

## DEPARTMENT OF THE INTERIOR

## Office of Surface Mining Reclamation and Enforcement

## 30 CFR Parts 707 and 874

RIN: 1029-AB89

## Abandoned Mine Land (AML) Reclamation Program; Enhancing AML Reclamation

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

ACTION: Final rule.

**SUMMARY:** The Office of Surface Mining Reclamation and Enforcement (OSM) is amending its rules concerning the financing of Abandoned Mine Land reclamation (AML) projects that involve the incidental extraction of coal. Projections of receipts to the AML fund through the year 2004, when the authority to collect fees will expire, strongly indicate that there will be insufficient money to address all problems currently listed in the Abandoned Mine Land Inventory System. Given these limited AML reclamation resources, OSM is establishing an innovative way for AML agencies, working with contractors, to maximize available funds to increase AML reclamation.

The first revision amends the definition of "government-financed construction" to allow less than 50 percent government funding when the construction is an approved AML project under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or "the Act"). The second revision adds a new section which requires specific consultations and concurrences with the Title V regulatory authority for AML construction projects receiving less than 50 percent government financing. These consultations and concurrences are intended to ensure the appropriateness of the project being undertaken as a Title IV AML project and not under the Title V regulatory program.

DATES: Effective March 15, 1999.

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## I. Background

## A. What is the Abandoned Mine Land (AML) Reclamation Program?

Title IV of SMCRA established the AML Reclamation Program in response to concern about extensive environmental damage caused by past coal mining activities. The program is funded primarily from a fee collected on each ton of coal mined in the country. This fee is deposited into a special fund, the Abandoned Mine Land Fund (Fund), and is appropriated annually to address abandoned and inadequately reclaimed mining areas where there is no continuing reclamation

responsibility by any person under State or Federal law. Under Title IV, the funding of reclamation projects is subject to a priority schedule with emphasis on sites affecting public health, safety, general welfare and property. In contrast, Title V establishes a program for regulating active mining and reclamation.

In most cases, the implementation of both Title IV and Title V authority has been delegated to States. Depending upon each State's internal organizational structure, the Title IV and Title V programs are, in many cases, carried out by separate State authorities. Currently, 23 States and 3 Indian Tribes (the Hopi, the Navajo and the Crow) have authority to receive grants from the Fund and are implementing Title IV reclamation programs in accordance with 30 CFR Subchapter R, and through implementing guidelines published in the **Federal Register** on March 6, 1980 (45 FR 27123), and revised on December 30, 1996 (45 FR 68777). In States and on Indian lands that do not have a Title IV program, reclamation is carried out by OSM.

## B. How is AML Reclamation Funded and How Do States and Indian Tribes Implement Their Programs?

State and Indian Tribal AML programs are funded at 100 percent by OSM from money appropriated annually from the AML Fund. The States and Indian Tribes must submit grant applications in accordance with procedures established by OSM and existing grant regulations found at 30 CFR 886. They must certify with each grant that the requirements of all applicable laws and regulations are met, including the Clean Water Act, the Clean Air Act, the National Historic Preservation Act, and the Endangered Species Act. They may undertake only projects that are eligible for funding as described in either Section 404 or Section 411 of SMCRA and which meet the priorities established in Section 403 of SMCRA. OSM requires that the State Attorney General or other chief legal officer certify that each reclamation project to be undertaken is an eligible site.

Certain environmental, fiscal, administrative and legal requirements must be in place in order for a program to receive grants for reclamation. An extensive description of these requirements can be found at 30 CFR 884, but certain of those are mentioned here to highlight safeguards the AML program has in place. For example, the agency must have written policies and procedures which outline how it will comply with the requirements of

SMCRA and implementing regulations in conducting a reclamation program, how it will comply with all applicable Federal and State laws and regulations, how projects will be ranked for reclamation priority and how the public will be given an opportunity to comment on proposed reclamation projects. The State or Indian Tribe chooses individual projects based upon the selection criteria in its reclamation program. While these criteria differ among AML programs, all consider the priority of the problem, public opinion regarding the project, cost effectiveness, technical feasibility and how the area will be used once reclaimed.

State and Tribal programs seek public input in several ways. For example, some AML programs require that a notice requesting comments on proposed reclamation be published in newspapers of general circulation in the area to be reclaimed. Some publish newspaper notices asking the public to identify potential reclamation sites. Others have public meetings to discuss upcoming reclamation or to identify potential sites. Still other programs seek public input about reclamation activities or potential sites through **Federal Register** notices.

OSM does not approve individual projects. However, before construction begins on any project, OSM must ensure that all requirements of the National Environmental Policy Act of 1969 are met before providing authorization to proceed on the project.

OSM annually reviews the State and Tribal AML programs to ensure that all program requirements are properly met, including site eligibility, proper financial policies and procedures, and reclamation accomplishments. State and Tribal agencies and OSM also review completed projects to determine the success of AML reclamation. Completed projects may be revisited as part of a site-specific contract, as part of an annual post-construction evaluation, or as otherwise specified under the State or Tribal AML reclamation program's maintenance plan. Further, AML reclamation programs evaluate selected, completed AML reclamation projects to determine how effective the overall reclamation program has been. Normally, these evaluations are annual, random samples of many types of reclamation, such as reclaimed subsidence areas, eliminated landslides, sealed openings and removed refuse piles.

### C. What Types of Abandoned Sites Does This Rule Target?

The rule is intended to facilitate the reclamation of certain abandoned mine

lands that have little likelihood of otherwise being reclaimed under either the current Title IV or Title V programs. These sites would not likely be reclaimed under the Title IV program because of severely limited funds; nor would they likely be mined under the Title V regulatory program due to the marginal coal reserves they contain and/or the potential risk for long-term liability associated with existing acid mine drainage (AMD) or other environmental problems.

According to estimates in the Abandoned Mine Land Inventory System, the most serious AML problems—those identified as Priority 1 or Priority 2 sites in the System—would cost more than 2.6 billion dollars to reclaim. These include highwalls, open shafts and accessible underground mines presenting a danger to human health, safety and welfare.

Thousands of other AML-eligible sites—Priority 3 sites that do not pose the same degree of danger to the public but that do adversely affect the environment—would cost tens of billions more dollars to correct. Without an innovative way to finance more reclamation, there is very little likelihood that enough AML money would ever be available to fund the reclamation of even the most serious of these eligible sites, let alone the eligible sites with primarily environmental impacts. Without adequate funding, exposed coal seams and subsided underground workings would continue to contribute acid mine drainage (AMD) and other environmental problems, often far beyond their realty boundaries. Interconnected abandoned mine passageways flooded with poor quality water would continue to discharge the characteristic “yellow-boy” iron precipitates and low pH waters into streams. Coal refuse piles would continue to yield excessive sediment and acid discharges into local water supplies killing fish, endangering wildlife and rendering streams useless for recreation.

The challenge which OSM attempts to address with this rule is how to accomplish reclamation at mines that the AML fund cannot afford to reclaim and that the private sector is not interested in re-mining. The answer for these sites lies in increasing the amount of reclamation without increasing the cost to the AML Fund.

### D. How Will the Final Rule Work?

The current rules at 30 CFR 707.1 and 707.5 provide for a Title V exemption for the extraction of coal which is an incidental part of a government-financed construction. “Government-

financed construction” requires that the project be funded 50 percent or more by funds appropriated from the government financing agency's budget or obtained from general revenue bonds. AML guidelines first published in the **Federal Register** on March 6, 1980 (45 FR 14810) and later amended on December 30, 1996 (61 FR 68777) provide for the sale of coal recovered incidental to an approved AML reclamation project. The 50 percent government-financing requirement of section 707.5 has not affected agency selection of AML construction projects where the anticipated proceeds from the sale of incidental coal were expected to be a small percentage of the total project cost. However, in cases where the anticipated proceeds from the sale of incidental coal were expected to be 50 percent or greater of the total project cost—a level that would have reduced the government contribution below the required 50 percent floor—this funding requirement discouraged AML reclamation.

For sites with substantial deposits of incidental coal, we expect that AML contractors will reflect the anticipated sale of such coal through a lowered project bid price. The lowered project bid price would, in turn, reduce the government's share of the total cost of the project. As a result, less public funding will be required for these sites to accomplish the same level of AML reclamation. By reducing the government's share of the cost of reclamation, AML money becomes available for other AML reclamation projects that would otherwise not be funded. Under this new rule, the contractor makes a profit, the government saves money and—most important of all—additional abandoned sites that we could not afford to reclaim in the past are reclaimed.

The key limitation in the application of this rule is that the coal removed and sold must be “incidental” to the reclamation project—physically necessary to remove in order to address the identified health, safety or environmental problem of the approved AML construction project. This concept conforms to existing regulations at 30 CFR 707.5. Coal extracted beyond that which is determined to be incidental will be subject to Title V permitting provisions.

