

**DEPARTMENT OF THE INTERIOR****Office of Surface Mining Reclamation and Enforcement****30 CFR Part 942**

RIN 1029-AC50

**Tennessee Federal Program**

**AGENCY:** Office of Surface Mining Reclamation and Enforcement, Interior.  
**ACTION:** Proposed rule; public comment period and opportunity for public hearing on revisions to the Tennessee Federal program.

**SUMMARY:** We, the Office of Surface Mining Reclamation and Enforcement (OSM or Office), are proposing three revisions to the Tennessee Federal program. The revisions would: (1) Provide regulations establishing trust funds or annuities to fund the treatment of long-term postmining pollutional discharges; (2) delete the minimum requirements of eighty percent (80%) ground cover for certain postmining land uses and provide that herbaceous ground cover be limited to that necessary to control erosion and support the postmining land use; and (3) exempt areas developed for wildlife habitat, undeveloped land, recreation, or forestry from the requirements that bare areas shall not exceed one-sixteenth (1/16) acre in size and total not more than ten percent (10%) of the area seeded.

**DATES:** Comments on the proposed rule must be received on or before 4 p.m., eastern time on May 8, 2006, to ensure our consideration. If requested, we will hold a public hearing on the amendment on May 1, 2006. We will accept requests to speak at a hearing until 4 p.m., eastern time on April 21, 2006.

**ADDRESSES:** You may submit comments identified by RIN 1029-AC50, by any of the following methods:

- E-Mail: [tdieringer@osmre.gov](mailto:tdieringer@osmre.gov).

Include docket number 1029-AC50 in the subject line of the message.

- Mail/Hand-Delivery/Courier:

Knoxville Field Office, Office of Surface Mining Reclamation and Enforcement, 710 Locust Street, 2nd Floor, Knoxville, Tennessee 37902.

- Federal e-Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

For detailed instructions on submitting comments and additional information on the rulemaking process, see "III. Public Comment Procedures" in the **SUPPLEMENTARY INFORMATION** section of this document.

You may submit requests for public hearings, review copies of the

Tennessee program, view a listing of any scheduled public hearings, and all written comments received in response to this document at the address listed below during normal business hours, Monday through Friday, excluding holidays at the Knoxville Field Office, Office of Surface Mining Reclamation and Enforcement, 710 Locust Street, 2nd Floor, Knoxville, Tennessee 37902.

**FOR FURTHER INFORMATION CONTACT:** Tim Dieringer, Field Office Director, Telephone: 865-545-4103; E-mail: [tdieringer@osmre.gov](mailto:tdieringer@osmre.gov).

**SUPPLEMENTARY INFORMATION:**

- I. Background on the Tennessee Program
- II. Description of the Proposed Amendment
- III. Public Comment Procedures
- IV. Procedural Determinations

**I. Background on the Tennessee Program**

Section 503(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or 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 under certain conditions. The Secretary of the Interior conditionally approved the Tennessee program on August 10, 1982, at 30 CFR part 942. However, because of actions taken by OSM pursuant to 30 CFR part 733, on May 16, 1984, the State repealed most of the Tennessee Coal Surface Mining Law of 1980, Tennessee Code Annotated 59-8-301—59-8-339 and its implementing regulations, effective October 1, 1984. As a result, on October 1, 1984, we withdrew approval of the Tennessee permanent regulatory program and promulgated a Federal program for Tennessee under authority of section 504(a) of the Act. The Federal program in Tennessee was promulgated at 30 CFR part 942, where it replaced the State program. On that date, OSM became the regulatory authority under SMCRA in Tennessee. You can find background information on the Tennessee Federal program, including findings, and the disposition of comments in the October 1, 1984, **Federal Register** (49 FR 38874). The regulations proposed today would amend the Federal program applicable to mining in Tennessee.

**II. Description of the Proposed Actions****A. Revision to 30 CFR 942.800(b)**

We are proposing to amend the regulations that govern the Federal program in Tennessee by providing express authority to accept trust funds or annuities as assurance for the long-

term treatment of pollutional discharges.

