

Telephone: (202) 514-3452; fax: (202) 514-4317.

SUPPLEMENTARY INFORMATION: This rule makes two technical changes to the Department of Justice's regulation concerning waiver of claims for erroneous payments of pay and allowances to its employees. The regulation to be modified currently delegates waiver authority under 5 U.S.C. 5584, "as amended by Public Law 92-453." Section 5584 has been amended several times since. The reference to Public Law 92-453 is outdated and is deleted. In addition, the current regulation directs application of "standards prescribed by the Comptroller General" for the waiver of claims. These standards are now obsolete and are therefore deleted.

Administrative Procedure Act

This rule relates to a matter of agency management or personnel and, therefore, is exempt from the usual requirements of prior notice and comment and a 30-day delay in effective date. See 5 U.S.C. 553(a)(2).

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this rule and, by approving it, certifies that it will not have a significant economic impact on a substantial number of small entities because it pertains to personnel and administrative matters affecting the Department. Further, a Regulatory Flexibility Analysis was not required to be prepared for this final rule because the Department was not required to publish a general notice of proposed rulemaking for this matter.

Executive Order 12866

This rule has been drafted and reviewed in accordance with Executive Order 12866, Regulatory Planning and Review, section 1(b), Principles of Regulation. This rule is limited to agency organization, management, and personnel as described by Executive Order 12866 section (3)(d)(3) and, therefore, is not a "regulation" or "rule" as defined by that Executive Order. Accordingly, this rule has not been reviewed by the Office of Management and Budget.

Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132,

Federalism, the Department has determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Executive Order 12988

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501 *et seq.*

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

This action pertains to agency management, personnel, and organization and does not substantially affect the rights or obligations of non-agency parties. Accordingly, it is not a "rule" for purposes of the reporting requirement of 5 U.S.C. 801.

Congressional Review Act

The Department has determined that this action pertains to agency management or personnel and, accordingly, is not a "rule" as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

List of Subjects in 28 CFR Part 0

Authority delegations (government agencies), Government employees, Organization and functions (government agencies).

■ Accordingly, by virtue of the authority vested in me as Attorney General, including 5 U.S.C. 301 and 5584, and 28 U.S.C. 509 and 510, Subpart X of Part 0,

Title 28 of the Code of Federal Regulations is amended as follows:

PART 0—ORGANIZATION OF THE DEPARTMENT OF JUSTICE

■ 1. The authority for part 0 continues to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510, 515-519.

§ 0.155 [Amended]

■ 2. In § 0.155, delete the phrase "as amended by Public Law 92-453," and delete the phrase "in accordance with the standards prescribed by the Comptroller General in 4 CFR parts 91 through 93".

Dated: September 21, 2004.

John Ashcroft,

Attorney General.

[FR Doc. 04-21604 Filed 9-24-04; 8:45 am]

BILLING CODE 4410-CS-P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 935

[OH-248-FOR]

Ohio Regulatory Program

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

ACTION: Final rule; approval of amendment.

SUMMARY: We are approving an amendment to the Ohio surface coal mining regulatory program (the Ohio program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). The amendment we are approving revises the Ohio program to reflect changes promulgated by the U.S. Environmental Protection Agency (EPA) related to coal re-mining operations. The amendment is intended to revise the Ohio program to be consistent with the corresponding Federal regulations.

DATES: *Effective* September 27, 2004.

FOR FURTHER INFORMATION CONTACT: Mr. George Rieger, Chief, Pittsburgh Field Division, Office of Surface Mining Reclamation and Enforcement, Appalachian Regional Coordinating Center, 3 Parkway Center, Pittsburgh, Pennsylvania 15220, Telephone (412) 937-2153. E-mail: grieger@osmre.gov.

SUPPLEMENTARY INFORMATION:

- I. Background on the Ohio Program
- II. Submission of the Amendment
- III. OSM's Findings

IV. Summary and Disposition of Comments
V. OSM's Decision
VI. Procedural Determinations

I. Background on the Ohio Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its program includes, among other things, "a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of the Act; and rules and regulations consistent with regulations issued by the Secretary pursuant to the Act." See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Ohio program on August 16, 1982. You can find background information on the Ohio program, including the Secretary's findings, the disposition of comments, and conditions of approval of the Ohio program in the August 16, 1982, **Federal Register** (47 FR 34687). You can also find later actions concerning Ohio's program and program amendments at 30 CFR 935.11, 935.15, and 935.16.

II. Submission of the Amendment

By letter dated November 7, 2003, Ohio sent us an amendment to its program (Administrative Record Number OH-2184-00) under SMCRA (30 U.S.C. 1201 *et seq.*). Ohio proposed to revise the Ohio Administrative Code (OAC) rules, Sections 1501:13-1-02 and 1501:13-4-15 relating to coal remining operations and water quality standards so that the Ohio program is consistent with the revised U.S. Environmental Protection Agency's (EPA) water quality standards relating to coal remining operations (January 23, 2002; 67 FR 3370).