This rule is not designed to address sites involving redisturbance and subsequent reclamation of abandoned mine lands, such as highwalls and outcrops that have become environmentally stable over the years and no longer pose problems. Rather, we hope to target long-standing AML

health, safety and environmental problems by the partial or complete removal of coal during AML reclamation projects. Such projects have the potential to remediate subsidence, to reduce the likelihood of perpetual acid discharge problems that are costly to treat through conventional chemical means, and, in some cases, to permanently eliminate AMD by removing the source of the problem.

This final rule will not alter existing AML program requirements. The eligibility for AML projects, the procurement systems which States and Indian Tribes use to contract for AML reclamation, and all Federal and State requirements that pertain to AML projects will remain the same. Undertaking AML projects that use less than 50 percent government-financing will not be mandatory for States or Indian Tribes; they may choose not to participate in this aspect of AML reclamation. However, State and tribal programs that do participate will be responsible to ensure that the provisions of this rule are applied appropriately and not abused.

#### *E. What is the Relationship Between the AML Agency and the AML Contractor?*

The relationship between the AML agency and the AML contractor under the final rule will be the same as for any approved reclamation project. Actual reclamation is usually done under a site-specific contract between the reclamation agency and third-party contractors. These contracts clearly outline the scope of work for each project, the cost, the time frames involved, how the contractor will be paid and penalties for failure to meet the contractual obligations by either party. The content of the contracts, along with bidding and selection procedures, performance bonding requirements and other contractual matters are established within each program in accordance with State or Tribal laws. The AML agency ensures that the contractor complies with applicable procedures through site visits and other monitoring techniques. If the contractor does not meet the terms of the contract, the AML agency invokes the penalties contained in the contract and allowed by law.

Each contract sets forth any unique features for the project to be reclaimed and any site-specific criteria for that project. For example, a project to address water quality problems will outline the acceptable pH or sediment levels for the water or sediment, the monitoring period associated with the treatment, whether wetlands will be created, any projected effects on wildlife

and any particular environmental impacts at the site or on adjacent properties. Sediment and water quality control plans must provide for adequate environmental protection during the construction phase of the reclamation project as well as after its completion.

When contracts are written, the AML reclamation agency can require that a project pass specific requirements after reclamation. For example, a contract could specify that a retaining wall provide protection for a highway for a three-year period. The contract could also specify that, should the retaining wall fail, the contractor must return to repair the damage. The frequency and extent of follow-up by the AML reclamation agency is written into the contract. AML contracts also identify the incidental coal that can be extracted under the project.

#### *F. What Is an Example of How the Final Rule Will Reduce the Government's Share of Reclamation Costs Under Title IV?*

The following example illustrates the process by which extraction of incidental coal under this rule can reduce the cost to the government for Title IV reclamation at an AML eligible site.

*Example:* After the requisite consultation and concurrences with the Title V regulatory authority (see response to question E. in Section I of this preamble: "What is the relationship between the AML agency and the AML contractor?"), the AML agency announces a contract solicitation to receive bids for the reclamation of a refuse pile contributing sediment and acid mine drainage to local streams. Prior to the solicitation, the AML agency estimates the total cost of reclaiming the refuse pile (removing it to another site, burying it, and revegetating both sites) at \$500,000. This figure includes a \$50,000 allowance for administrative expenses such as project design and project monitoring.

Based on existing chemical analysis of the refuse pile, including BTU information, AML estimates place the net proceeds of the incidental coal in the refuse pile (after transportation, cleaning, royalty costs, etc.) at roughly \$400,000. The estimated net cost for completing the project would then be \$100,000 (\$500,000—\$400,000). Based on these estimates, project bids from contractors would be expected to come in around the \$100,000 range.

Therefore, reclamation of a project that would ordinarily cost the AML agency \$500,000 without contractor sale of incidental coal, or that would cost the agency at least \$250,000 under the existing rule requiring at least 50 percent government financing, will now cost only about \$100,000 under this new rule. If the contract is awarded, the contractor becomes fully responsible for the completion of the work regardless of the contractor's actual proceeds on the sale of incidental coal.

#### *G. Can Private Organizations (e.g., Watershed Groups) Assist in AML Reclamation Efforts?*

Yes. AML agencies can form partnerships with industry, private citizens and other government agencies to help address AML problems. Partnerships, such as those developed under the Clean Streams Initiative—a partnership of Federal, State and local government as well as other public and private interests—can assist in reclaiming lands. Outside funds can also be contributed for specific AML projects as allowed by law.

#### *H. Will the Final Rule Adversely Affect AML Reclamation at Some Sites?*

No. Under the AML program, the percentage of government funding for reclamation of an eligible site does not adversely impact the quality of the reclamation of that site. As with any other AML reclamation project, under this final rule the AML agency selects individual sites from the Abandoned Mine Land Inventory using its priority system. The AML agency then develops the reclamation parameters for that site and includes them in its reclamation contract. We emphasize that the AML agency, not the AML contractor or the owner of the coal, establishes these parameters. The AML agency oversees the reclamation and ensures that the contractor adheres to the contract requirements, including removing and selling only that coal which has been identified as incidental.

#### *I. How Will an AML Agency Approve Reclamation Projects Under the Final Rule?*

As with any other AML project, reclamation projects involving the incidental extraction of coal and reduced government funding levels will have to meet the requirements specified in 30 CFR Subchapter R. The AML agency controls every project specification from design, to bidding, to final reclamation completion. The selection of reclamation sites by the AML agency is based on the need to protect the public health and safety and/or the environment from the adverse effects of past mining activities. A particular site can be selected only after the AML agency determines that private industry would be unable or unwilling to remine and reclaim the site as a Title V operation, and the State Attorney General or other legal officer certifies that the project meets the eligibility requirements specified in State or Indian Tribe counterparts to Title IV.

OSM is expressly prescribing certain procedures to ensure that the provisions

of this final rule are implemented appropriately. First, the AML agency, in consultation with the Title V regulatory authority, determines whether the site is appropriate for AML reclamation activities based on the likelihood of extracting the coal under a Title V permit. Second, the Title V regulatory authority and the Title IV AML agency have to concur on the boundaries of the AML project and on the identification of incidental coal—that which is physically necessary to remove to accomplish the approved reclamation.

*J. What Will be the Consequence of AML Contractors Removing Coal Outside the Limits Authorized by the AML Project?*

AML contractors removing coal outside the limits authorized by the AML project will be subject to contract remedies as deemed appropriate by the AML agency. These can include termination of AML contracts, forfeiture of any performance and reclamation bonds, or other remedies provided by law for breach of contract. The AML agency will further be expected to notify the Title V regulatory authority when any unauthorized coal is removed.

Sometimes there is unintended and extremely limited removal of coal beyond that which has been determined to be incidental to the project that may not justify termination of the AML contract or bond forfeiture. Further, when the amount of unauthorized coal removal is less than 250 tons, the operation may be exempt from Title V permitting requirements under 30 CFR 700.11(a)(2). We rely on the experience and judgment of AML authorities, in consultation with Title V regulatory authorities, as appropriate, to determine when a contractor has exceeded the allowable limits for removal and sale of coal at an AML project. The consequences of removing coal located outside the project limits is discussed further at Section II of this preamble in the response to question J: "What must the contractor do under final section 874.17(e) if extracting coal beyond the limits of the incidental coal specified in section 874.17(b)?"

*K. The Proposed Rulemaking*

After substantial public outreach, OSM proposed rules on June 25, 1998 (63 FR 34768) with a 30-day comment period. The comment period was reopened and extended on July 31, 1998 (63 FR 40871) until August 11, 1998, and reopened and extended again on September 3, 1998 (63 FR 46951) until September 18, 1998. No public meetings or hearings were requested or held. OSM proposed to revise the definition of "government-financed construction"

at section 707.5 and add a new section 874.17 detailing procedures for AML construction projects initiated under the scope of the new definition.

OSM received comments in response to the proposed rule from 21 commenters representing industry, State regulatory authorities, Federal agencies, and environmental groups. OSM has reviewed each comment carefully and has considered the commenters' suggestions and remarks in preparing this final rule.

**II. Response to Comments and Final Rule**

The great majority of commenters generally supported the proposed rule. Twelve commenters supported the proposal in whole or in part. Six commented without supporting or opposing the proposed rule. And, three objected to the proposed rule. The wide-ranging comment support included such reasons as: the rule represents a sensible approach to achieving greater AML reclamation at a lower cost; the rule would permit greater flexibility needed to address reclamation problems that are not being addressed under current rules; the rule would bring to bear additional resources to remedy the effects of past mining, including the numerous acid mine drainage problems occurring nationwide; the rule would provide adequate safeguards, including sound environmental protection safeguards, to ensure that it is applied only in appropriate circumstances; and the rule would encourage on-the-ground reclamation improvements at many AML eligible sites that otherwise would not occur due to limited AML funding and the absence of sufficient incentives to remine and reclaim such sites as Title V regulated operations.