SMCRA, its implementing regulations and OSM policy have provided guidance on bonding for treatment of postmining pollutional discharges. Section 509(a) of the Act requires that each permittee post a performance bond conditioned upon faithful performance of all the requirements of the Act and the permit. That section of the Act specifies that "[t]he amount of the bond shall be sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority in the event of forfeiture."

Our regulations implementing the requirements of section 509 of the Act can be found in the Code of Federal Regulations at 30 CFR part 800. These regulations, first promulgated in 1979, have evolved over the years to make it clear that performance bonds must be adjusted when the cost of reclamation increases. Unanticipated events such as postmining pollutional discharges which increase the cost of reclamation are among the events that would require a regulatory authority to adjust bonds to reflect the increased reclamation (treatment) costs that such discharges would present.

In our discussion of determining bond amounts in the March 13, 1979, **Federal Register** (44 FR at 15111), we noted:

The Office recognizes that the regulatory authority cannot reasonably establish the initial bond amount based upon speculative events such as the need to abate ground water pollution, since the operation must be designed initially to prevent such consequences in order to qualify for a permit. However, such unplanned consequences occasionally occur due to improper mining or reclamation, or because an important variable was not evaluated properly. When such consequences are identified prior to the release of all liability and termination of the permit in accordance with part 807, the permittee's legal obligation to abate them necessarily adds to the cost of reclamation.

Under such circumstances, the regulatory authority would be authorized to impose additional bond liability under that permit, or to retain a larger portion of the total liability than otherwise required in response to an application for release of bond, in order to ensure adequate funding to complete the abatement work required (Sections 805.14(a) and 807.12(d)).

While this discussion notes that State regulatory authorities had discretionary authority to increase bonds to reflect the increased costs of reclamation from unanticipated events such as postmining pollutional discharges, in 1983 OSM specifically indicated that such increases were required. In the July 19, 1983, **Federal Register**, we noted:

Each regulatory authority should be able to estimate the cost of all potential reclamation with reasonable accuracy. If at any time the cost of future reclamation under the bond changes, the regulatory authority is required to adjust the bond accordingly (Sec. 800.15(a)). Thus, the amount of the bond for any increment must at all times be sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority. (48 FR 32937)

On September 26, 1983 (48 FR 43956), OSM's revised hydrology regulations included the concept of a hydrology reclamation plan, which includes any required water treatment. Thus, completion of the reclamation plan includes any required water treatment.

OSM further affirmed its position on financial guarantees for postmining pollutional discharges in its March 31, 1997, document titled, "Policy Goals and Objectives on Correcting, Preventing and Controlling Acid/Toxic Mine Drainage." Objective 2 of the policy requires that financial responsibility associated with acid mine drainage (AMD) be fully addressed. Strategies discussed within the policy to achieve this objective include: requiring operators to adjust financial assurance if, subsequent to permit issuance, monitoring identifies acid- or toxic-forming conditions; and where inspections conducted in response to bond release requests identify surface or subsurface water pollution, holding bond in an amount adequate to abate the pollution as long as water treatment is required, unless a financial guarantee or some other enforceable contract or mechanism to ensure continued treatment exists.

When responding to commenters who objected to the requirement that permittees post financial guarantees for treatment of pollutional discharges during and after land reclamation, OSM noted:

[T]here is no doubt that, under SMCRA, the permittee must provide a financial guarantee to cover treatment of postmining discharges when such discharges develop and require treatment.

On May 30, 2000, OSM's Knoxville, Tennessee Field Office (KFO) issued Field Office Policy Memorandum No. 37 titled "Policy for Requiring Bond Adjustments on Permitted Sites Requiring Long-Term Treatment of Pollutional Discharges." This policy described the general procedure that KFO would utilize to require adjustments to performance bonds on sites in Tennessee where unanticipated pollutional discharges are occurring and long-term treatment is required. Subsequently, KFO notified some

permittees in Tennessee to submit revisions for approval of long-term treatment systems and provided the permittees the opportunity to submit annual operating and maintenance costs as well as capital costs for replacement of the system during the 75-year treatment period.