We announced receipt of the proposed amendment in the January 20, 2004, **Federal Register** (69 FR 2689) (Administrative Record Number OH-2184-02). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the amendment's adequacy. We did not hold a hearing or a meeting because no one requested one. The public comment period closed on February 19, 2004. We received comments from one Federal agency.

In the letter that accompanied the State's November 7, 2003, submittal of this amendment, the Chief of the Division of Mineral Resources Management (DMRM) stated that the intent of the proposed amendment is to "bring Ohio's program up to date with

the recent changes promulgated by the USEPA [United States Environmental Protection Agency] on January 23rd, 2002 [67 FR 3370] to 40 CFR part 434, subpart G Coal Remining. * * * The letter also stated that the DMRM "proposes updating existing policy and procedure directives to capture the statistical and monitoring procedures for coal mining." The statistical and monitoring procedures referred to in the quoted language above are located in appendix B to 40 CFR part 434.

Ohio's submittal also included two draft documents. One of the draft documents is titled "Memorandum of Agreement, Remining NPDES Permits" and concerns an agreement between the Ohio Environmental Protection Agency (OEPA) and Ohio Department of Natural Resources. DMRM related to the issuance of remining National Pollutant Discharge Elimination System (NPDES) permits. The second draft document is titled "Policy/Procedure Directive, Regulatory" and outlines the inspection responsibilities for pollution abatement areas. Because both of these documents were in draft form and not applicable as a State program amendment, we did not request public comment on the documents in the January 20, 2004, **Federal Register** notice.

III. OSM's Findings

Following are findings we made concerning the amendments under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. We are approving the amendment. Any revisions that we do not specifically discuss below concern nonsubstantive wording or editorial changes, or recodification changes resulting from these amendments, and we are approving them here without discussion.

As we noted above, Ohio submitted the proposed amendment to update Ohio's program with the recent changes to 40 CFR part 434, subpart G—Coal Remining that were promulgated by the EPA on January 23rd, 2002. The EPA regulations apply to pre-existing discharges that are located within, or that are hydrologically connected to, pollution abatement areas of a coal remining operation. The EPA regulations implement Section 301(p) of the Clean Water Act, which provides incentives for remining abandoned mine lands that pre-date the passage of SMCRA in 1977.

Despite the fact that Ohio submitted the amendment to update its program with the recent changes to EPA's regulations at 40 CFR part 434, subpart G—Coal Remining, our standards for review and approval of State program

amendments, as provided in the Federal regulations at 30 CFR 732.17(h)(10) and 732.15(a), are SMCRA and its implementing regulations at 30 CFR part 700 to End. That is, our standards of approval for the proposed amendments are not the Clean Water Act nor EPA's regulations at 40 CFR part 434, but are SMCRA and its implementing regulations.

We note, however, that the Federal regulations at 30 CFR 816/817.42, concerning hydrologic balance, water quality standards and effluent limitations, provide as follows:

Discharges of water from areas disturbed by surface mining activities shall be made in compliance with all applicable State and Federal water quality laws and regulations and with the effluent limitations for coal mining promulgated by the U.S. Environmental Protection Agency set forth in 40 CFR 434.

Therefore, while our standards for review and approval of the amendments are SMCRA and its implementing regulations at 30 CFR part 700 to End, we will also discuss the proposed amendments in the light of the EPA regulations at 40 CFR part 434, subpart G—Coal Remining.

1. 1501:13-1-02 Definitions

a. Definition of "Abatement plan." This definition has been revised by adding a reference to "best management practices" and, as an example of best management practices, the phrase "daylighting old underground works." As amended, the definition provides as follows:

(A) "Abatement plan" means any individual technique or combination of techniques, the implementation of which may result in reduction of the base line [baseline] pollution load. Abatement techniques may include but are not limited to Best Management Practices such as: addition of alkaline material, daylighting old underground works, special plans for managing toxic- and acid-forming material, regrading, and revegetation.

This new State provision appears to be consistent with EPA's requirements at 40 CFR 434.72(a) concerning effluent limitations attainable by the application of best practicable control technology currently available. The EPA provision at 40 CFR 434.72(a) provides that the operator must submit a site-specific "Pollution Abatement Plan" to the permitting authority for the pollution abatement area. The EPA requirement further provides, among other things, that the Plan must identify the selected "best management practices (BMPs)" to be used. In its discussion of BMPs for permits issued after the 1987 amendment to the Clean Water Act

(January 23, 2002; 67 FR 3370, 3376), EPA stated that “[t]hese BMPs include special handling of acid-producing materials, daylighting of abandoned underground mines, control of surface water and ground water, control of sediment, addition of alkaline material, and passive treatment.” Therefore, the State’s proposed revision to the definition of “Abatement plan” appears to be consistent with EPA’s requirements concerning Pollutational Abatement Plans at 40 CFR 434.72(a).