The three commenters objecting to the proposed rule asserted that it was an incentive for remining—a process that involves Title V regulated coal mining at previously mined sites where the original operations left some coal in the ground, on the surface or in coal mine waste piles. Our response to this assertion can be found in the answer to question L. in Section II of this preamble: "Is this rulemaking really more about remining than AML reclamation?"

*A. What is the Statutory Authority for the Final Rule?*

Three sections in SMCRA outline the eligibility requirements for sites being considered for funding under the AML program. They are sections 404, 402(g)(4)(B)(I), and 402(g)(4)(B)(ii). Section 403 of SMCRA establishes priorities for expenditures from the

AML Fund on eligible sites. An eligible site must then meet one of the five priorities of Section 403(a)(1)–(5) in order to be funded.

Section 413(a) of SMCRA provides the Secretary with the "power and the authority, if not granted it otherwise, to engage in any work and to do all things necessary or expedient, including the promulgation of rules and regulations, to implement and administer the provisions of this [Title IV]." This final rule change is narrowly limited in its application to the AML program and is necessary and expedient for OSM and the States and Tribes to more efficiently and effectively carry out the reclamation mandate established by Congress. This statutory authority allows OSM to propose revisions to the AML program that will provide States and Tribes the authority to reduce project costs to the maximum extent practical on abandoned mine sites which have deposits of coal or coal refuse remaining. Thus, the final rule will allow for more program-wide reclamation for the same level of program funding.

In addition, Congress specifically provided under Section 528(2) that SMCRA would not apply to activities involving the "extraction of coal as an incidental part of Federal, State or local government-financed highway or other construction under regulations established by the regulatory authority." Thus, Title V permitting requirements do not apply to areas from which coal is extracted as an incidental part of a government-financed construction operation. Because AML reclamation projects are government-financed, they qualify as government-financed construction under Section 528(2).

Each of the three opposing commenters challenged the legal authority promulgating this rule. The first stated that the congressional intent behind the Section 528(2) exemption was to facilitate public works projects, including highway construction, rather than projects authorized under Title IV. The second commenter did not categorically exclude AML projects from the ambit of the Section 528 exemption, but maintained that the elimination of the 50 percent funding requirement opened the exemption to "all construction" in contravention to the intent of Congress (citing H.R. Rep., No. 95–492, at 112 (1977)). The third commenter stated, without support, his conclusion that OSM lacked legal authority for its rule.

In response to these commenters, OSM notes that the plain language of Section 528(2) exempts the "extraction of coal incidental to \* \* \* government-

financed highway or other construction \* \* \*." While the legislative history of this exemption does not indicate what "other [government-financed] construction" Congress intended to exempt, the legislative history is clear that Congress did not intend to exempt the broad brush of private construction, *i.e.*, the "all construction" referenced by the second commenter. (See proposed rules, 43 FR 14672, September 18, 1978; citing to H.R. Conf. Rep. No. 95-493, at 112 (1977)). As the legislative history of Section 528(2) indicates, Congress patterned the exemption in some ways after the Pennsylvania Highway Law and was very much concerned with ensuring appropriate government reclamation of affected areas. (43 FR 14672, September 18, 1978; citing to H.R. 5988, 93d Cong. § 203 (1973); 119 Cong. Rec. 1368 (January 18, 1973, discussing § 203 of H.R. 5988)).

Approved AML construction projects are consistent with the constituent elements of the Section 528(2) exemption for the extraction of coal incidental to government-financed "other" construction. These AML projects are "government-financed" and, from start to finish, government-initiated, government-approved, and government-monitored. The only coal that can be extracted by these projects is that which is incidental to the reclamation of the site and delineated in the AML contract. In this regard, AML construction projects are not unlike other government-financed construction, such as that of airports and schools, for which the "other construction" exemption provision of Section 528 has been recognized to apply. Even more than in airport and school construction, the preeminent reclamation purpose of AML construction projects satisfies congressional intent that exempted government-financed construction projects address the reclamation concerns of affected areas.

As early as 1980, the Secretary formally recognized the applicability of the Section 528(2) exemption to the incidental recovery of coal in conjunction with AML projects. (AML Guidelines, Item B. 5., 45 FR 14810, March 6, 1980). Therefore, while the application of the Section 528(2) exemption to AML construction projects may not have been specifically envisioned by Congress twenty years ago, such application is reasonable and consistent with what we know from the legislative history of Congress' intent to exempt "other" government-financed construction from the provisions of the Act.

#### *B. What is the Amended Definition of "Government-financed Construction" at Section 707.5?*

OSM proposed to amend the definition of "government-financed construction" in section 707.5 of the permanent program regulations to allow less than 50 percent government funding from OSM or other AML agencies for construction undertaken as an approved AML reclamation project under Title IV of the Act when the reclamation involves the incidental extraction of coal. A government agency includes a State or Indian Tribe with an approved Title IV program under the definition of agency found at 30 CFR 870.5. For those States and Indian Tribes that do not have approved Title IV programs, a government agency means OSM or its designated State agent.

AML reclamation projects are funded from several sources, including private individuals who donate time and money, environmental groups, utilities, industry and the government through the Title IV program. Under the previous definition of "government-financed construction," the government's financial share of the AML reclamation had to be at least 50 percent of the total project cost. By reducing the required government share for these AML projects, we anticipate that the final rule will free up AML money to do reclamation that otherwise might never be accomplished.

One commenter opposed the provisions of the proposed rule which would allow less than 50 percent government funding when the construction is an approved AML reclamation project. That commenter cited the preamble to the 1978 rule, which originally proposed the 50 percent funding requirement, to support the claim that the funding requirement serves to "exempt only those projects in which the government has a significant government interest." (Emphasis added by commenter.) (43 FR 41672-3, September 18, 1978). The commenter also viewed the funding requirement as fulfilling Congress' intent to limit carefully and narrowly the scope of the Section 528(2) exemption.

However, in the preamble to the 1979 final rule, OSM acknowledged that it had considered alternatives to lowering the 50 percent funding requirement. In that preamble, OSM stated that little rationale had been received in support of a lower percentage and that the only example which had been given of a public benefit from such lowering was a donated haul road. In that same preamble discussion, OSM indicated

that it believed there would be few instances in which the 50 percent funding requirement would discourage construction that otherwise would comply with a lower percentage. (44 FR 14949, March 13, 1979).

Now, some twenty years later, we fully support eliminating the 50 percent funding requirement for approved AML projects. Our rationale is, to a large degree, based upon the unique governmental character and protections associated with approved AML construction projects and the substantial public benefit reasonably expected from the reclamation of a considerable number of AML sites which would not otherwise be reclaimed because of the prior 50 percent standard.

See the response to question B. in Section II of this preamble for a discussion of OSM's statutory authority for eliminating the funding requirement for approved AML projects. As amended, the section 707.5 definition for "government-financed construction" will continue to narrowly limit the scope of the exemption in a manner which we believe is consistent with the congressional intent of Section 528 of SMCRA, the overall structure of SMCRA, and its goal of promoting the reclamation of previously mined eligible areas.

Another commenter asked OSM to consider revising the proposed definition in section 707.5 in a manner that would recognize that any AML project which involves the incidental removal of coal is government-funded construction, regardless of funding level and technique. The commenter was concerned that in-kind payments such as administrative expenses incurred by the AML agency in reviewing and approving the project may not qualify as government funding and thus preclude projects where there was no direct funding by the AML agency.

OSM assures the commenter that all expenses incurred directly or indirectly by the AML agency, such as project design, project solicitation and project management and project oversight qualify as government funding under the section 707.5 definition based on long-standing grants practice in the AML program. In light of this, OSM does not believe there is a need to revise the proposed definition. The definition of "government-financed construction" at section 707.5 is adopted as proposed.

#### *C. What Is the Change in Information Collection for Section 707.10?*

OSM is revising section 707.10 which contains the information collection requirements for Part 707. The revision changes the prior justification for Part

707's exemption from the requirements of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). The revised basis for this exemption is that the information required to be maintained in section 707.12 consists only of information that would be provided by persons in the normal course of their business activities. No comments were received on section 707.10, "Information collection," and it is adopted as proposed.

#### *D. What Are the Information Collection Requirements for Section 874.10?*

OSM is adding a section 874.10, which contains the information collection requirements for Part 874 and the Office of Management and Budget (OMB) clearance number. The addition includes the estimated reporting burden per project for complying with the new information collection requirements contained in the final rule.

One commenter suggested that OSM's estimate of 27 hours for the burden of the proposed collection of information under the requirements of the proposal was too low. The commenter suggested 60 hours was a more reasonable estimate and we have accepted this figure in the final rule at section 874.10, "Information collection."