The permittees required to adjust their performance bonds for long-term treatment sought administrative review of KFO's decisions. In a related matter, the National Mining Association (NMA) filed suit, on October 2, 2000, in the United States District Court for the Eastern District of Tennessee seeking relief from OSM for acting in violation of the Administrative Procedure Act and SMCRA relative to implementation of the policy. Administrative review of individual actions has been placed in abeyance pending resolution of that litigation which is still pending.

The bonding regulations for the Tennessee Federal program are located in 30 CFR 942.800. Those regulations incorporate the Federal rules in part 800 by reference. They also add a few Tennessee-specific clarifications. The Tennessee Federal program relies upon a conventional bonding system in which site-specific performance bonds are required to be filed with OSM. The amount of the performance bond is based on the approved reclamation plan and is adjusted periodically when the cost of future reclamation changes. The bond must be sufficient to assure completion of the plan if OSM has to perform the work in the event of bond forfeiture.

Our experience has shown that bonding systems which do not provide an income stream are not well-suited to ensuring the treatment of long-term pollutional discharges, such as AMD. Surety bonds, the most common form of conventional bond, are especially ill-suited for this purpose because no surety will underwrite a bond where there is no expectation of release of liability. Further, mandating that the permittee immediately post other forms of conventional bonds, such as cash or negotiable bonds, may force insolvency on a permittee that is currently treating pollutional discharges. Bankruptcy will lead to bond forfeiture and forfeited amounts are not likely to be sufficient to ensure perpetual treatment of discharges. Comments received from an OSM advance notice of proposed rulemaking (ANPRM) of May 17, 2002 (67 FR 35070), titled, "Bonding and Other Financial Assurance Mechanisms for Treatment of Long-Term Pollutional Discharges and Acid/Toxic Mine Drainage (AMD) Related Issues," confirms our experience regarding the

unsuitability of bonds that do not generate income for water treatment. In that ANPRM, we sought comment on, among other things, the form and amount of financial assurance that should be required to guarantee treatment of postmining pollutional discharges. Commenters on the ANPRM disagreed as to whether financial assurance should be required, but they largely agreed that, if it was, surety bonds are not the best means—or even an appropriate means—of accomplishing that purpose. The Surety Association of America stated that surface coal mining operations "would not be prudently bondable if the scope of the obligation included perpetual treatment of discharge[s]." According to the Association, "the problem of acid mine drainage requires a funding vehicle, and a surety bond is not a funding vehicle."

We believe that the best approach to providing financial assurances for long-term treatment of pollutional discharges is to require that the permittee establish dedicated income-producing accounts such as trust funds or annuities that are held by a third party as trustee for the regulatory authority. However, the Tennessee Federal program currently lacks express authority to accept such accounts as bond. If adopted, this proposed amendment would allow Tennessee to accept trust funds or annuities to fund treatment of postmining pollutional discharges. It also would establish the parameters under which those trust funds or annuities must operate.

In this proposal, we are building on the experience of Pennsylvania, which has successfully implemented similar provisions. The provisions included in our proposed rule are based upon the Pennsylvania provisions and its experience with those provisions.

Pennsylvania amended its Surface Mining Conservation and Reclamation Act and implementing regulations in 1998 to include trust funds to fund treatment of postmining discharges. As of today, Pennsylvania has executed eight trust fund account agreements involving thirty-five treatment facilities. The first two agreements were executed in March, 1999; followed by one each in October 2001; November 2002; June 2003; September 2003; June 2004; and November 2004. Six of the trust fund accounts are fully funded and two are partially funded. There are 45 agreements in various stages of processing that remain to be completed for a total of 53 trust fund agreements.

Pennsylvania's law and regulations allow the complete release of any conventional bonds remaining after land

reclamation has been fully completed and the revegetation responsibility period has expired for a site with a pollutional discharge if provisions have been made for sound future treatment of that discharge. The provisions for sound future treatment must be another approved financial instrument, such as a trust fund, that will fully secure the long-term treatment obligation and is applicable to the area associated with that treatment.