Neither SMCRA nor its implementing regulations have a definition of “best management practices.” However, we find that the addition of the term “best management practices” and the addition of the phrase “daylighting old underground works” as a specific example of a best management practice are not inconsistent with SMCRA or its implementing regulations and do not render the existing definition less effective than the Federal regulations at 30 CFR 816/817.42, which require compliance with all applicable State and Federal water quality laws and regulations and with the effluent limitations for coal mining promulgated by EPA at 40 CFR part 434. Therefore, we are approving the amendments to the definition of “Abatement plan.”

b. Definition of “Acid water.” This definition has been revised by changing the pH standard and by adding the phrase “or a total iron concentration equal to or greater than 10mg/l.” As amended, the definition provides as follows:

(D) ‘Acid water’ means any waters, the pH of which, as determined by standard methods, is less than 6.5, or a total iron concentration equal to or greater than 10mg/l.

The amended definition of “Acid water” appears to be consistent with EPA’s definition of AMD (acid mine drainage) in appendix A of the preamble to EPA’s January 23, 2002, final rule notice (67 FR 3370, 3405). EPA defines AMD as acid mine drainage which, before any treatment, either has a pH of less than 6.0 or a total iron concentration equal to or greater than 10 mg/l. The pH standard in the State’s definition of acid water (less than 6.5) is a higher standard than EPA’s standard for AMD (less than 6.0) and, therefore, appears to be not inconsistent with the EPA standard.

The Federal regulations at 30 CFR 701.5 define the term “acid drainage” as follows:

Acid drainage means water with a pH of less than 6.0 and in which total acidity exceeds total alkalinity, discharged from an active, inactive or abandoned surface coal

mine and reclamation operation or from an area affected by surface coal mining and reclamation operations.

There is no definition of “acid water” in SMCRA or its implementing regulations. However, there is a definition in OSM’s regulations for “acid drainage” at 30 CFR 701.5. The State has set a higher pH standard (6.5) than the 6.0 pH standard in OSM’s definition. We note Ohio also has a definition for “acid drainage” which is identical to and no less effective than the Federal definition. There is nothing in the proposed definition of “acid water” that supersedes or replaces the definition of “acid drainage” or the State’s effluent limitation standards for iron or its compliance with the EPA effluent limitation at 40 CFR part 434. Therefore, we find that the State’s definition is not inconsistent with the Federal definition and can be approved.

c. Definition of “Base line pollution load.” This definition has been revised by deleting the term “pH” and replacing that term with the words “net acidity.” In addition, the word “total” is added immediately before the words “iron,” and “manganese.” The words “and total suspended solids” are added immediately following the word “manganese.” As amended, the definition provides as follows:

(N) “Base line pollution load” means the characterization of the material being discharged from or on the pollution abatement area, described in terms of mass loading for net acidity, total iron and total manganese, and total suspended solids, including seasonal variations and variations in response to precipitation events.

The EPA regulations do not specifically define the term “baseline pollution load.” However, the EPA regulations at 40 CFR part 434, appendix B outline the procedures for determining the baseline loadings of pre-existing pollutant discharges, and provide us with some understanding of the term baseline pollution load. Essentially, baseline pollution load is an estimate of the existing quantities of pollutants in a discharge as determined by at least monthly sampling over a period of 12 months. Such a sampling regimen would take into consideration the seasonal changes in water quantities and pollutant concentrations. As amended, the State’s definition of “Base line pollution load” appears to be consistent with and incorporates the same pollutant terminology that appear in the table of effluent limitations at 40 CFR 434.72(b)(1).

There is no definition of “Base line pollution load” in SMCRA or its implementing regulations. We find, however, that the State’s definition is

not inconsistent with the Federal regulations at 30 CFR 816/817.42, which require compliance with all applicable State and Federal water quality laws and regulations and with the effluent limitations for coal mining promulgated by EPA at 40 CFR part 434 and can be approved.

d. Definition of “Best available technology economically achievable.” This definition has been totally revised to provide as follows:

(O) “Best available technology economically achievable” for remining operations means implementation of a pollution abatement plan that incorporates Best Management Practices (BMPs) designed to improve pH (as acidity) and reduce pollutant loadings of iron, manganese and sediment to the maximum extent possible from or on the pollution abatement area.

(1) BMP’s are practices implemented during the mining and reclamation of remining sites that are designed to reduce, if not completely eliminate, the pre-existing water pollution problems. BMP’s are tailored to specific mining operations based largely on pre-existing site conditions, hydrology, and geology. BMP’s are designed to function in a physical and/or geochemical manner to reduce pollution loadings. These BMP measures include engineering, geochemical, daylighting, regrading, revegetation, diversion ditches or other applicable practices.

In the preamble to the **Federal Register** notice in which EPA promulgated its coal remining regulations at 40 CFR part 434, subpart G, EPA discussed the term “best available technology economically achievable” (BAT) (67 FR 3370, 3379; January 23, 2002). Specifically, EPA stated that it “is establishing that the best available technology economically achievable for remining operations is implementation of a pollution abatement plan that incorporates BMPs [best management practices] designed to improve pH (as acidity) and reduce pollutant loadings of iron, manganese and sediment, and a requirement that such pollutant levels do not increase over baseline conditions.” In the same notice, in a discussion of remining permits issued by various States under Section 301(p) of the Clean Water Act, EPA stated that the remining operations must meet the alternate baseline numeric limits specified in the permits “and must implement site-specific BMPs” (67 FR at 3376). These BMPs, EPA stated, “include special handling of acid-producing materials, daylighting of abandoned underground mines, control of surface water and ground water, control of sediment, addition of alkaline material, and passive treatment” (67 FR at 3376). Ohio’s definition of “Best available technology economically

achievable," with its included definition of "best management practices" appears to be consistent with EPA's discussion of the meaning of these terms in its January 23, 2002, **Federal Register** notice.