#### *E. What is the Purpose Behind New Section 874.17: "AML Agency Procedures for Reclamation Projects Receiving Less Than 50 Percent Government Funding?"*

This new section outlines the procedures an AML agency will need to follow in approving AML projects receiving less than 50 percent government funding because of planned coal extraction incidental to the reclamation. Its intent is to ensure that the revised definition of "government-financed construction" at 30 CFR 707 is applied only when appropriate to achieve reclamation at AML-eligible sites.

Several commenters agreed with OSM that sufficient safeguards exist to ensure the procedure is used only in appropriate circumstances. Another acknowledged that it will now be incumbent upon both the States and OSM to implement the rule in a professional and responsible manner. These comments are consistent with our belief that the experience and safeguards of the AML program, combined with OSM's oversight role, will prevent abuse of the provisions in this rule. Again, we emphasize that States—not contractors or operators—select projects, solicit bids and decide whether to award contracts.

Two commenters opposed the rule citing a potential for substantial administrative abuse. One commenter quoted OSM's 1978 justification for proposing the 50 percent funding requirement as minimizing the opportunity for this abuse. Both commenters looked to the history of SMCRA as providing examples of how its provisions had been abused and such abuse had been tolerated by regulatory authorities. Each commenter saw every reason to expect that regulatory authorities would participate in such abuse in the future.

OSM is very much aware of the pressure for regulatory authorities to apply this rule in such a way as to maximize AML reclamation by maximizing coal extraction. It was for this reason that OSM added to its original outreach document the consultation and concurrence requirements of section 874.17(a) and (b) and the documentation requirements of section 874.17(c) which added an element of personal accountability to the required determinations and decisions. Notwithstanding, OSM has every reason to believe that the Title IV authorities will continue to properly implement their programs as they have done in the past. Should OSM discern a problem with program implementation, we will address that problem through oversight.

With regard to the commenter's reference to OSM's 1978 justification for the 50 percent funding requirement, we note that the same pressures to maximize coal extraction exist under both the prior and present rule. Yet the present rule, objected to by the commenters, provides significantly less potential for abuse than the prior rule in that it provides for the section 874.17 protections not found in that prior rule.

The introductory paragraph of section 874.17, "AML agency procedures for reclamation projects receiving less than 50 percent government funding," is adopted as proposed. Paragraphs 874.17(a) through (e) are discussed in the sections that follow.

#### *F. How Will the Consultation in Section 874.17(a) Work?*

The consultation process under 874.17(a) requires the AML agency to consult with the regulatory authority to determine the likelihood of the coal at a proposed AML project being mined under a Title V permit. The purpose of this consultation is to ensure that the AML program and funds are not used for activities that should properly be permitted and regulated under Title V. Through this consultation process OSM

seeks to ensure that AML funds are directed only to eligible sites.

OSM believes the information upon which the "likelihood of the coal being mined under a Title V permit" determination is made should be information that is reasonably available. In both our proposed and final rules, we have listed certain kinds of information that we believe would be available and helpful in reaching a decision on whether or not to proceed with the project under the AML program. These examples of "available" information are not exhaustive. Each site will present a different set of circumstances and problems which are best addressed on a case-by-case basis. We believe it best to leave to the experience and technical and professional judgment of the Title IV and Title V officials within each jurisdiction to decide if an abandoned mine should be remined under a Title V permit or reclaimed under the AML program. We will continue to monitor those decisions through our oversight of the respective State programs.

Under this section, the AML agency also will consult with the regulatory authority to determine the likelihood for potential problems and impacts arising between Title IV reclamation projects and any adjacent or nearby Title V operations. The purpose of this provision is to identify environmental problems at an early stage and to establish reclamation responsibility. An example of where reclamation responsibility needs to be established is where a hydrologic connection exists between nearby or adjacent Title IV and Title V activities. In such cases where there is acid mine drainage, OSM believes it is essential to ensure that responsibility for acid mine drainage arising from a permitted Title V activity but impacting a Title IV activity remains with the Title V permittee. Conversely, a Title V permittee would not be held responsible for any environmental problems originating from a nearby or adjacent Title IV reclamation activity impacting the Title V activity.

One commenter suggested that this section be amended to include consideration of economic factors which limit the development or marketing of the coal resources as an active mining venture.

OSM recognizes that economics related to environmental risks, permitting costs, regulatory compliance costs, quantity and quality of the coal as well as development and marketing issues are all important factors leading to a decision by a coal operator to mine or not mine under a Title V permit. A rough economic analysis is not precluded by the regulatory language.

The AML agency and regulatory authority are free to use any information and analyses, including an economic analysis, that they consider appropriate to reach and support their section 874.17 decisions. On the other hand, a thorough economic analysis would be costly, and the information needed for its preparation would not always be readily available. In light of these considerations, we are not requiring an economic analysis in the final rule.

The same commenter suggested that a finding be made during the consultation as to the likelihood that the project will aid in correcting existing off-site environmental damage caused by on-site problems, such as discharge of acid mine drainage. Because AML authorities already factor such considerations into their project-selection decisions, we see no reason to require an additional step in the consultation process.

Another commenter was encouraged that the ultimate determination of whether an abandoned mine site should be reclaimed under a Title V permit or reclaimed under the Title IV AML program would be left to the experience and technical and professional judgment of State officials. This commenter, and one other, further expressed the hope that, under OSM's oversight of State programs, OSM would not be second-guessing State determinations about the likelihood that sites would be mined under Title V. One of these commenters further questioned whether, if OSM were to reverse a State determination, the State would then disallow the AML funding and cite the contractor for mining without a permit?

State authorities will have to make determinations under this rule based on experience, professional judgment, and the best available information. OSM does not intend to second-guess individual decisions by State Title IV authorities. Our approach to oversight will be to review first the State determinations, as documented under paragraph (c) of this section, to find out whether there is a pattern of questionable State determinations and, if there is such a pattern, to look into the reasons before deciding what remedial action would be appropriate. This is consistent with OSM's overall approach to oversight of State programs under SMCRA. Even if we were to determine that a State is not properly implementing this rule, there would be no basis for OSM to take action against a contractor who, in good faith, is and has been complying with all terms and conditions of the contract. Instead, our focus would be on working with the

State to correct any program deficiencies.

One commenter indicated that the waiver of AML reclamation fees was key to offsetting some fairly significant risks to contractors in taking on an AML project under this rule. Among the risks noted by the commenter were the quantity and quality of the incidental coal, negotiation of a lease and associated royalty payments, potential bonding requirements, and the responsibility to complete the project regardless of the return on the sale of the incidental coal. The commenter believed it might be necessary to consider "additional adjustments" in the final rule in order to encourage contractors to undertake this type of project.

OSM realizes that there is a significant factor of operator risk in any AML reclamation contract whether or not it involves the incidental extraction of coal. However, when there is risk of loss there is also potential for gain. Contractors who are uncomfortable with site-specific risks inherent in individual reclamation contracts should not bid on the contract. The final rule is built upon the basic elements of a standard AML contract. OSM will not consider adjustments to any of these basic elements to encourage operators to undertake reclamation projects. Concerning the comment on the waiver of AML fees, the payment of AML fees has never been required of contractors extracting coal under a Section 528(2) exemption.

Another commenter suggested that it was unfair to hold the contractor responsible for completing the AML work if the project was begun with a reliance on agency estimates of coal amount, quality, location, marketability, etc., that turned out to be miscalculated or otherwise in error. The commenter also asked if OSM would amend the AML contract if any material miscalculations were discovered.

This commenter misinterprets the proposed rule to mean that contractors will have to rely upon AML estimates of amount of coal, quality of coal, etc.. Under this rule, the AML agency will establish and describe the limits of the incidental coal to be removed and any other information it has about the deposit. If the AML agency drills the site as part of its determination of what coal is incidental to the project, that information will be provided to interested contractors. But as in any arms-length transaction, it behooves both sides to assure themselves that they have sufficient accurate information to enter into a contract. Contractors submit bids based on their

own cost-benefit considerations.

Likewise, AML agencies select and reject bids based on whether they are in the best interest of the agency. Once a contract is executed, however, each party is bound by the terms and the conditions of the contract. Contract amendments can take place if approved by the AML agency for extraordinary circumstances. However, we stress that we see no valid reason for modifying the contract because of the contractor's incorrect estimate of either the amount of coal at the site or its ultimate value.

One commenter asserted that the determination in section 817.74(a)(1) as to the likelihood of the site being mined under a Title V permit could not properly be made outside the context of the baseline hydrologic, geologic and coal reserve information normally submitted as part of a Title V permit application.

OSM does not agree that a reasonable "likelihood" determination cannot properly be made on the basis of available (a)(1) information. On occasion, however, the AML agency may consider that available documentation on coal reserves needs to be augmented, for example, by the drilling of core samples. We expect that the results of such drilling would be shared with contractors.