When Pennsylvania submitted the amendment to its program authorizing the use of trust funds and annuities, it characterized those financial instruments as collateral bonds and we approved them as such (70 FR 25472). However, the Federal regulations under 30 CFR 800.11(e) provide another option for approving trust funds and annuities. Trust funds and annuities held by a third party would fit under the alternative bonding system (ABS) criteria of 30 CFR 800.11(e), which implement the provision in section 509(c) of SMCRA authorizing OSM and the States to establish an ABS if they "will achieve the objectives and purposes of the bonding program." The regulations require that such systems (1) ensure that the regulatory authority have available sufficient funds to complete the reclamation plan for any areas that may be in default at any time and (2) provide a substantial economic incentive for the permittee to comply with all reclamation provisions. Establishment of a trust fund would satisfy the first criterion, while the permittee's provision of the monies needed to establish a trust fund would satisfy the second criterion. Approval of trust funds and annuities as an ABS as proposed here will allow a reasonable time to fully fund such accounts. This is preferable to the lump sum deposit required for collateral bonds, particularly in those cases where treatment of the discharge will involve a large capital expense. As part of this proposed rulemaking, we are seeking comments on approving trust funds and annuities as an ABS under 30 CFR 800.11(e) as opposed to approval of those instruments as a collateral bond under 30 CFR 800.21.

Postmining pollutional discharges exist in Tennessee and treatment of the discharges is a necessity. We are committed to establishing a workable means in Tennessee to secure the necessary funds to ensure that treatment can continue. We believe that properly managed trust funds will provide the necessary funds and will result in treatment of the discharges to the standards in the Tennessee program. We are issuing this proposed rulemaking to

seek comments on providing the Tennessee Federal program with the authority to establish trust funds or annuities as an ABS to fund long-term treatment of postmining pollutional discharges in Tennessee by adding paragraph (4) to 30 CFR 942.800(b) as noted below.

Proposed 30 CFR 942.800(b)(4) would provide the authority for establishing trust funds and annuities. Establishing trust funds and annuities as an ABS will keep bonds in place on those areas where discharges are occurring as well as on the areas necessary for the construction of treatment facilities and areas in support of treatment facilities (*i.e.*, access roads). Additionally, a trust fund or annuity will be available to fund treatment of discharges in the event of an operator's bankruptcy. The conditions for establishing trust funds are found in paragraphs (i) through (ix) and are discussed individually below.

In paragraph (i), we are proposing that the amount of the trust fund or annuity be determined by OSM. We believe OSM is in the best position for evaluating the site conditions and impact of the discharges and, therefore, can most accurately evaluate the costs necessary for treatment, including both capital and operational expenses.

In paragraph (ii), we are proposing that the trust fund or annuity be in a form specified by OSM and contain terms and conditions required by OSM. As we stated earlier, OSM is in the best position to establish the terms of the trust fund based on its knowledge of the site conditions. This provision will give OSM the flexibility to tailor individual trust agreements to best reflect treatment options.

In paragraph (iii), we are proposing that at a minimum, a trust fund or annuity shall provide that OSM is irrevocably established as the beneficiary of the trust fund or of the proceeds from the annuity. This provision will ensure that all of the monies in the trust funds will be available for treatment regardless of an operator's financial circumstances.

In paragraph (iv), we are proposing that the investment objectives of the trust fund or annuity be specified by OSM. This will ensure the stability of investments for the trust funds and allow OSM to focus on the goal of producing sufficient revenue for treatment of discharges.

In paragraph (v), we are proposing that termination of the trust fund or annuity may occur only as specified by OSM upon a determination that treatment is no longer necessary, that reclamation has been completed, or that a replacement bond has been posted.

This provision will allow OSM to keep the trust fund in place for as long as necessary to maintain treatment facilities and will ensure that the only reason for termination of the trust fund is that the treatment goals have been attained or that a replacement bond has been posted.