There is no definition of "Best available technology economically achievable" in SMCRA or its implementing regulations. We find, however, that the State's definition is not inconsistent with the Federal regulations at 30 CFR 816/817.42, which require compliance with all applicable State and Federal water quality laws and regulations and with the effluent limitations for coal mining promulgated by EPA at 40 CFR part 434 and can be approved.

e. Definition of "Chief." This definition, at 13-1-02(R), has been revised to mean the Chief of the division of "Mineral Resources Management." The name change resulted when Ohio's Department of Natural Resources combined the responsibilities of the Division of Oil and Gas with those of the Division of Mines and Reclamation. We find that this revision does not render the Ohio program less effective than the Federal regulations and can be approved.

f. Definition of "Pollution abatement area." This definition has been amended by adding a new sentence at the end of the existing definition. The new sentence provides that the "pollution abatement area must include, to the extent practicable, areas adjacent to and nearby the remining operation that also must be affected to reduce the pollution load of the pre-existing discharges and may include the immediate location of the pre-existing discharges." As amended, the definition provides as follows:

(MMMM) "Pollution abatement area" means that part or parts of the permit area which are causing or contributing to the base line [baseline] pollution load, and which must be affected to bring about potential improvement of the base line [baseline] pollution load, and which may include the immediate location of the discharge(s). The pollution abatement area must include, to the extent practicable, areas adjacent to and nearby the remining operation that also must be affected to reduce the pollution load of the pre-existing discharges and may include the immediate location of the pre-existing discharges.

The new sentence that has been added to the definition of "Pollution abatement area" appears to be substantively identical to the counterpart sentence in EPA's definition of "pollution abatement area" in the Federal regulations at 40 CFR 434.70(b). There is no definition of "Pollution

abatement area" in SMCRA or its implementing regulations. We find, however, that the State's definition is not inconsistent with the Federal regulations at 30 CFR 816/817.42, which require compliance with all applicable State and Federal water quality laws and regulations and with the effluent limitations for coal mining promulgated by EPA at 40 CFR part 434 and can be approved.

g. Definition of "Pre-existing discharge." This definition has been amended by adding a new sentence at the end of the existing definition. As amended, the definition provides as follows:

(OOOO) "Pre-existing discharge" means a discharge from surface or subsurface waters which is located on previously mined area as defined in this rule. This term shall include a pre-existing discharge that is relocated as a result of the implementation of best management practices contained in the abatement plan.

The new sentence that was added to the definition of "Pre-existing discharge" appears to be substantively identical to the counterpart sentence in EPA's definition of "pre-existing discharge" in the Federal regulations at 40 CFR 434.70(c). There is no definition of "Pre-existing discharge" in SMCRA or its implementing regulations. We find, however, that the State's definition is not inconsistent with the Federal regulations at 30 CFR 816/817.42, which require compliance with all applicable State and Federal water quality laws and regulations and with the effluent limitations for coal mining promulgated by EPA at 40 CFR part 434 and can be approved.

2. OAC 1501:13-4-15 Authorization To Conduct Coal Mining on Pollution Abatement Areas

This provision is amended by adding new paragraphs 1501:13-4-15(C)(2)(a), (b) and (c) as follows:

(a) If the Chief determines that it is infeasible to collect samples for establishing the baseline pollution load and that remining will result in significant improvement that would not otherwise occur, then the numeric effluent limitations do not apply to the pollution abatement area. Pre-existing discharges for which it is infeasible to collect samples for determination of baseline pollutant levels include, but are not limited to, discharges that exist as a diffuse groundwater flow that cannot be assessed via sample collection; a base flow to a receiving stream that cannot be monitored separate from the receiving stream; a discharge on a steep or hazardous slope that is inaccessible for sample collection; a pre-existing discharge that is too large to adequately assess via sample collection; or a number of pre-existing discharges so extensive that

monitoring of individual discharges is infeasible.

(b) If the Chief approves a non-numeric NPDES remining permit the operator shall implement a pollution abatement plan incorporating BMP's designed to reduce the pollutant levels of acidity, iron, manganese, and solids in pre-existing discharges. The monitoring plan will be determined by the Chief. An operator who obtains a non-numeric NPDES remining permit will not be subject to paragraphs F(2), (3), (4), (5), (6) and (H)(3)(c) of this section.

(c) TSS [total suspended solids] and SS [suspended solids] are exempt during mining and reclamation, if the Chief determines it is infeasible or impractical based on the site specific conditions of the soil, climate, topography, steep slopes, or other baseline conditions provided that the operator demonstrates that significant reductions of TSS and SS will be achieved through the incorporation of sediment control BMP's into the pollution abatement plan as required under paragraph (C)(4).

