therefore, because the Montana definition of "Prime farmland" proposes to rely exclusively on an undefined phrase in part (b), the Director finds the proposed definition to be less effective than the Federal counterpart at 30 CFR 701.5 and disapproves this revision. In addition, the Director places a required program amendment on the Montana program to revise the definition of "Historically used for cropland" at ARM 26.4.301(52) to include the criteria concerning "lands that would likely have been used as cropland for any 5 out of the last 10 years, immediately preceding such acquisition but for the

same fact of ownership or control of the land unrelated to the productivity of the land."

### 4. MCA 82-4-203(25) and 82-4-226(8), Definition of "Prospecting"

In response to the required program amendment codified at 30 CFR 926.16(f), Montana submitted both Senate Bill 234 and House Bill 0162 which defined "Prospecting" with different language. OSM, in the issue letter to Montana dated December 5, 1996 (Administrative Record No. MT-14-08), requested that Montana clarify which proposal the State would like OSM to consider.

Montana responded by letter dated November 6, 1997 (Administrative Record No. MT-14-11), with a 1997 revised version of the definition of "Prospecting" at MCA 82-4-203(25). The revised definition responds to OSM's concerns in the required program amendment at 30 CFR 926.16(f) by: (1) Including the activities of gathering surface or subsurface geologic, physical, or chemical data by mapping, trenching, or geophysical or other techniques necessary to determine the location, quantity, or quality of a mineral deposit (coal or uranium); (2) clarifying that an activity need not involve surface disturbance to be considered "prospecting"; and (3) removing the word "*natural*" to refer to mineral deposit at MCA 82-4-226(8) and 82-4-203(25) so that the definition would include such human-made structures as coal waste piles.

The Director finds that Montana's revised definition of "Prospecting" at MCA 82-4-203(25) to be no less effective than the Federal definition of "Coal exploration" at 30 CFR 701.5 and no less stringent than SMCRA Section 512. The Director approves the proposed amendment and removes the required program amendment at 30 CFR 926.16(f).

### 5. MCA 82-4-239, Reclamation

In this abandoned mine land reclamation (AMLR) statute, Montana has made revisions to reflect the reorganized duties of the Board of Environmental Review and the Department of Environmental Quality. Montana has changed the wording to delete "Board" and insert "Department" as appropriate. However, Montana has not submitted an organizational chart for its reorganized AMLR plan under the renamed Department of Environmental Quality. The organizational chart submitted in the November 6, 1997, revised amendment with explanatory information (Administrative Record No. MT-14-08) clarifies the current State

organization for the Title V (Regulatory) program, not the Title IV (AMLR) plan.

In the final rule dated July 19, 1995 (60 FR 36998), concerning Montana's AMLR plan, OSM approved a renaming of the former Department of State Lands as the Department of Environmental Quality. However, the organizational chart (Exhibit A) submitted in that amendment (Administrative Record No. MT-AML-01; March 22, 1995) showed no renaming or reorganization of the Divisions and Bureaus below the Departmental level. Supporting documentation from Governor Marc Racicot dated June 15, 1995, and from the Department's Chief Legal Counsel, John North, dated June 9, 1995, only referred to the name change to the Department of Environmental Quality, and did not specify a renaming of Divisions and Bureaus, nor a change in the State organizational chart concerning the AMLR plan (Administrative Record No. MT-AML-18).

At this time, it is unclear what the new reorganization of the Montana AMLR plan consists of, as well as which AMLR rules and statutes have been revised as a result of the 1995 State reorganization. During the Montana reorganization, the regulatory (Title V) and the abandoned mine land reclamation (Title IV) programmatic rules were recodified from ARM 26.4 to ARM 17.24. This new recodification is reflected in the November 6, 1997, Montana submittal (Administrative Record No. MT-14-11). However, OSM has never approved the recodification as Montana removed some of its abandoned mine land reclamation provisions without explanation. Before OSM can approve the recodification, the missing AMLR rules must be explained. The regulatory program (Title V) was recodified intact.

Therefore, the Director is deferring approval on the revision to MCA 82-4-239 until these issues are clarified. The Director is requiring that Montana submit and receive approval on the AMLR reorganization initiated in 1995 and revised by the 1997 Montana legislature, as well as submit and obtain approval on all revised AMLR statutes and rules, subsequent to final rule **Federal Register** notice, 60 FR 36998, dated July 19, 1995.