In paragraph (vi), we are proposing that release of money to the permittee from the trust fund or annuity may be made only upon written authorization of OSM. This provision is designed to ensure that only funds necessary for treatment of discharges are released to an operator and that OSM is made aware of all expenditures from the funds.

In paragraph (vii), we provide the requirements for institutions who serve as trustees or issue annuities. We are proposing to allow only the following types of financial institutions to serve as a trustee or issue an annuity for the purposes of this rule:

- A bank or trust company chartered by the Tennessee Department of Financial Institutions.
- A national bank chartered by the Office of the Comptroller of the Currency.
- An operating subsidiary of a national bank chartered by the Office of the Comptroller of the Currency.
- Any other financial institution with trust powers and with offices located in Tennessee, provided that institution's or company's activities are examined or regulated by a State or Federal agency.

We are further proposing to require that an insurance company issuing an annuity be licensed or authorized to do business in Tennessee by the Tennessee Department of Commerce and Insurance or be designated by the Commissioner of that Department as an eligible surplus lines insurer. We are proposing these requirements to ensure that only qualified business institutions are administering the trust funds. This will ensure that the trust funds are administered in a way that meets the treatment goals of OSM and will provide the security this program requires to ensure the funds are available for treatment. In paragraph (viii), we are proposing that trust funds and annuities, as described in this paragraph, are established to guarantee that moneys are available to pay for treatment of postmining pollutional discharges or reclamation of the mine site or both. This provision is necessary to codify the intent of the program. Reclamation of the mine site will be an objective of the program if such reclamation reduces or eliminates the discharge.

Finally, in paragraph (ix), we are proposing to allow the release of conventional bonds if, apart from the pollutional discharge, the permittee has met all applicable reclamation requirements and has made provisions, as noted in this section, for treatment of pollutional discharges. The establishment of trust funds or annuities for treatment of long-term pollutional discharges will constitute a replacement of bonds as authorized in 30 CFR 800.30; there is no need to retain bonds for other areas for which all reclamation requirements have been met and the revegetation responsibility period has expired.

*B. Revisions to 30 CFR 942.816(f)(3) and 30 CFR 942.817(e)(3)*

The Federal requirements for revegetation success are discussed in both SMCRA and the Federal regulations. Section 515(b)(19) of SMCRA requires establishment of a diverse, effective, and permanent vegetative cover, at least equal to the premining cover, that is capable of self generation and plant succession. The Federal regulations at 30 CFR 816.116 (for surface mining activities) and 30 CFR 817.117 (for underground mining activities) provide national standards for revegetation success. At 30 CFR 816.116(b)(3) and 30 CFR 817.116(b)(3), the Federal regulations discuss revegetation success standards for areas to be developed for postmining land uses of fish and wildlife habitat, recreation, shelter belts, or forest products. These regulations, last revised on September 7, 1988, provide that success of vegetation shall be determined on the basis of tree and shrub stocking and vegetative ground cover. The regulations further provide that minimum stocking and planting arrangements for these postmining land uses shall be specified by the regulatory authority on the basis of local and regional conditions.

In promulgating a Federal program for Tennessee, we noted that 30 CFR 816.116(a)(1) requires the regulatory authority to select the standards for revegetation success and include them in the regulatory program. Therefore, we included specific standards at 30 CFR 942.816(f)(3) and 30 CFR 942.817(e)(3) that provide revegetation success standards for areas developed for wildlife habitat, recreational or forest products. These regulations require a minimum eighty percent (80%) ground cover for those postmining land uses. In the preamble discussion of those rules, we noted that we believed that a minimum level of 80% vegetative coverage was necessary to control

erosion on the steep terrain that is common to eastern Tennessee coal fields. The regulations also stated that stocking requirements for woody plants for areas developed for wildlife habitat, recreational or forest products would be determined on a case-by-case basis and specified in the approved mining and reclamation plan. We noted in our preamble discussion that we believed that such case-by-case approvals would allow the flexibility necessary to accommodate the specialized requirements of various wildlife and forest management plans (49 FR 38888). The corresponding Federal standards at 30 CFR 816.116(b)(3) for stocking of woody plants have since been revised and are not as stringent as those currently contained at 30 CFR 942.816(f)(3), which have not been changed since October 1, 1984.