On January 23, 2002, the EPA amended 40 CFR part 434 by adding new subpart G-Coal Remining (67 FR 3370). 40 CFR 434.72(b)(1) sets forth the effluent limits for pre-existing discharges. 40 CFR 434.72(b)(2) authorizes an exception to compliance with the effluent limitations at 40 CFR 434.72(b)(1) in cases where the permitting authority determines that it is infeasible to collect samples for establishing the baseline pollutant levels and that remining will result in significant improvement that would not otherwise occur. The proposed State language at OAC 1501:13-4-15 (C)(2)(a) appears to be substantively identical to the EPA provisions at 40 CFR 434.72(b)(2).

OAC 1501:13-4-15(C)(2)(a) authorizes the use of non-numeric effluent limitations in cases where the Chief of the DMRM determines that it is infeasible to collect samples for establishing the baseline pollution load and where significant improvement that would not otherwise occur. In response to our request to EPA for its concurrence and comments on the proposed amendment, the EPA concurred with the proposed amendment and stated that it had no comments (Administrative Record Numbers OH-2184-03 and OH-2184-04). EPA is primarily responsible for establishing effluent limitations. Therefore, for the reasons discussed above, we find that proposed OAC 1501:13-4-15 (C)(2)(a) can be approved because it is in accordance with Section 702(a) of SMCRA which provides that nothing in SMCRA can be construed as superseding, amending or modifying the Federal Water Pollution Control Act (*i.e.* the Clean Water Act) or its regulations.

OAC 1501: 13-4-15(C)(2)(b) exempts an operator who receives a non-numeric NPDES remining permit under OAC 1501: 13-4-15(C)(2)(a) from the discharge treatment requirements at OAC 1501: 13-4-15 F(2), (3), (4), (5), (6), and from the bond release requirements at OAC 1501: 13-4-15(H)(3)(c). The new State provision appears to be consistent with EPA's requirements concerning effluent limitations for coal remining operations at 40 CFR 434.72(b)(2). The EPA provision provides that if the permitting authority determines that it is infeasible to collect samples for establishing the baseline pollutant levels pursuant to 40 CFR 434.72(b)(1), and that remining will result in significant improvement that would not otherwise occur, then the numeric effluent limitations at 40 CFR 434.72(b)(1) do not apply. That is, under the EPA rule, no effluent limitations would be established for pre-existing pollutional discharges that qualify under the "unfeasible to establish baseline pollutant levels" provision at 40 CFR 434.72(b)(2). Therefore, when the State authorizes a non-numerical NPDES permit for pre-existing pollutional discharges, no baseline effluent limitation standards would be established for the qualifying discharges. Therefore, the requirements concerning treatment of discharges at OAC 1501: 13-4-15 F(2), (3), (4), (5), and (6) would not apply to the qualifying discharges because no numerical baseline treatment standards were established and these Subsections pertain to numeric effluent limitations. Similarly, the bond release requirements at OAC 1501: 13-4-15(H)(3)(c) would not apply to the qualifying discharges because no numerical baseline treatment standards were established.

The EPA regulations concerning alternate and non-numerical effluent limitations for pre-existing pollutional discharges, at 40 CFR part 434, subpart G-Coal Remining, apply only to pre-existing discharges that are not co-mingled with waste streams from active mining areas. Any pre-existing discharge that is co-mingled with active mining wastewater is subject to the most stringent limitations applicable to any component of the waste stream. Once active co-mingling of waters has ceased, however, the pre-existing discharge is not required to continue to meet the more stringent effluent limits. EPA stated that it believes that it would create a significant disincentive for remining activities to continue to require compliance with the more stringent effluent limits after co-mingling has ceased (67 FR 3378). The

same is true in Ohio at OAC 1501: 13-4-15(F)(1).

In its January 23, 2002, **Federal Register** notice, EPA explained that in specific and limited cases, permit requirements may be based on implementation of an approved BMP plan "in lieu of numeric limitations based on baseline pollution levels" (67 FR 3378). That is, in specific and limited cases, there would be no numerical effluent limitations established based upon baseline sampling data. Rather, the Pollution Abatement Plan that is required under 40 CFR 434.72(a), must be designed to reduce the pollution load from pre-existing discharges and must identify selected BMPs to be used. The BMPs must be implemented as specified in the plan. As we noted above, EPA concurred with the proposed Ohio amendments and stated that it had no comments. Neither SMCRA nor its implementing regulations have a counterpart to 1501:13-4-15(F)(2), (3), (4), (5), (6) and (H)(3)(c). Therefore, an exemption from these requirements found at proposed OAC 1501:13-4-15(C)(2)(b), does not render the Ohio program inconsistent with the Federal regulations at 30 CFR 816/817.42 and can be approved. Considering the above, we find that proposed OAC 1501: 13-4-15(C)(2)(b) does not render the Ohio program less effective than the Federal regulations at 30 CFR 816/817.42 concerning compliance with water quality standards and effluent limitations and can be approved.