#### 6. MCA 82-4-221(1), Mining Permit Required

Montana proposes to require that an application for permit renewal be filed at least 240 days, and no more than 300 days, prior to permit expiration. Both the State and Federal statutes provide a

procedural time period for the involved parties to file an application for permit renewal prior to the expiration of the valid permit. Section 506(d)(3) of SMCRA and 30 CFR 774.15(b)(1) only require that such filing shall be made *at least* 120 days prior to the expiration of the valid permit. The Federal requirement, unlike the State's proposal, does not set a limit on how far in advance an applicant may submit an application for permit renewal. This State proposal is a procedural requirement which provides involved parties with similar rights and remedies as those provided by SMCRA at Section 506(d)(3) and 30 CFR 774.15(b)(1). Accordingly, the Director finds that the State's proposed revision is no less stringent than SMCRA and no less effective than the Federal regulations at 30 CFR 774.15(b)(1). The Director approves the proposed amendment.

#### 7. MCA 82-4-226(8), Prospecting Permits and Notices of Intent

In the February 1, 1995, final rule **Federal Register** (60 FR 6006), OSM placed three required program amendments on the Montana program concerning a prospecting permit at MCA 82-4-226(8). The required program amendment at 30 CFR 926.16(h) required that Montana prohibit prospecting under notices of intent when more than 250 tons of coal are to be removed. The required program amendment at 30 CFR 926.16(i) required that Montana delete the word "reasonable" in the final sentence of MCA 82-4-226(8). The required program amendment at 30 CFR 926.16(j) required that Montana provide authority for the inspection of monitoring equipment and prospecting methods for prospecting conducted under notices of intent, and access to and copying of any records required by the Montana program on such prospecting operations, at any reasonable time without advance notice upon presentation of appropriate credentials, and to provide for warrant-less right of entry for prospecting operations conducted under notices of intent, to be no less effective in meeting SMCRA's requirements than 30 CFR 840.12(a) and (b).

In the November 6, 1997, submittal (Administrative Record No. MT-14-11), Montana modified its statute at MCA 82-4-226(8), and presented additional explanatory information concerning prospecting, in order to respond to the three required program amendments.

a. Prospecting (Coal Exploration) Under Notices of Intent

Montana proposed to revise MCA 82-4-226(8) to state that prospecting that is not conducted in an area designated unsuitable for coal mining, that is not conducted for the purposes of determining the location, quality, or quantity of a mineral deposit, "and that does not remove more than 250 tons of coal", is not subject to subsections (1) through (7) (the requirements for a prospecting permit). "In addition, prospecting that is conducted to determine the location, quality, or quantity of a mineral deposit outside an area designated unsuitable, that does not remove more than 250 tons of coal, and that does not substantially disturb the natural land surface is not subject to subsections (1) through (7)."

The revisions made by Montana in the November 6, 1997, submittal (Administrative Record No. MT-14-11), now restrict prospecting under a notice of intent to those operations which remove less than 250 tons of coal. The revisions meet the federal requirements at SMCRA Section 512(d) and 30 CFR Part 772 which require that coal exploration permits be obtained when an exploration operation will remove more than 250 tons of coal, regardless of the intent of the prospecting (coal or overburden) or the degree of disturbance. With these revisions, the Montana program becomes no less stringent than SMCRA and no less effective than the Federal regulations. The Director approves the proposed amendment and removes the required program amendment at 30 CFR 926.16(h).

In addition to restricting prospecting operations under a notice of intent to those which remove less than 250 tons of coal, the Montana revisions at MCA 82-4-226(8) also restrict prospecting operations under a notice of intent to those lands outside of an area designated as "lands unsuitable." The Montana program now contains the same provisions as the Federal counterpart at 30 CFR 772.11(a) and 772.12(a) which prohibit coal exploration under a notice of intent, and require an exploration permit, for any coal exploration on lands unsuitable, regardless of whether the exploration "substantially disturbs" the natural and surface. The Director finds the Montana revision at MCA 82-4-226(8) to be no less effective than the Federal requirements at 30 CFR 772.11(a) and 772.12(a). The Director approves the revision.

b. Specification of Which Prospecting Activities Are Required To Meet Performance Standards and Specification of Applicable Performance Standards

In the February 1, 1995, **Federal Register** notice (60 FR 6006), finding 5(b) requested that Montana clarify which performance standards are applicable to prospecting operations. At that time, OSM approved the revision to MCA 82-4-226(8) with the proviso that it not be implemented until Montana had promulgated and OSM had approved a definition of "substantially disturb" which was no less effective than 30 CFR Part 772 and 30 CFR 701.5.

