

DEPARTMENT OF THE INTERIOR**Office of Surface Mining Reclamation and Enforcement****30 CFR Part 707**

RIN 1029-AC07

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

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

ACTION: Final rule.

SUMMARY: We are publishing a final rule in response to the decision by the United States Court of Appeals, District of Columbia Circuit, remanding the February 12, 1999, Enhancing AML Reclamation Rule for further explanation as to the types of government expenses that will qualify as government financing under the rule. This rulemaking provides the requested explanation and represents a clarification and not a substantive change to the Abandoned Mine Land (AML) program authorized by the Surface Mining Control and Reclamation Act of 1977 ("SMCRA" or "the Act"). We are also taking this opportunity to explain what is meant by the prohibition in the rule against "in-kind" payments being counted towards the government financing of a "government-financed" construction.

DATES: Effective November 20, 2003.

FOR FURTHER INFORMATION CONTACT: Danny Lytton, Chief, Division of Abandoned Mine Lands, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue, NW., ms 120-SIB, Washington, DC 20240; Telephone: 202-208-2788. E-Mail: dlytton@osmre.gov.

SUPPLEMENTARY INFORMATION:**I. Background**

- A. Why are we publishing this rule?
- B. What is the exemption for "government-financed" construction?
- C. What is the AML Reclamation Program?
- D. How is AML reclamation funded and how do States and Indian Tribes implement their programs?
- E. What types of abandoned sites does the Enhancing AML Reclamation Rule target?

II. Discussion of the Final Rule**III. Procedural Determinations****I. Background****A. Why Are We Publishing This Rule?**

On March 13, 1979, OSM published rules implementing the exemption from

SMCRA provisions provided by section 528 of the Act when the extraction of coal is an incidental part of Federal, State, or local government-financed construction. These regulations, codified at 30 CFR part 707 (44 FR 15322), defined "government-financed construction" as meaning "construction funded 50 percent or more by [government] funds. * * *" 30 CFR 707.5. On February 12, 1999, we published the Enhancing AML Reclamation Rule ("Enhancing AML Rule") which amended this definition of "government-financed construction" to allow less than 50 percent government financing when the construction project is an approved AML project. (64 FR 7470). The Kentucky Resources Council (KRC) challenged the rule on several counts. *KRC v. Norton*, No. 99-00892 (D.D.C.). In its September 22, 2000 slip opinion, the district court granted the government summary judgment. The KRC appealed that decision to the United States Court of Appeals for the District of Columbia Circuit.

On May 30, 2002, the court of appeals concluded that the Department had not only reasonably interpreted the term "construction" to include AML reclamation projects that involve the incidental extraction of coal but also reasonably determined that, in some circumstances, AML projects to which the government provides less than 50 percent of the financing may qualify as "government-financed" construction. Notwithstanding these conclusions, the court remanded the rule for further explanation as to which government administrative expenses will qualify as "government financing" for the purposes of the exemption from the provisions of the Act. *KRC v. Norton*, No. 01-5263, 2002 WL 1359455 at *2 (D.C. Cir.).

The court further noted that, even though "in kind" payments do not qualify as government financing under 30 CFR 707.5, our 1999 **Federal Register** notice appeared to accept a commenter's suggestion that qualifying government financing includes "in kind payments such as administrative expenses incurred by the AML agency in reviewing and approving the project." *KRC v. Norton* at *2.

We are publishing this rulemaking to provide the explanation required by the court as to which government administrative expenses qualify as "government financing" under 30 CFR 707.5. In addition, we are taking this opportunity to explain what the agency has historically meant by the prohibition in section 707.5 against "in-kind" payments being counted towards the government financing of a

"government-financed" construction. Further, editorial changes have also been made to the definition for clarity.

The preamble to the February 12, 1999, Enhancing AML Rule should be consulted for additional background information. 64 FR 7470.

B. What Is the Statutory Exemption for "Government-Financed" Construction?

Title V of SMCRA, 30 U.S.C. 1251-1279, has regulated surface coal mining operations since 1977 though stringent standards regarding the permitting, mining, and reclamation of such sites. Title V prescribes that "no person shall engage in or carry out on lands within a State any surface coal mining operations unless such person has first obtained a permit issued by such State pursuant to an approved State program or by the Secretary pursuant to a Federal program." 30 U.S.C. 1256. Applicants for a Title V permit must pay a fee to cover all or some of the costs of reviewing, administering, and enforcing the permit (30 U.S.C. 1257). They must submit a reclamation plan (30 U.S.C. 1258) and, after the permit has been approved but prior to issuance of the permit, must file with the regulatory authority a bond to ensure performance of the reclamation plan (30 U.S.C. 1259). Congress, however, exempted some activities from the Title V requirements by providing:

The provisions of this chapter *shall not apply* to any of the following activities:

- (1) the extraction of coal by a landowner for his own noncommercial use from land owned or leased by him; and (2) 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.

30 U.S.C. 1278. (Emphasis added).

C. What Is the AML Reclamation Program?

Title IV of SMCRA (30 U.S.C. 1231-1243) 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 financing of reclamation projects is subject to a priority schedule with emphasis on sites