OAC 1501: 13-4-15(C)(2)(c) exempts pre-existing pollutional discharges from TSS and SS standards upon the specified determinations by the Chief of the DMRM. This new State provision appears to be consistent with EPA's requirements concerning effluent limitations for coal remining operations at 40 CFR 434.72(b)(1). Footnote 1 to the table of effluent limitations at 40 CFR 434.72(b)(1) provides as follows:

¹ A pre-existing discharge is exempt from meeting standards in Subpart E of this part [40 CFR part 434, subpart E] for TSS and SS when the permitting authority determines that Subpart E standards are infeasible or impractical based on the site-specific conditions of soil, climate, topography, steep slopes, or other baseline conditions provided that the operator demonstrates that significant reductions of TSS and SS will be achieved through the incorporation of sediment control BMPs into the Pollution Abatement Plan as required by paragraph (a) of this section [40 CFR 434.72(a)].

The proposed State provision at OAC 1501: 13-4-15(C)(2)(c) appears to be substantively identical to and provides the same exemption concerning TSS

and SS as is authorized by EPA at 40 CFR 434.72(b)(1). As 40 CFR 434.71(a) clarifies, 40 CFR part 434, subpart G applies to pre-existing discharges that are located within or are hydrologically connected to pollution abatement areas of a coal remining operation. Therefore, the exemption for TSS and SS applies only to pre-existing discharges that are located within or are hydrologically connected to pollution abatement areas of a coal remining operations. As we noted above, EPA concurred with the proposed amendments and stated that it had no comments. We find that proposed OAC 1501: 13-4-15(C)(2)(c) does not render the Ohio program less effective than the Federal regulations at 30 CFR 816/817.42, which requires compliance with all applicable State and Federal water quality laws and regulations, or with 30 CFR 780.21(j)(2)(ii), which requires the monitoring of point source discharges in accordance with 40 CFR parts 122, 123 and 434, and can be approved.

3. OAC 1501:13-4-15(E)(3) Notification of Implementation and Completion of Each Step of the Abatement Plan

Subsection 13-4-15(E)(3) is deleted from the performance standards at OAC 1501:13-4-15(E). The deleted language provided that an operator shall "[n]otify the chief immediately prior to the start and upon completion of each step of the abatement plan." There is no direct counterpart to the deleted State language in SMCRA or its implementing regulations, nor in the EPA requirements at 40 CFR part 434, subpart G concerning coal remining.

The State's provision at Subsection 13-4-15(C)(4)(b) requires an operator to provide "a description and explanation of each step in the proposed abatement plan." In addition, Subsection 13-4-15(E)(4) provides that an operator must "submit a certification by the supervising professional engineer of the proper construction of certain steps of the abatement plan which may include, but not be limited to, the completion of mine seals, compaction tests, subsurface drains and, where necessary, stability analyses." As we noted above, EPA concurred with the proposed amendments and stated that it had no comments. Therefore, it appears that the proposed deletion does not render the performance standards at 13-4-15(E) inconsistent with EPA's requirements at 40 CFR part 434, subpart G concerning coal remining. We find that the proposed deletion of OAC 1501: 13-4-15(E)(3) does not render the Ohio program less effective than the Federal regulations at 30 CFR 816/817.42

concerning compliance with all applicable State and Federal water quality laws and regulations and with the effluent limitations for coal mining promulgated by EPA at 40 CFR part 434 and can be approved.

4. OAC 1501:13-4-15(F)(1) Treatment of Discharges

Subsection 13-4-15(F)(1) is revised to provide as follows:

(F) Treatment of discharges.

(1) For any pre-existing discharges from or on the pollution abatement area, that are commingled with active mining wastewater, the operator shall comply with rule 1501:13-9-04(B) of the Administrative Code, until the pollution abatement plan is implemented and the commingling is ceased.

Prior to being amended, this provision provided that “[e]xcept for pre-existing discharges from or on the pollution abatement area the operator shall comply with rule 1501:13-9-04 of the Administrative Code.” The proposed amendment, in effect, clarifies that when commingling occurs between pollution discharges from the pollution abatement area and drainage from the active mining, the alternate effluent limitations for the pollution discharges from the pollution abatement area no longer apply, and the commingled discharge must comply with the standards at OAC 1501:13-9-04(B). Compliance with OAC 1501:13-9-04(B) must continue until the pollution abatement plan is implemented and the commingling ceases.

As amended, OAC 1501:13-4-15(F)(1) appears to be consistent with EPA’s requirements concerning effluent limitations for coal remining operations at 40 CFR 434.71(b). EPA’s requirements at 40 CFR 434.71(b) provide that a pre-existing discharge that is intercepted by active mining or that is commingled with waste streams from active mining areas for treatment is subject to the provisions of 40 CFR 434.61 concerning the commingling of waste streams. 40 CFR 434.71(b) also provides that Section 434.61 applies to the waste stream only during the time when the pre-existing discharge is intercepted by the active mining or is commingled with active wastewater for treatment or discharge. After commingling has ceased, the pre-existing discharge is subject to the provisions of 40 CFR part 434, subpart G, coal remining.