In its November 6, 1997, response (Administrative Record No. MT-14-11), Montana stated that:

Section 82-4-226(8) \* \* \* provides that lands substantially disturbed under a notice of intent, \* \* \* must be conducted in accordance with the performance standards of the board's rules regulating the conduct and reclamation of prospecting operations that remove coal. Therefore, any prospecting that "substantially disturbs" the land surface must comply with the same performance standards, regardless of whether the prospecting is done pursuant to a notice of intent or a prospecting permit.

Montana's explanation also lists the performance standards contained in Chapter 10 of the Administrative Rules of Montana (ARM), as those which apply to prospecting (coal exploration) operations. This explanation meets the requirements of SMCRA Section 512(a) which requires that all exploration which substantially disturbs the natural land surface be conducted in accordance with the performance standards of SMCRA Section 515.

Therefore, Montana has complied with the proviso in finding 5(b) in the February 1, 1995, **Federal Register** notice (60 FR 6006). The Director accepts the explanatory information provided by Montana. With this explanation, the Montana program is no less stringent than SMCRA in meeting performance standards for coal exploration operations.

c. Right of Entry To Inspect

At 30 CFR 926.16(i), OSM required that Montana delete the word "reasonable" from MCA 82-4-226(8) so that the State regulatory program would have the authority to right of entry to any coal exploration operation without advance notice, upon presentation of appropriate credentials, and not limited to "reasonable" times. At 30 CFR 926.16(j), OSM required that Montana revise its program to provide authority for the inspection of prospecting operations conducted under notices of

intent, and access to the records on such operations at any reasonable time without search warrant.

In the November 6, 1997, response (Administrative Record No. MT-14-11), Montana noted that the required program amendment changes to the statutes had not been made. In lieu of making the statutory revisions, the State argued that two existing rules respond to OSM's concerns. Those rules are: ARM 26.4.1201 and 26.4.1202. ARM 26.4.1201, Frequency of Inspections, requires "such periodic partial or complete inspections of prospecting operations as are necessary to enforce the Act, the rules adopted pursuant thereto, and the permit." ARM 26.4.1202, Method of Inspections, states that "Inspections must occur without prior notice to the permittee, except for necessary on-site meetings, be conducted on an irregular basis, and be scheduled to detect violations on nights, weekends, and holidays." (Montana's response actually references the rules at ARM 17.24.1201 and 17.24.1202, reflecting the State's 1996 rules recodification. Refer to the discussion in Finding No. 5 above concerning the recodification.)

The existing rules at ARM 26.4.1201 and .1202 allow for State inspections to take place at prospecting operations without prior notice to the permittee and to be conducted on an irregular basis. OSM interprets these rules as allowing inspections at other than "reasonable" times. In addition, these same rules would allow for inspections of prospecting operations "as are necessary to enforce the Act, the rules adopted pursuant thereto, and the permit", as well as to "collect evidence of violations and to file inspection reports adequate to determine whether violations exist." OSM, therefore, interprets these rules as providing sufficient "authority for the inspection of monitoring equipment and prospecting methods for prospecting conducted under notices of intent, and access to and copying of any records required by the Montana program on such prospecting operations, at any reasonable time without advance notice upon presentation of appropriate credentials, and to provide for warrantless right of entry for prospecting operations conducted under notices of intent."

OSM believes that these rules address the concerns of the required program amendments at 30 CFR 926.16 (i) and (j), as well as serve to clarify the statute at MCA 82.4.226(8). The Director approves the explanatory information presented by Montana and removes the

required program amendments at 30 CFR 926.16 (i) and (j).