One commenter asserted that the rule is deficient in not being "need-tested," namely that there is no requirement for the "operator" to demonstrate that the reclamation would not otherwise be accomplished under a viable Title V operation.

OSM interprets this comment as a proposal to change the "likelihood" test into a "never-ever" test. Such a proposed limiting or narrowing of the "likelihood" determination would negate the very purpose of this rulemaking by discouraging reclamation under Title IV while doing nothing to increase the likelihood of reclamation under Title V. In addition, this suggestion would essentially create a requirement that a contractor know other companies' trade secrets with which it would be impossible to comply. Section 874.17(a), "Consultation with the Title V Regulatory Authority," is adopted as proposed.

#### *G. What Types of Concurrences Between the AML Agency and the Regulatory Authority Will be Required in Section 874.17(b)?*

Under proposed section 874.17(b), if the AML agency would have decided to proceed with the reclamation project after consulting with the Title V regulatory authority, then the two

would have had to concur in determinations as to: (1) the extent and amount of any coal refuse, coal waste, or other coal deposits, the extraction of which would be covered by the Part 707 exemption or counterpart State and Tribal laws and regulations, and (2) the delineation of the boundaries of the AML project. These determinations primarily were intended to ensure that only the amount of coal physically needed to accomplish the reclamation is covered by the Part 707 exemption. This coal would be "incidental" and exempt from the reclamation fee payment.

One commenter suggested that the rule should have included a provision that allows the contractor to amend or revise the boundaries of the AML project where conditions or circumstances warrant the removal of additional coal as long as the coal is incidental to the reclamation. Another commenter suggested that a provision be included for amending the determination on the amount and extent of incidental coal if additional coal is found to be incidental to the reclamation.

OSM does not accept either of these suggestions. As with any AML reclamation project, the contractor can propose contract revisions based on unusual or unanticipated conditions experienced on the site. However, only the AML agency has the authority to revise or amend the contract. Because the AML agency already has this authority, OSM does not see the need for specifically providing for it through a new rule provision.

Two commenters suggested increasing the number and scope of the required Title V concurrences. The first proposed to replace the existing concurrence on the extent and amount of incidental coal with one on the estimated contractor revenues from the sale of that coal. This was seen as more appropriate because revenues from coal sales are to be used to offset project costs. The second comment proposed requiring Title V concurrence on all contract amendments.

OSM considered but did not accept either of these suggestions. The principal reason for involving the Title V authority in the paragraph (b)(1) concurrence process is to secure the greatest assurance that the limits of incidental coal are correctly identified. As discussed elsewhere in this rulemaking, precise estimates of contractor returns require company-specific information not available to either OSM or State authorities. All that is needed by the AML agency for the purposes of this rule is a rough estimate of contractor returns to set the range of

expected contractor bids on the project. Requiring a Title V concurrence on this process is not necessary and would divert limited agency resources away from addressing more crucial information needs.

For similar reasons, OSM did not accept the second proposal that Title V concurrence be required for amendments to the reclamation contract. One of the principal purposes of the rule is secured by involving the Title V authority in the initial determination of the contract limits of incidental coal. Once this has occurred, the AML authority should have little or no difficulty when considering amendments affecting the determination of incidental coal. Requiring concurrence of the Title V authority in subsequent revisions to the contract, including adjustments to the limits of incidental coal, would be of little benefit. If the AML authority decides there is a need to discuss a contract amendment with the Title V authority, the AML authority is free to seek such advice.

Several comments focused on the language of proposed (b)(1) which would have required specification of the "amount" of coal that could be extracted under the Part 707 exemption. This "amount" specification was complicated by the language of proposed (e) which would have required a Title V permit in cases where a contractor extracts "more coal than specified in (b)(1)." Read together, these paragraphs appeared to require a Title V permit if more coal was extracted than the extent and amount specified in the Title IV and Title V concurrence. Commenters not only suggested that such language would require AML auditing of company books but also offered opinions on the senselessness of tonnage measurements. Other comments interpreted the proposed (b)(1) and (e) language as requiring AML audit of tonnage figures, company sales and net revenue figures.

OSM never intended the proposed paragraphs (b)(1) and (e) language to require a Title V permit for the extraction of any amount of coal that lies within the incidental coal limits specified under (b)(1). Instead, OSM intended that the language would only require a Title V permit for coal extracted beyond those limits. The "extent" or limits of incidental coal can reasonably be defined in terms of the dimensions of the area containing the coal. Exact determination of tonnage within these dimensions would, in most cases, be impossible to achieve prior to removing the coal.

To eliminate any ambiguities that may have appeared in the proposed (b)(1) rule language, the final rule replaces the phrase "extent and amount" with the word "limits". The remainder of section 874.17(b)(1) and (2), "Concurrence with the Title V Regulatory Authority," is adopted as proposed.

Final section 874.17(b)(1) reads:

You [the AML authority] must concur in a determination of the limits on any coal refuse, coal waste, or other coal deposits which can be extracted under the Part 707 exemption or counterpart State/Indian Tribe laws and regulations.

For information on conforming changes to section 874.17(e), see the response to question J. in Section II of this preamble: "What must the contractor do under final section 874.17(e) if extracting coal beyond the limits of the incidental coal specified in section 874.17(b)?"

#### *H. Under Section 874.17(c), How Will the AML Agency Document the Results of the Consultation and the Concurrences With the Title V Regulatory Authority?*

Under the proposed and final rules, the AML agency documents, in the AML case file, the determinations as to the likelihood of coal at the site being mined under a Title V permit and the likelihood of interactions between AML activities and nearby or adjacent Title V activities that might create new environmental problems or adversely affect existing situations. Also, the AML agency documents the information used for making these determinations and the names of the responsible agency officials.

As we received no comments on section 874.17(c), "Documentation," it is adopted as proposed.

#### *I. What Special Requirements Will Apply for Qualifying Section 874.17(d) Reclamation Projects?*

Under the proposed and final rule, section 874.17(d)(2) expressly requires that qualifying AML reclamation projects comply with provisions for State and Tribal reclamation plans and grants found at 30 CFR Subchapter R. The required compliance with Subchapter R is intended to ensure that the incidental coal extraction projects authorized under this rulemaking is accomplished in accordance with the substantial safeguards of the AML program. These safeguards include such features as: public participation and involvement; environmental evaluation to achieve compliance with the National Environmental Policy Act of 1969; and use of appropriate State or Tribal procurement procedures and regulations

as authorized under the grant common rule at 43 CFR 12.76.

Further, to provide increased protections to the AML fund and to citizens or landowners who might be affected by the project, we proposed three additional requirements to qualifying section 874.17 reclamation projects. These three proposed requirements, with only a minor wording adjustment in paragraph (d)(4) discussed below, are included in the final rule. Paragraph (d)(1) requires the AML agency to characterize the site in terms of existing hydrologic and other environmental problems. Paragraph (d)(3) requires the AML agency to develop site-specific reclamation and contractual provisions, such as performance bonds, to ensure that the reclamation is completed. And, paragraph (d)(4) requires the contractor to provide documents that authorize the extraction of the coal and commit to the payment of royalties to the mineral owner or other appropriate party.

The purpose of the (d)(4) requirement is to ensure that before a reclamation contract is awarded, there will be a valid coal lease authorizing the contractor to extract the coal. The terms of the lease will identify the party responsible for paying the royalty, the amount of the royalty, and the party receiving the royalty. To make the rule language clearer, we are including in final (d)(4) the qualifying phrase that the contractor provide, "prior to the time reclamation begins," applicable documents that clearly "commit to the payment of royalties."

One commenter indicated that the documentation requirements of section 874.17(d) must be interpreted as requirements for the AML program and not as information to be supplied in lieu of a mining permit. The commenter reasoned that the goal of the AML program is to improve existing environmental conditions and not just to protect or preserve existing conditions. OSM agrees with the commenter on both points.

Two other commenters raised issues regarding the payment of royalties, severance taxes and related obligations. The first wanted to ensure that the AML contractor secure a mineral lease and/or pay associated royalties, particularly for Federal and State coal. The second raised the question of the proof of payment for such "other" fees as severance and black lung taxes.

In response to both these commenters, we emphasize, as we have done in the proposed rule and elsewhere in this final rule, that this rulemaking is not intended to change, alter, or supersede any other Federal or State laws,

regulations, or requirements that apply to all AML reclamation projects. The requirement for a Federal or State lease and the payment of Federal or State royalties is unaffected by this rule. Also, any requirements for proof of payment for severance and black lung fees—fees which are not required under SMCRA—are unaffected by this rule.