There is no specific counterpart to the proposed language in either SMCRA or its implementing regulations. However, we find that Subsection 13-4-15(F)(1) is consistent with the Federal regulations at 30 CFR 816/817.42, which require compliance with all applicable State

and Federal water quality laws and regulations and with the effluent limitations for coal mining promulgated by EPA at 40 CFR part 434 and can be approved. As we noted above, EPA concurred with the proposed amendments and stated that it had no comments.

5. OAC 1501:13-4-15(H)(3)(c) Criteria and Schedule for Release of Bonds on Pollution Abatement Area

Subsection 13-4-15(H)(3)(c) has been revised by the addition of the phrase “the total suspended solids meets the standard NPDES limits.” As amended, 13-4-15(H)(3)(c) provides as follows:

(c) The operator has not exceeded the effluent limitations established in the remining NPDES permit from the time of bond release pursuant to paragraph (H)(2) of this rule for a period of two years from the discontinuance of treatment pursuant to paragraph (F)(5) of this rule; the total suspended solids meets the standard NPDES limits.

OAC 1501:13-4-15 concerns authorization to conduct coal mining on pollution abatement areas. Under OAC 1501:13-4-15(H)(3)(c), the remaining portion of the bond may be released if, among other requirements, the total suspended solids effluent is in compliance with the standards identified in the NPDES remining permit. Under a remining NPDES permit issued by the State, the total suspended solids limitations would be either required to comply with the baseline effluent limitations identified under OAC 1501:13-4-15(C)(2), or with the exemption to total suspended solids and suspended solids under OAC 1501:13-4-15(C)(2)(c).

This new State provision appears to be consistent with EPA’s requirements concerning effluent limitations for total suspended solids for coal remining operations at 40 CFR 434.72(b)(1). Footnote 1 to the table of effluent limitations at 40 CFR 434.72(b)(1) provides that a pre-existing discharge is exempt from meeting standards in Subpart E of 40 CFR part 434 for total suspended solids and suspended solids when the permitting authority determines that Subpart E standards are infeasible or impractical based on the site-specific conditions of soil, climate, topography, steep slopes, or other baseline conditions provided that the operator demonstrates that significant reductions of total suspended solids and suspended solids will be achieved through the incorporation of sediment control best management practices into the Pollution Abatement Plan as required by paragraph (a) of Section 40 CFR 434.72(a). The State counterpart to

the EPA exemption for total suspended solids that is identified in the footnote to Table 1 at 40 CFR 434.72(b)(1) is the new State language at OAC 1501:13-4-15(C)(2)(c) (see finding 2, above).

There is no specific counterpart to the proposed language at Subsection 13-4-15(H)(3)(c) either in SMCRA or its implementing regulations. However, we find that Subsection 13-4-15(H)(3)(c) is consistent with the Federal regulations at 30 CFR 816/817.42, which require compliance with all applicable State and Federal water quality laws and regulations and with the effluent limitations for coal mining promulgated by EPA at 40 CFR part 434, and with the Phase III bond release requirements at 30 CFR 800.40(c)(3) and can be approved. As we noted above, EPA concurred with the proposed amendments and stated that it had no comments.

IV. Summary and Disposition of Comments

Public Comments

No comments were received in response to our request for comments from the public on the proposed amendments (see Section II of this preamble).

Federal Agency Comments

Under 30 CFR 732.17(h)(11)(i) and Section 503(b) of SMCRA we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Ohio program (Administrative Record Numbers OH-2184-01). We received a response from one Federal agency (see below).

Environmental Protection Agency (EPA) Comments

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

On December 24, 2004, we requested concurrence on the amendment from EPA (Administrative Record Numbers OH-2184-01). The EPA responded by letter dated March 10, 2004, and an undated letter received by facsimile on March 18, 2004 (Administrative Record Numbers OH-2184-03 and OH-2184-04, respectively). In its undated letter, EPA stated that it has “no comment to offer on those proposed revisions to Ohio Administrative Code Section 1501:13-4-15 and 1501:13-1-02 and, as such, concur in those revisions.”

V. OSM's Decision

As we noted above in Section II., Submission of the Amendment, the DMRM stated in its submittal letter dated November 7, 2003, that the proposed amendment is intended to bring Ohio's program up to date with the recent changes promulgated by the EPA on January 23rd, 2002, to 40 CFR part 434, subpart G Coal Remining. The DMRM's November 7, 2003, letter also stated that it intends to update existing policy and procedure directives to capture the statistical and monitoring procedures for coal mining. The statistical and monitoring procedures that the State referred to are located in appendix B to 40 CFR part 434.

It is our understanding that the Ohio program requires compliance with the Federal regulations at 40 CFR part 434, including compliance with the procedures to be used for establishing effluent limitations for pre-existing discharges at coal remining operations that are set forth in subpart G. appendix B to part 434. It is also our understanding that Ohio will not implement the regulations that we approve here until it completes updating its existing policy and procedure directives to capture the statistical and monitoring procedures for coal mining that are located in appendix B to part 434. Our approval of the proposed amendments in the above findings is based upon those understandings.