8. MCA 82-4-235, *Inspection of Vegetation—Final bond Release*

In the May 16, 1995, submittal, Montana proposed to revise MCA 82-4-235(1) to provide that final bond release may not be withheld on the basis that introduced species compose a major or dominant component of the reclaimed vegetation on lands which were seeded with a seed mix approved to include substantial introduced species (applicable to both pre- and post-SMCRA areas) (Administrative Record No. MT-14-01). This proposal had the effect of allowing, in some circumstances, final bond release when revegetation performance standards are not achieved. However, OSM notified Montana in the December 5, 1996, issue letter (Administrative Record No. MT-14-08) that SMCRA Section 519(c)(3) requires that prior to final bond release, the operator must have successfully completed all reclamation activities, including not only planting the approved seed mix, but also achieving revegetation success standards, OSM could not approve proposed MCA 82-4-235(1).

In the November 6, 1997, response to OSM's issue letter, Montana deleted the sentence in subsection (1) which would have allowed, in some circumstances, final bond release when revegetation performance standards were not achieved (Administrative Record No. MT-14-11). The remaining changes to proposed subsection (1) contain two non-substantive wording changes. The first proposed revision to subsection (1) is to make the timing of the final bond release inspection and evaluation of permanent diverse vegetative cover, dependent upon an application for final bond release, not upon the satisfactory stand, itself, having been established. SMCRA, also, requires that the regulatory authority conduct a performance bond release inspection upon receipt of a notification and request from the permittee. Therefore, the State revision is no less stringent than SMCRA.

The second proposed revision to subsection (1) is to change the February 2, 1978, seeding date to May 3, 1978. This means that any reclamation work such as augmented seeding, fertilizing, or irrigation taking place after May 3, 1978 (previously February 2, 1978) may not receive final bond release until at least 10 years after the last year of such work. May 3, 1978, nine-months after the effective date of SMCRA, is the date upon which, or after, all surface coal mining operations on State-regulated

lands must be in compliance with the provisions of SMCRA, according to SMCRA Section 502(c) and 30 CFR 710.11(a)(3)(ii). Therefore, the Director finds this revision to be no less effective than the Federal regulations and no less stringent than SMCRA. The effect of OSM's approval is that the paragraph labeled "82-4-235 (Effective on occurrence of contingency) Inspection of vegetation—final bond release" in Montana's 1997 legislative amendment (Administrative Record No. MT-14-11) would be approved.

Montana proposes to revise paragraph (2) of MCA 82-4-235 to provide revised bond release criteria on revegetated lands seeded with mixtures of introduced species on which coal was removed prior to May 3, 1978 (the effective date of SMCRA), or lands on which coal was not removed or lands disturbed after May 2, 1978. Montana states the intent of this provision is to provide revegetation success standards for lands which were reclaimed using seed mixes containing introduced species during a period (1970s and 1980s) when native seed mixes were in short supply. Montana's proposed changes concern lands disturbed prior to the effective date of SMCRA (August 3, 1997) and reclamation on those lands. The changes do not conflict with any SMCRA requirement. Therefore, the Director is approving MCA 82-4-235(1) and (2).

#### 9. MCA 82-4-227(10), Coal Conservation Plan

OSM placed a required program amendment (30 CFR 926.16(g)) on Montana in the February 1, 1995, **Federal Register** notice (60 FR 6006) to modify its program to require that no permit or major permit revision be approved unless the coal conservation plan affirmatively demonstrate that failure to conserve coal will be prevented. OSM placed the required program amendment on the Montana program due to a typographic error which unintentionally resulted in a substantive revision to state program amendment dated July 28, 1993, Administrative Record No. MT-11-01.

In the May 16, 1995, submittal (Administrative Record No. MT-14-01), Montana subsequently proposed a statutory revision at MCA 82-4-227(10) which corrected the earlier error and restored the State program to its previous statutory language. Therefore, the Director finds the Montana revised statute to be no less effective than the Federal requirement and approves the proposed language. The Director removes the required program amendment at 30 CFR 926.16(g).

#### 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

OSM invited public comments on the proposed amendment, but none were received.

##### 2. Federal Agency Comments

Pursuant to 30 CFR 732.17(h)(11)(i), 884.15(a), and 884.14(a)(2), OSM solicited comments on the proposed amendment from various Federal agencies with an actual or potential interest in the Montana program and plan.