A final commenter raised the question of whether the (d)(4) documentation authorizing coal extraction (e.g., a lease) would be required before or after project bid submission. OSM believes that requiring the paragraph (d)(4) documentation before the reclamation actually begins will provide the greatest latitude to parties interested in bidding on the AML reclamation projects. As indicated earlier, we have further revised final (d)(4) to include the qualifying phrase "prior to the time reclamation begins" to reflect this intention. In all other ways, final section 874.17(d), "Special requirements," is adopted as proposed and now reads:

(d) *Special requirements.* For each project, you must:

(1) Characterize the site in terms of mine drainage, active slides and slide-prone areas, erosion and sedimentation, vegetation, toxic materials, and hydrologic balance;

(2) Ensure that the reclamation project is conducted in accordance with the provisions of 30 CFR Subchapter R;

(3) Develop specific-site reclamation requirements, including performance bonds when appropriate in accordance with State procedures; and

(4) Require the contractor conducting the reclamation to provide prior to the time reclamation begins applicable documents that clearly authorize the extraction of coal and payment of royalties.

*J. What Must the Contractor do Under Final Section 874.17(e) if Extracting Coal Beyond the Limits of the Incidental Coal Specified in Section 874.17(b)?*

In proposed and final section 874.17(e), the contractor is required to obtain a permit under Title V for the extraction of any coal not included in the paragraph (b)(1) Part 707 exemption. Such coal is not incidental to the AML reclamation project and thus is subject to all the regulatory requirements of Title V.

One commenter asked what OSM would do if, after a contract is signed, the lessor and contractor wanted to take out additional coal underlying the coal determined to be incidental to the project and possibly provide more complete reclamation in the process. Would OSM consider the additional coal extending beyond the established

project limits to be incidental because its removal could improve the reclamation, or would OSM consider the coal non-incidental and expect the contractor to obtain a Title V permit?

This is an important issue, and we want to clarify how it must be addressed under the final rule. All coal extracted beyond the limits of the incidental coal identified in the AML contract, regardless of where it is found relative to the incidental coal, is subject to Title V requirements, including obtaining a permit and payment of reclamation fees. Once the contractor begins work on the project and the AML authority subsequently determines that additional coal is incidental to the project, the contract could be amended to include the additional coal. The standard for determining incidental coal is always whether removal or extraction is physically necessary to accomplish the reclamation of the approved AML construction project. This standard must be applied in the initial contract determination and in any amendments that change the contract limits of incidental coal. Any coal whose removal or extraction is not physically necessary to complete the reclamation is not incidental to that project—even if such removal and sale would reduce the overall cost of the reclamation to the government.

One commenter suggested that the preamble discussion in the proposed rule (question K. in Section II of the preamble to the proposed rule) providing for contract remedies against AML projects for the extraction of coal outside of the section 874.17(b)(1) project limits, conflicted with the proposed rule language of section 874.17(e) requiring a Title V permit for such extraction. While several commenters read the proposed rule language of paragraphs (b)(1) and (e) as establishing a tonnage limit on the amount of incidental coal that could be extracted from the AML project (with a Title V permit being required for coal exceeding the tonnage limit), most commenters appeared to correctly interpret these paragraphs to mean that the limits on incidental coal would be identified and described in terms of dimensions of the area containing the coal. A Title V permit would not be needed to extract coal within these prescribed limits, regardless of how much coal is extracted or the quality and value of the coal. To make it clear in this final rule that paragraph (e) requires a Title V permit only for the extraction of coal beyond the paragraph (b)(1) limits, we are making the following clarifying changes to that paragraph.

Final paragraph (e) replaces the word "more" in front of the word "coal" with the phrase "beyond the limits of the incidental [coal]." The rule language concludes with the addition of the new phrase "for such coal." This change should clarify that extraction of coal beyond that which has been determined to be incidental to the project under (b)(1) is unauthorized and, thus, requires a Title V permit. At the same time coal extracted within the (b)(1) limits, regardless of how much or how valuable, is incidental and, therefore, authorized under the project.

Final section 874.17(e) reads:

If the reclamation contractor extracts coal beyond the limits of the incidental coal specified in paragraph (b)(1) of this section, the contractor must obtain a permit under Title V of SMCRA for such coal.

Two commenters suggested an auditing or final adjusting of contractor cost to net revenues in lieu of the proposed regulatory requirement to seek a Title V permit if the contractor extracts more coal than authorized in the AML contract. One of the commenters believed that this was fairer, more effective and would not halt the AML project if the contractor could not obtain a permit or delay it until such time as the contractor obtained a permit. These and other commenters proposed alternative remedies, procedures, and sanctions to the paragraph (e) requirement that a contractor obtain a Title V permit for extraction of coal beyond the incidental coal limits of (b)(1).

As previously mentioned, OSM recognizes that there are times that unintended and extremely limited extraction of coal may occur beyond prescribed (b)(1) limits. To the extent that such coal is less than 250 tons, the extraction may be exempt from regulation under the Title V permitting requirement at 30 CFR 700.11(a)(2). Failing that exemption, the Act allows no leeway in the requirement for Title V permitting. To be reasonably assured that coal removal will not exceed the incidental coal limits of (b)(1), contractors should design projects accurately and precisely and pay close attention to project boundaries and incidental coal limits when undertaking the project.

We note that the paragraph (e) requirement that the contractor must obtain a Title V permit does not preclude the AML agency from imposing contract sanctions under the Title IV program if the contractor breaches the conditions of the contract. As indicated in the preamble discussion following question K. in Section II of the

proposed rule, AML contractors removing coal beyond the limits authorized by the AML project could be subject to a wide range of remedies for breach of contract. Such sanctions are already available to the Title IV agency to use at its discretion to ensure that reclamation is conducted fully in accordance with applicable laws, regulations and contract requirements. Indeed, when a contractor clearly exceeds the (b)(1) incidental coal limits, OSM expects that the AML agency would impose appropriate sanctions, as well as refer the matter to Title V authorities for appropriate action. Hence, we have not adopted any of the suggested rule changes that would have limited the available remedies or sanctions.

#### *K. How Does This Rulemaking Relate to the Established AML Priority System for Selecting Projects?*

OSM received several comments concerning the relationship to the priorities established in Section 403 of SMCRA relative to projects involving the incidental recovery of coal. One of these commenters encouraged OSM to add a paragraph (d) under section 874.17 titled "Project Priority," the purpose of which would be to remind the States that the selection of projects shall reflect the priorities outlined in Section 403 of SMCRA regardless of whether or not there is coal recovery potential. This commenter suggested that such an advisory statement would help States defend their project selection process against political or business pressure to fund certain sites with coal recovery potential. At the same time, the commenter suggested, an advisory statement would not preclude States from approving low priority projects where coal recovery potential allows reclamation to be performed at little or no cost to the government.

Another commenter indicated that the discussion in our proposal (63 FR 34770; June 25, 1998) suggested that the AML agency could select sites independent of the priority ranking. The commenter recommended that OSM clarify that the rule provides the State AML agency with the authority to depart from the priority system in order to speed approval of the incidental coal removal projects developed under this rule.

A third commenter was encouraged by OSM's recognition that the types of AML projects likely to attract most attention under this rule are those listed as priority 3 under Section 403 of SMCRA. This same commenter was encouraged again that the rule does not mandate that the States approve all

AML projects presented to them which involve less than 50 percent government funding.

OSM certainly did not intend by anything said in its proposed rule to suggest that States disregard the established priority system. In our proposed rule, we expressly stated that, "The AML agency selects individual sites from the AML Inventory using its priority system." (63 FR 34771; June 25, 1998).

OSM further does not believe that there is need to add an advisory regulation to clarify the priority structure. Projects done under authority of this rule will not differ from any other AML project with regard to Section 403 of SMCRA. The States have been administering quality AML programs since the early 1980's. Political or business pressure in project selection has always been part of the process, and there is every reason to believe that such pressure can be expected here. While individual projects selected may be priority 1, 2 or 3, depending on the State's needs and the amount of AML reclamation remaining to be done, individual projects are approvable as long as they reflect, within the context of other AML projects, the priorities outlined in Section 403. States will retain the maximum discretion in choosing AML projects consistent with their current authority in Section 403.

One commenter believed that OSM's statement that, "The proposal was not intended to address project sites involving redisturbance and subsequent reclamation of abandoned mine lands, such as highwalls and outcrops that have become environmentally stable over the years and pose no other problems" provides a significant obstacle to reducing the current AML inventory through reclamation. OSM disagrees with the commenter. Section 403 of SMCRA states that, in addition to the eligibility criteria for AML reclamation found at Section 404, sites must meet one of the priorities at Section 403. If an abandoned mine site has become stable over the years, it would not meet the priorities in Section 403 and it would not be subject to expenditures from the AML fund. Such a site could properly be removed from the inventory at the State's discretion.