Based on the above findings, we are approving the amendments submitted to us on November 7, 2003.

To implement this decision, we are amending the Federal regulations at 30 CFR part 935, which codify decisions concerning the Ohio program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that the State's program demonstrate that the State has the capability of carrying out the provisions of the Act and meeting its purposes. Making this rule effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

VI. Procedural Determinations

Executive Order 12630—Takings

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

Executive Order 12866—Regulatory Planning and Review

This rule is exempt from review by the Office of Management and Budget under Executive Order 12866.

Executive Order 12988—Civil Justice Reform

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

Executive Order 13132—Federalism

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

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on federally-recognized Indian tribes and have determined that the rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

The basis for this determination is that our decision is on a State regulatory program and does not involve Federal regulations involving Indian lands.

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

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

National Environmental Policy Act

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

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of \$100 million;

(b) will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (c) does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the analysis performed under various laws and executive orders for the counterpart Federal regulations.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or

tribal governments or the private sector of \$100 million or more in any given year. This determination is based upon the analysis performed under various laws and executive orders for the counterpart Federal regulations.

List of Subjects in 30 CFR Part 948

Intergovernmental relations, Surface mining, Underground mining.

Dated: August 12, 2004.

Brent Wahlquist,

Regional Director, Appalachian Regional Coordinating Center.

■ For the reasons set out in the preamble, 30 CFR part 935 is amended as set forth below:

PART 935—OHIO

■ 1. The authority citation for part 935 continues to read as follows:

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

■ 2. Section 935.15 is amended in the table by adding a new entry in chronological order by “Date of final publication” to read as follows:

§ 935.15 Approval of Ohio regulatory program amendments.

* * * * *

Original amendment submission date	Date of final publication	Citation/description
November 7, 2003	September 27, 2004	OAC 1501:13-1-02(A), (D), (N), (O), (R), (MMMM), (OOOO); 1501:13-4- 15(C)(2)(a),(b),(c); (C)(3)(b); (E)(3); (F)(1), (H)(3)(c).

[FR Doc. 04-21539 Filed 9-24-04; 8:45 am]
BILLING CODE 4310-05-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[CGD05-04-160]

RIN 1625-AA08

Special Local Regulations for Marine Events; Sunset Lake, Wildwood Crest, NJ

AGENCY: Coast Guard, DHS.
ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a special local regulation during the “Sunset Lake Hydrofest,” a marine event to be held October 2 and 3, 2004, on the waters of Sunset Lake, Wildwood Crest, New Jersey. This special local regulation is necessary to provide for the safety of life on navigable waters during the event. This action will restrict vessel traffic in portions of Sunset Lake during the event.

DATES: This rule is effective from 7 a.m. on October 2, 2004, to 6 p.m. on October 3, 2004.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket CGD05-04-160 and are available for inspection of copying at Commander (oax), Fifth

Coast Guard District, 431 Crawford Street, Portsmouth, Virginia 23704-5004, between 9 a.m. and 2 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Dennis Sens, Project Manager, Auxiliary and Recreational Boating Safety Branch, at (757) 398-6204.

SUPPLEMENTARY INFORMATION:

Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B) and (d)(3), the Coast Guard finds that good cause exists for not publishing a NPRM and for making this regulation effective less than 30 days after publication in the **Federal Register**. Publishing a NPRM and delaying its effective date would be contrary to public interest, since immediate action is needed to protect event participants, spectator craft, and other vessels transiting the event area from the dangers in high-speed power boats racing. Additionally, the parameters of the safety zone are limited to the race area, and the length of time this zone will be effective is limited to the times and dates of the event.

Background and Purpose

On October 2 and 3, 2004, the Sunset Lake Hydrofest Association will sponsor the “Sunset Lake Hydrofest” on the waters of Sunset Lake near Wildwood Crest, New Jersey. The event will consist of approximately 100 inboard hydroplanes, Jersey Speed Skiffs, and flat-bottom Ski boats racing in heats

counter-clockwise around an oval racecourse. A fleet of approximately 100 spectator vessels is expected to gather nearby to view the competition. Due to the need for vessel control during the event, vessel traffic will be temporarily restricted to provide for the safety of participants, spectators, and transiting vessels.

Discussion of Rule

The Coast Guard is establishing a temporary special local regulation on specified waters of Sunset Lake. The temporary special local regulation will be enforced from 7:30 a.m. to 4:30 p.m. on October 2 and 3, 2004, and will restrict general navigation in the regulated area during the event. Except for participants and vessels authorized by the Coast Guard Patrol Commander, no person or vessel will be allowed to enter or remain in the regulated area. This regulation is needed to control vessel traffic during the event to enhance the safety of participants, spectators and transiting vessels.

Regulatory Evaluation

This rule is not a “significant regulatory action” under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not “significant” under the regulatory policies and procedures of the Department of Homeland Security (DHS).