The Natural Resources Conservation Service responded on June 6, 1997, with the recommendation that reclaimed areas be fenced under grazing conditions in order to ensure that stands of introduced species and off-site native species become established (Administrative Record No. MT-14-04). OSM responds that this is not required in either the Montana program, or the Federal statutes or regulations. Therefore, to require the fencing of reclaimed areas under grazing conditions would be more stringent than either the Federal statutes or the regulations. However, the requirement to fence reclaimed lands during the vegetation establishment period is often placed on the permit by the State, OSM, or other Regulatory Agency, and potentially even required by lease. This is because protection of the revegetated area is in the operator's best interest, since the operator will eventually be required to meet revegetation success standards. OSM has forwarded the comments from the Natural Resources Conservation Service to Montana for consideration.

The U.S. Army Corps of Engineers and the Bureau of Indian Affairs had no objections to the proposed revisions (Administrative Record Nos. MT-14-07 and MT-14-05).

##### 3. Environmental Protection Agency (EPA) Concurrence and Comments

Pursuant to 30 CFR 732.17(h)(11)(ii), OSM is required to solicit the written concurrence of EPA with respect to those provisions of the proposed amendment that relate to air or water quality standards promulgated 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.*).

Pursuant to 30 CFR 732.17(h)(11)(i), OSM solicited comments on the

proposed amendment from EPA (Administrative Record No. MT-14-03). The proposed revisions did not relate to air quality or water quality, and the EPA did not submit comments.

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

Pursuant to 30 CFR 732.17(h)(4), OSM solicited comments on the proposed amendments from the SHPO and ACHP (Administrative Record No. MT-14-03). Neither SHPO nor ACHP responded to OSM's request.

#### V. Director's Decision

Based on the above findings, the Director approves, with certain exceptions and additional requirements, Montana's proposed amendment as submitted on May 16, 1995, and as revised and supplemented with additional explanatory information on November 6, 1997.

The Director approves, as discussed in: Finding No. 1, proposed MCA 82-4-203(1), (2), (3), (4), (7), (8), (10), (11), (13), (14), (15), (16), (17), (18), (19), (20), (21), (22), (23), (26), (27), (28), (29), (30), (31), (32), (33), (34), and (35), concerning Definitions; proposed MCA 82-4-221 (2) and (3), concerning Mining permit required; proposed MCA 82-4-226 (1) and (2), concerning Prospecting permit; proposed MCA 82-4-227(1), (2), (5), (7), (8), (9), (11), and (12), concerning Refusal of permit; proposed MCA 82-4-231 (1) and (6), concerning Submission of and action on the reclamation plan; proposed MCA 82-4-232(6), concerning Area mining—bond—alternative; proposed MCA 82-4-251 (6) and (7), concerning Noncompliance—suspension of permits; Finding No. 2, proposed MCA 82-4-203 (6) and (12), 82-4-204, 82-4-205, 82-4-223 (2) and (3), 82-4-226 (8), 82-4-227 (3) and (4), 82-4-231 (9) and (10), 82-4-232 (7), 82-4-240, 82-4-242, 82-4-251 (1), (2), (3), (4), (5), and (8), 82-4-254 (1), (2), and (3), 2-15-3501, and 2-15-3502, concerning the definitions of "Board," "Department," and "Director," Board Rules and Administration by department; Finding No. 4, proposed MCA 82-4-203(25) and 82-4-226(8), concerning the definition of "Prospecting;" Finding No. 6, proposed MCA 82-4-221(1), concerning Mining permit required; Finding No. 7, proposed MCA 82-4-226(8), concerning Prospecting permit and notices of intent; Finding No. 8, proposed MCA 82-4-235, concerning Inspection of vegetation—final bond release; and Finding No. 9, proposed MCA 82-4-227(10), concerning the Coal conservation plan.

As discussed in Finding Nos. 3 and 5, the Director is disapproving the proposed revisions to MCA 82-4-203(24) and deferring her decision on the proposed revisions to MCA 82-4-239.

The Federal regulations at 30 CFR Part 926, codifying decisions concerning the Montana program and plan, are being amended to implement this decision. This final rule is being made effective immediately to expedite the State program amendment process and to encourage States to bring their programs into conformity with the Federal standards without undue delay. Consistency of State and Federal standards is required by SMCRA.

VI. 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 12988

The Department of the Interior has conducted the reviews required by Section 3 of Executive Order 12988 (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 State regulatory programs and program amendments since each such 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.