#### *L. Is This Rulemaking Really More About Remining than AML Reclamation?*

No. The three commenters opposing the rule asserted that it was a thinly veiled remining incentive. They uniformly decried what they perceived to be the loss of Title V remining

protections for operations that they suggested would be conducted as Title IV reclamation projects under this rule. Much of commenters' concerns centered on their assertion that the rule would lead to administrative abuse and operate as a remining incentive. One of the three commenters asserted that the rule was a remining incentive because it would lead to "coal mining for commercial profit" as part of a government-financed operation.

OSM has already addressed commenters' concerns about abuse of the rule in Section II.E. of this preamble. With regard to the commenter's concern that the rule would serve as a remining incentive because it would lead to "coal mining for commercial profit," we note that Section 528(2) exempted operations can include the extraction of coal for commercial profit. Profit is not in conflict with the goal or intent of Section 528(2). This rule is not a remining incentive. It is intended to encourage the reclamation at AML-eligible sites that have little-to-no likelihood of ever being remined.

The commenter's concern that operators might "mine" coal for "commercial profit" under this rule is balanced by industry commenters' often voiced concern over the same potential for "commercial loss." As under any AML reclamation contract, whether or not it involves the extraction of coal, there will always be an element of risk for the bidding party. OSM neither guarantees a profit nor insures against a loss for reclamation contracts. OSM's primary interest, particularly for the reclamation conducted under this rule, is in negotiating a contract that reflects a savings from the anticipated program costs of reclaiming the site and burying or disposing of the incidental coal deposits. Such savings will in turn be used to reclaim other eligible sites.

This same commenter challenged the justification for the rule on the basis of "remining incentives" already on the books. The commenter cited: (1) the Clean Water Act Reauthorization of 1978, and (2) the Energy Policy Act of 1992. Effective as these incentives may have been in encouraging Title V remining, substantial acreage remains unremined with little likelihood of being remined under existing regulations. It is these sites that this final rule targets for Title IV reclamation.

The same commenter also characterized the rule as using AML funds to improperly subsidize the remining industry. The commenter cited Congress' prior rejection of such a subsidy in the legislative history of the Energy Policy Act of 1992. Although no

specific citation was provided, the commenter probably was referring to the provisions of House Bill 4053, which created a State remining insurance fund derived mainly from AML monies. This fund would have assumed a Title V permittee's liability for correcting environmental problems that resulted from unanticipated events or conditions. H.R. 4053, 101st Cong. § 422 (1990). The concern expressed in hearings over these provisions was that a few problem sites could deplete the entire fund. Coal Remining: Hearings on H.R. 2791 and 4053 before the Subcommittee on Mining and Natural Resources, 101st Cong. at 181,187 (1990) (Statements of Dave Rosenbaum and Nick J. Rahall.)

Beyond the fact that the present rule concerns Title IV reclamation and not Title V remining, we note that the rule does not threaten to exhaust AML funds on Title V reclamation, but rather is a means of maximizing existing AML funds for Title IV reclamation. It could be better said that this rule does not subsidize industry but, under controlled parameters, uses industry to subsidize AML reclamation.

Another commenter suggested that the proposal be withdrawn and that OSM explore other approaches to the creation of "remining" incentives. Several incentives were proposed which, because they dealt with remining and not AML reclamation projects, were beyond the scope of this rulemaking. We note, however, that the commenter's suggested remining incentives (1) would require congressional action in the form of statutory changes or appropriations, or (2) were conditioned with such caveats so as to render them ineffective as incentives to the coal industry. These recommended incentives highlight the difficulty encountered over the last twenty years by industry, OSM, and the environmental community in developing meaningful, environmentally protective, mutually supportable remining incentives. As a result, an enormous number of disturbed sites have yet to be remined and reclaimed under Title V. We are promulgating the current rule in an effort to encourage the Title IV reclamation of some of those sites.

Following the prior theme from commenters that the rule is not a reclamation procedure but a remining incentive, one commenter listed seven areas in which projects authorized under this rule, although providing Title IV protections, did not provide Title V level protections. This less than Title V level of protection is not unexpected considering that projects authorized

under this final rule are AML reclamation projects and not Title V activities. AML reclamation has been successfully performed under SMCRA for 20 years complying with numerous AML program and AML contract safeguards. The commenter has, in effect, made a broad sweeping condemnation of the AML procedures inherent to all reclamation projects, including those that would be initiated under the scope of this final rule. At the same time, despite OSM's detailed explanations of the safeguards in the preamble to the proposed rule, the commenter did not specifically cite which AML safeguards are deficient or have proved inadequate in the past and did not offer suggestions on how they could be strengthened.

#### *M. Other Comments*

One commenter supporting the rule characterized it as a further step in implementing primacy under SMCRA. This commenter correctly noted that a State's adoption of this rule and the resulting change in reach of its AML program is optional. Each State is free to manage its AML program in light of its particular needs and resources.

The three commenters categorically opposing the rule also attacked it as lacking adequate justification. Two of the commenters asserted that OSM was not justified in seeking new ways of funding the reclamation of acreage that otherwise would not be reclaimed because there was still a "significant sum of [AML] money unexpended in the treasury and unrequested by OSM." The commenters were referring to the unappropriated balance in the AML Fund—more than \$1 billion collected in AML fees and deposited in the Fund but not appropriated by Congress for reclamation. These and other commenters expressed support for making all Fund money available for reclamation.

This comment is outside of the scope of this rulemaking, and it refers both to an agency budget request and a congressional appropriation process over which OSM has little control. Further, if every dollar in the Fund were to be appropriated for reclamation, it would not come close to satisfying the reclamation need. Even if the entire Fund became available for reclamation, this final rule would still be necessary.

One of these commenters stated that OSM had not provided any figures showing how many additional abandoned mines would be reclaimed under the proposal and demonstrating that the rule would have tangible environmental benefits. While projections of the exact number of sites

that would be reclaimed as a result of this new rule cannot be reliably made, OSM has information from 15 States that collectively estimated that a range of from 32 to 80 sites per year could be reclaimed under this rule.

One commenter asked for confirmation that the proposed change in the definition at section 707.5 would not affect the review responsibility to identify historic properties and effects under 36 CFR 800. That commenter also suggested that it would be helpful to consider coordination measures for AML and regulatory agencies to perform the needed reviews and to avoid redundancy. This rule does not change any existing requirements in the Title IV AML program or procedures and thus will not change existing review requirements for historic properties. Changes in coordination procedures, if any, will be left to the discretion of the individual States.

One commenter expressed the idea that the enhanced reclamation scope of the rule leaves open for interpretation and possible reevaluation of the procedures for State contracting and bonding. Again, we emphasize that reclamation projects covered under the scope of this rule making are intended to be accomplished within existing AML processes and procedures. This final rule does not change, alter or supercede any other Federal or State laws, regulations or requirements that would otherwise apply to the AML projects. At the same time, it does not preclude States from revising any procedures in order to better implement the provisions of this final rule.

### III. Procedural Determinations

#### 1. Executive Order 12866—Regulatory Planning and Review

This document is a significant rule and has been reviewed by the Office of Management and Budget under Executive Order 12866.

a. This rule will not have an effect of \$100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities.

b. This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

c. This rule does not alter the budgetary effects or entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients.

d. This rule does raise novel policy issues.

#### 2. 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 rule, when implemented, should slightly improve business opportunities for all entities, small and large, by increasing the likelihood that between 32 and 80 additional reclamation projects will be undertaken each year. In February 1997, a survey of 15 States, conducted by the National Association of Abandoned Mine Land Programs, indicated that if the proposal were implemented, 13 States intended to use the provisions to achieve reclamation of problem areas such as coal refuse, dangerous highwalls, AMD, and subsidence. Of those States, 12 anticipated one to five projects per year, while one State anticipated 20 or more. Therefore, OSM estimates a range of from 32–80 additional projects per year that will be undertaken as a result of the new rule. In calendar year 1997, there were 476 AML reclamation projects approved and in calendar year 1998, there were 460. This results in an average of 468 projects per year for this two year period. Therefore, it is anticipated that the average number of AML projects under the new rule will increase from 468 to a low of 500 and a high of 548 projects per year, or an increase of between 6.8 and 17.1 percent.

Data from OSM's electronic Applicant Violator System indicates that since July 1994, we have cleared approximately 724 businesses as contractors for AML reclamation projects. While it is likely that some of the 724 businesses were coal mining companies which we classify as small businesses under the Small Business Administration (SBA) criteria, some were also construction companies, landscape companies, and other types of businesses with the heavy equipment necessary to reclaim an abandoned coal mine site. Since we do not collect data on the nature of the businesses bidding on reclamation projects, the number of employees they have, or their annual receipts in millions of dollars, we are unable to determine how many of the 724 would qualify as small businesses under the SBA criteria at 13 CFR 121.201. However, given a maximum increase of 80 new projects undertaken each year and a potential bidding pool of over 724 distinct businesses from various industries, it is unlikely that the rule will have an impact on a substantial number of small businesses.