3. National Environmental Policy Act

No environmental impact statement is required for this rule since 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)).

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 State submittal that 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. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. 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.

6. Unfunded Mandates

This rule will not impose a cost of \$100 million or more in any given year on any governmental entity or the private sector.

List of Subjects in 30 CFR Part 926

Abandoned mine reclamation programs, Intergovernmental relations, Surface mining, Underground mining.

Dated: December 28, 1998.

Russell F. Price,

Acting Regional Director, Western Regional Coordinating Center.

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

PART 926—MONTANA

1. The authority citation for part 926 continues to read as follows:

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

2. Section 926.10(a) is revised to read as follows:

§ 926.10 State regulatory program approval.

\* \* \* \* \*

(a) Montana Department of Environmental Quality, Industrial and Energy Minerals Bureau, P.O. Box 200901, Helena, Montana 59620-0901, (406) 444-1923.

\* \* \* \* \*

3. Section 926.15 is amended in the table by adding a new entry in chronological order by "Date of Final Publication" to read as follows:

§ 926.15 Approval of Montana regulatory program amendments.

\* \* \* \* \*

Table with 3 columns: Original amendment submission date, Date of final publication, Citation/description. Row 1: May 16, 1995, January 22, 1999, MCA 2-15-3501, 2-15-3502, 82-4-203(1) through (35), except (24); MCA 82-4-204; MCA 82-4-205; MCA 82-4-221; MCA 82-4-223; MCA 82-4-226(8); MCA 82-4-227; MCA 82-4-231; MCA 82-4-232(6) and (7); MCA 82-4-235; MCA 82-4-240; MCA 82-4-242; MCA 82-4-251; and MCA 82-4-254(1) through (3). Decision deferred on MCA 82-4-239; MCA 82-4-203(24) disapproved.

4. Section 926.16 is amended by removing and reserving paragraphs (f), (g), (h), (i), and (j); and adding paragraph (k) to read as follows:

§ 926.16 Required program amendments.

\* \* \* \* \*

(k) By March 23, 1999, Montana shall revise ARM 26.4.301(52), or otherwise

modify its program, to require that the definition of "Historically used for cropland" address lands that would have been likely used as cropland for any 5 out of the last 10 years, immediately preceding such acquisition but for the same fact of ownership or control of the land unrelated to the productivity of the land.

5. Section 926.21 is added to read as follows:

§ 926.21 Required abandoned mine land plan amendments.

Pursuant to 30 CFR 884.15, Montana is required to submit for OSM's approval the following proposed plan amendment by the date specified.

(a) By March 23, 1999, Montana shall submit a copy of the State's reorganization of the abandoned mine land reclamation plan, as well as all statutes and rules relating to the abandoned mine land reclamation plan revised subsequent to the final rule published in the **Federal Register** dates July 19, 1995 (60 FR 36998).

(b) [Reserved].

[FR Doc. 99-1445 Filed 1-21-99; 8:45 am]

BILLING CODE 4310-05-M

## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining Reclamation and Enforcement

#### 30 CFR Part 926

[SPATS No. MT-018-FOR]

#### Montana Regulatory Program

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

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

**SUMMARY:** The Office of Surface Mining Reclamation and Enforcement (OSM) is approving, with additional requirements, a proposed amendment to the Montana regulatory program (hereinafter, the "Montana program") under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). Montana proposed revisions to rules pertaining to permit renewals, permit requirements, and notices of intent to prospect. The amendment was intended to revise the Montana program to be consistent with the corresponding Federal regulations and SMCRA, to provide additional safeguards, clarify ambiguities, and improve operational efficiency.

**EFFECTIVE DATE:** January 22, 1999.

**FOR FURTHER INFORMATION CONTACT:** Guy V. Padgett, Telephone: (307) 261-6550; Internet address: gpadgett@osmre.gov.

**SUPPLEMENTARY INFORMATION:**

#### I. Background on the Montana Program

On April 1, 1980, the Secretary of the Interior conditionally approved the Montana program. General background information on the Montana program, including the Secretary's findings, the disposition of comments, and conditions of approval of the Montana program can be found in the April 1, 1980, **Federal Register** (45 FR 21560). Subsequent actions concerning Montana's program and program amendments can be found at 30 CFR 926.15, 926.16 and 926.30.

#### II. Proposed Amendment

By letter dated March 5, 1996, Montana submitted a proposed amendment to its program (Administrative Record No. MT-15-01) pursuant to SMCRA (30 U.S.C. 1201 *et seq.*). Montana submitted the proposed amendment at its own initiative. The provisions of Administrative Rules of Montana (ARM) that Montana proposed to revise were: 26.4.410, ARM (permit renewal); 26.4.1001, ARM (prospecting permit requirement); and 26.4.1001A, ARM (notice of intent to prospect).

OSM announced receipt of the proposed amendment in the April 10, 1996, **Federal Register** (61 FR 15910), provided an opportunity for a public hearing or meeting on its substantive adequacy, and invited public comment on its adequacy (Administrative Record No. MT-15-04). Because no one requested a public hearing or meeting, none was held. The public comment period ended on May 10, 1996.

During its review of the amendment, OSM identified concerns at ARM 26.4.1001(1)(a) and 26.4.1001A(1) and (1)(b)(ii) relating to the removal of more than 250 tons of coal under a notice of intent. OSM notified Montana of the concerns by letter dated December 6, 1996 (Administrative Record No. MT-15-09).

Montana responded by submitting additional explanatory information in a letter dated November 6, 1997 (Administrative Record No. MT-15-12). The explanatory information consisted of a proposed statutory revision for a separate amendment currently under review by OSM (SPATS No. MT-017-FOR; Administrative Record No. MT-14-01). Instead of revising the proposed rules to address OSM's concerns with prospecting permit requirements and a notice of intent to prospect, Montana explained that proposed statutory revisions made by the 1997 Montana legislature to the Montana Code Annotated at 82.4.226(8), MCA, to require a permit for prospecting when more than 250 tons of coal would be removed, would resolve OSM's concerns.

Based upon the additional explanatory information for the proposed program amendment submitted by Montana, OSM reopened the public comment period in the December 2, 1997, **Federal Register** (62 FR 63685; Administrative Record No. MT-15-13). Because no one requested a public hearing or meeting, none was held. The reopened public comment period ended on December 17, 1997.

Also being considered in this final approval of SPATS No. MT-018-FOR

(Administrative Record No. MT-15-01) is language from an earlier submitted amendment, SPATS No. MT-003-FOR (Administrative Record No. MT-12-01; dated February 1, 1995) insofar as it relates to the requirements for prospecting permits and notices of intent to prospect. Montana originally proposed revisions to ARM 26.4.1001 and proposed to add ARM 26.4.1001A in SPATS No. MT-003-FOR.

Before OSM was able to take action on MT-003-FOR, Montana proposed further revisions to ARM 26.4.1001 and 26.4.1001A as part of the SPATS No. MT-018-FOR. Therefore, OSM is considering and taking action on all revisions to ARM 26.4.1001 and 26.4.1001A as part of SPATS No. MT-018-FOR, and is removing the proposed revisions from SPATS No. MT-003-FOR. Montana agreed to this approach in a telephone conversation on January 23, 1998 (Administrative Record Nos. MT-12-21 and MT-15-14).

The definition of "substantially disturb", which was submitted in the State's February 6, 1996, response (SPATS No. MT-003-FOR; Administrative Record No. MT-12-19) to OSM's issue letter dated October 17, 1995 (Administrative Record No. MT-12-16), is also being considered for approval in SPATS No. MT-018-FOR and is being withdrawn from SPATS No. MT-003-FOR.

#### III. Director's Findings

As discussed below, the Director, in accordance with SMCRA and 30 CFR 732.15 and 732.17, finds, with additional requirements, that the proposed program amendments submitted by Montana on March 5, 1996, and as supplemented with additional explanatory information on November 6, 1997, is no less effective than the corresponding Federal regulations and no less stringent than SMCRA. Accordingly, the Director approves the proposed amendment.

##### 1. Nonsubstantive Revisions to Montana's Rules

Montana proposed revisions to the following previously-approved rules that are nonsubstantive in nature and consist of minor editorial, grammatical, or recodification changes (corresponding Federal provisions are listed in parentheses):

26.4.1001, ARM, subsections (1) (codification) and (2) (introductory text and codification), (30 CFR 772.12), prospecting (coal exploration) permits.

Because the proposed revisions to these previously-approved rules are nonsubstantive in nature, the Director