The economic impact of the rule on small businesses is expected to be minimal. This determination is based on the following facts:

- The rule will not increase the cost or burden on businesses reclaiming sites eligible under the existing regulations;
- The rule merely makes possible for businesses to undertake the reclamation of areas not previously mined or reclaimed under existing regulations;
- The undertaking of the discreet reclamation projects opened up by this new rule is entirely voluntary; and
- The only increase in cost due to these new projects will be that for documentation related to the removal and sale of coal as an incidental part of the reclamation project.

This incremental cost will be factored into the cost of the project bid submitted to the Title IV governmental authority and should prove to be an insignificant percentage of the total bid. None of the comments from businesses complained that the rule imposed additional burdens on doing business. Instead, business commented that the rule did not go far enough in encouraging the reclamation of eligible sites. Those who do participate and bid on reclamation projects resulting from the new rule will do so to reap an economic benefit in the form of a profit on the sale of coal incidentally mined during the reclamation of the site. The total amount of Federal money that will be available each year for AML projects will neither increase nor decrease as a result of this rule.

#### 3. Small Business Regulatory Enforcement Fairness Act

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

a. Does not have an annual effect on the economy of \$100 million or more. It would allow AML agencies to work in partnership with contractors to leverage finite AML Reclamation Fund dollars to accomplish more reclamation. To offset the reduction in government funding, the contractor would be allowed to sell coal found incidental to the project and recovered as part of the reclamation. Participation under the rule change is strictly voluntary and those participating are expected to do so because of the economic benefit.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions because the rule

does not impose any new requirements on the coal mining industry or consumers, and State and Indian AML program administration is funded at 100 percent by the Federal government.

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 for the reasons stated above.

#### 4. Unfunded Mandates

This rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local or Tribal governments or the private sector. The administration of the AML program by a State or Indian Tribe is funded at 100 percent by the Federal Government and the decision by a State or Indian Tribe to participate is voluntary. A statement containing the information required by the Unfunded Mandates Reform Act (1 U.S.C. 1531, *et seq.*) is not required.

#### 5. Executive Order 12630—Takings

In accordance with Executive Order 12630, the rule does not have significant takings implications. The rule would allow AML agencies to work in partnership with contractors to leverage finite AML Reclamation Fund dollars to accomplish more reclamation. To offset the reduction in government funding, the contractor would be allowed to sell coal found incidental to the project and recovered as part of the reclamation.

#### 6. Executive Order 12612—Federalism

In accordance with Executive Order 12612, the rule does not have significant Federalism implications to warrant the preparation of a Federalism Assessment for the reasons discussed above.

#### 7. Executive Order 12988—Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

#### 8. Paperwork Reduction Act

Under the Paperwork Reduction Act, agencies may not conduct or sponsor a collection of information unless the collection of information displays a currently valid Office of Management and Budget (OMB) control number. Also, no person is required to respond to an information collection request unless the form or regulation requesting the information has a currently valid

OMB control number. Therefore, in accordance with 44 U.S.C. 3501 *et seq.* OSM submitted the information collection and record keeping requirements of 30 CFR Part 874 to OMB for review and approval. OMB approved the collection activity for Part 874 and assigned it OMB control number 1029-0113. This control number will appear in section 874.10. To obtain a copy of OSM's information collection clearance authority, explanatory information, and related form, contact John A. Trelease at (202) 208-2783 or by e-mail at jtreleas@osmre.gov.

#### 9. National Environmental Policy Act

OSM has prepared an environmental assessment (EA) of this rule and has made a Finding of No Significant Impact (FONSI) on the quality of the human environment under Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. Section 4332(2)(C). The EA and FONSI are on file in the OSM Administrative Record for the rule.

Authors: D.J. Growitz and Danny Lytton, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue, N.W., Washington, D.C. 20240.

#### List of Subjects

##### 30 CFR Part 707

Highways and roads, Incidental mining, Reporting and recordkeeping requirements, Surface mining, Underground mining.

##### 30 CFR Part 874

Reclamation, Surface mining, Underground mining.

Dated: December 21, 1998.

#### Sylvia V. Baca,

Acting Assistant Secretary, Land and Minerals Management.

For the reasons given in the preamble, 30 CFR Parts 707 and 874 are amended as set forth below:

#### PART 707—EXEMPTION FOR COAL EXTRACTION INCIDENTAL TO GOVERNMENT-FINANCED HIGHWAY OR OTHER CONSTRUCTION

1. The authority citation for Part 707 continues to read as follows:

**Authority:** Secs. 102, 201, 501, and 528 of Pub. L. 95-87, 91 Stat. 448, 449, 467, and 514 (30 U.S.C. 1202, 1211, 1251, 1278).

2. In § 707.5, the definition of *Government-financed construction* is revised to read as follows:

#### § 707.5 Definitions.

\* \* \* \* \*

*Government-financed construction* means construction funded 50 percent or more by funds appropriated from a government financing agency's budget or obtained from general revenue bonds. Funding at less than 50 percent may qualify if the construction is undertaken as an approved reclamation project under Title IV of the Act. Construction funded through government financing agency guarantees, insurance, loans, funds obtained through industrial revenue bonds or their equivalent, or in-kind payments does not qualify as government-financed construction.

3. Section 707.10 is revised to read as follows:

#### § 707.10 Information collection.

Since the information collection requirement contained in 30 CFR 707.12 consists only of expenditures on information collection activities that would be incurred by persons in the normal course of their activities, 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.

#### PART 874—GENERAL RECLAMATION REQUIREMENTS

4. The authority citation for Part 874 continues to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*, as amended.

5. Section 874.10 is added to read as follows:

#### § 874.10 Information collection.

(a) In accordance with 44 U.S.C. 3501 *et seq.*, the Office of Management and Budget (OMB) has approved the information collection requirements of this part. The OMB clearance number is 1029-0113. This information is needed to ensure that appropriate reclamation projects involving the incidental extraction of coal are conducted under the authority of Section 528(2) of SMCRA and that selected projects contain sufficient environmental safeguards. Persons must respond to obtain a benefit.

(b) OSM estimates that the public reporting burden for this part will average 60 hours per project, including time spent reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of these information collection requirements, including suggestions for reducing the

burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, 1951 Constitution Avenue, N.W., Washington, DC 20240; and the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Interior Desk Officer, 725 17th Street, NW, Washington, DC 20503. Please refer to OMB Control Number 1029-0113 in any correspondence.

6. Section 874.17 is added to read as follows:

**§ 874.17 AML agency procedures for reclamation projects receiving less than 50 percent government funding.**

This section tells you, the AML agency, what to do when considering an abandoned mine land reclamation project as government-financed construction under Part 707 of this chapter. This section only applies if the level of funding for the construction will be less than 50 percent of the total cost because of planned coal extraction.

(a) *Consultation with the Title V Regulatory Authority.* In consultation with the Title V regulatory authority, you must make the following determinations:

(1) You must determine the likelihood of the coal being mined under a Title V permit. This determination must take into account available information such as:

(i) Coal reserves from existing mine maps or other sources;

(ii) Existing environmental conditions;

(iii) All prior mining activity on or adjacent to the site;

(iv) Current and historic coal production in the area; and

(v) Any known or anticipated interest in mining the site.

(2) You must determine the likelihood that nearby or adjacent mining activities might create new environmental problems or adversely affect existing environmental problems at the site.

(3) You must determine the likelihood that reclamation activities at the site might adversely affect nearby or adjacent mining activities.

(b) *Concurrence with the Title V Regulatory Authority.* If, after consulting with the Title V regulatory authority, you decide to proceed with the reclamation project, then you and the Title V regulatory authority must concur in the following determinations:

(1) You must concur in a determination of the limits on any coal refuse, coal waste, or other coal deposits which can be extracted under the Part 707 exemption or counterpart State/Indian Tribe laws and regulations.

(2) You must concur in the delineation of the boundaries of the AML project.

(c) *Documentation.* You must include in the AML case file:

(1) The determinations made under paragraphs (a) and (b) of this section;

(2) The information taken into account in making the determinations; and

(3) The names of the parties making the determinations.

(d) *Special requirements.* For each project, you must:

(1) Characterize the site in terms of mine drainage, active slides and slide-prone areas, erosion and sedimentation, vegetation, toxic materials, and hydrologic balance;

(2) Ensure that the reclamation project is conducted in accordance with the provisions of 30 CFR Subchapter R;

(3) Develop specific-site reclamation requirements, including performance bonds when appropriate in accordance with State procedures; and

(4) Require the contractor conducting the reclamation to provide prior to the time reclamation begins applicable documents that clearly authorize the extraction of coal and payment of royalties.

(e) *Limitation.* If the reclamation contractor extracts coal beyond the limits of the incidental coal specified in paragraph (b)(1) of this section, the contractor must obtain a permit under Title V of SMCRA for such coal.

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