Finally, we promulgated 30 CFR 942.816(f)(4), which prohibits bare areas larger than one-sixteenth of an acre in size and that total more than 10% of the area seeded. We promulgated this provision because we believed that it was necessary to avoid releasing bond on lands that meet the overall cover requirements of 80% or 90% ground cover, but still have localized areas that are not yet stabilized with respect to soil erosion (49 FR 38888).

Since these requirements were promulgated in 1984, a great deal has been learned about reestablishing vegetation on mined land, particularly trees. It has also become apparent that permittees generally prefer pasture or grazing land as postmining land uses because they do not require the extra work and expense of planting trees and ensuring successful tree establishment. Thus, the reclamation of minesites has typically resulted in dense grasslands, with few trees. Many trees that were planted had low survival rates and required replanting, and those that survived did not reach their optimal growth potential, which further discouraged operators from considering a land use that required planting trees.

Virtually all of the land being mined in Tennessee was woodland or forest at the time it was mined. We recognize the importance and benefits of promoting the reestablishment of forests on mined land, which involves encouraging postmining land uses that include trees, such as wildlife habitat, undeveloped land, recreation, or forestry. However, without healthy, vigorously growing trees, these postmining land uses cannot be successfully achieved. Therefore we need to reconsider our revegetation standards to assure that they do not unduly impair tree seedling survival and growth or discourage operators and

landowners from considering land uses that involve planting trees.

We have reviewed available literature and met with recognized experts to determine what site conditions resulted in tree mortality or stunted growth and we reviewed our regulations to identify any impediments to successful forest establishment. Our goal is to have regulations that promote planting trees and reclamation techniques that increase tree survival and growth rates, as well as ensure natural succession of native plants and trees on minesites. In short, our goal is to reestablish diverse and productive forest land.

We found that to promote and enable diverse, vigorous forested lands on minesites, changes to our regulations are necessary. The conventional method of reclaiming minesites, developed with the passage of the Act, typically includes using bulldozers to grade and track-in spoil, creating smooth slopes. This method results in a compacted surface that not only inhibits root growth of seedlings, but restricts infiltration of precipitation and increases runoff. To prevent erosion from the runoff, operators seed the regraded areas with aggressive, quick growing ground covers. This method of reclamation is very effective in producing dense hayland and pastureland. However, it is very detrimental to establishing forested land on minesites for three reasons: The dense vegetative covers used to control erosion compete with trees for soil nutrients, water and sunlight, the compaction of the minesite inhibits root growth as well as water infiltration, and the dense ground cover provides habitat for animals that eat the tree seedlings.

In summarizing the research into ground cover and its effects on trees in 2003, Jim King and Jeff Skousen of West Virginia University noted that:

The negative effects of overly abundant and aggressive ground cover on the survival and growth of trees planted on reclaimed mine lands has long been known. Trees planted into introduced, aggressive forages [especially tall fescue and sericea lespedeza] often are overtopped by the grass or legume and are unable to break free (Burger and Torbert, 1992; Torbert *et al.*, 1995). The seedlings are pinned to the ground and have little chance for survival. If it is known that trees are to be planted, a tree-compatible ground cover should be seeded that will be less competitive with trees. Tree compatible ground cover should be slow growing, sprawling or low growing, not allopathic, and non-competitive with trees (Burger and Torbert, 1992). Plass (1968) reported that after four growing seasons the height growth of sweetgum and sycamore planted into an established stand of tall fescue on spoil banks was significantly retarded. Andersen *et al.*

(1989) found that survival and height growth for red oak and black walnut was significantly greater on sites where ground cover was chemically controlled.<sup>1</sup>

The amount of ground cover for reclaiming minesites to be used as forestland was also discussed by researchers affiliated with the Virginia Polytechnic Institute and State University:

The use of tree-compatible ground covers during reclamation can allow seedlings to survive at rates exceeding the 70% that is necessary to achieve regulatory compliance without the expense of follow-up herbicide treatment. Furthermore, our experience indicates that sowing tree-compatible groundcovers at reduced rates often allows invasion by woody vegetation from adjacent forests. The results of this study suggest that sowing ground cover at reduced rates achieving 50 to 70% cover, instead of 90% currently required by Virginia's regulations, would also greatly improve the likelihood of hardwood reforestation success.<sup>2</sup>

Researchers from the University of Maine have found that only a small amount of ground cover can inhibit tree growth:

Additional research has found that herbaceous vegetation (grasses and broadleaves) in small amounts (<20% cover) around seedlings immediately after planting will substantially reduce early stand growth.<sup>3</sup>

The researchers are united in their findings that even ground cover significantly less dense than the 80% ground cover required in Tennessee's rules for sites to be developed for wildlife habitat, undeveloped land, recreation, or forestry would still be detrimental to tree survival and growth. We have also found that heavy ground cover impedes the natural succession of native forest plants, thereby frustrating SMCRA's goal of establishment of a diverse, effective, and permanent vegetative cover of the same seasonal variety native to the area and capable of self-regeneration and plant succession. As Burger and Zipper noted:

Another purpose of low ground cover seeding rates is to allow the invasion of native plant species such as yellow poplar, red maple, birches and other light-seeded trees. Dense ground covers prevent the natural seeding-in of native plants.<sup>4</sup>

<sup>1</sup> *Tree Survival on a Mountaintop Surface Mine in West Virginia*, King, J., J. Skousen, West Virginia University Morgantown, American Society of Mining and Reclamation, 2003.

<sup>2</sup> *Herbaceous Ground Cover Effects on Native Hardwoods Planted on Mined Land*, Burger, J.A., D.O. Mitchem, C.E. Zipper, R. Williams, Virginia Polytechnic Institute and State University, American Society of Mining and Reclamation, 2005.

<sup>3</sup> *Top 10 Principles for Managing Competing Vegetation to Maximize Regeneration Success and Long-Term Yields*, R.G. Wagner, University of Maine.

<sup>4</sup> *How to Restore Forests on Surface-Mined Land*, Burger, J.A., C.E. Zipper, Virginia Polytechnic

Institute and State University, Powell River Project, Virginia Cooperative Extension Publication 460-123, Revised 2002.

While we have found that excessive vegetative cover is detrimental to tree growth and survival and natural succession, we are cognizant of the general expectation that vegetative cover is needed to control erosion on newly reclaimed minesites. However, the amount of ground cover necessary to control erosion on any particular site is a function of the site topography, composition of surface material, precipitation amounts, and the level of site compaction. Loose or uncompacted material, particularly if relatively flat, may have virtually no runoff or erosion and would require little or no vegetation to control erosion. Conversely, a highly compacted steep slope severely limits infiltration and increases runoff so that a dense vegetative cover is needed to control erosion. Forestry researchers agree that productive forest land can best be created on reclaimed mine land by using techniques that we will refer to as the Forestry Reclamation Approach. This approach requires loosely grading the final 4 to 6 feet of topsoil or topsoil substitute to create a non-compacted growth medium.

Non-compacted mine soils have higher infiltration rates and erode less than graded soils. When using the Forestland Reclamation Approach, less ground cover is needed to prevent erosion and protect water quality, and in the process, diverse mixes of trees are able to survive and grow at rates that will create an economically viable forest.<sup>5</sup>

Also in support:

Third-year results show that intensive grading did not result in better ground cover establishment or erosion control. In fact, erosion was highest on the intensively graded plots.<sup>6</sup>

Reduced grading of minesites will result in less compacted growing media on the surface that will increase water infiltration and limit the amount of water running off a minesite. This in turn will limit erosion and sedimentation from that site as well as making more water available for tree growth. Limited compaction is also more favorable to tree root growth which will increase survivability and growth rates.

<sup>5</sup> *Herbaceous Ground Cover Effects on Native Hardwoods Planted on Mined Land*, Burger, J.A., D.O. Mitchem, C.E. Zipper, R. Williams, Virginia Polytechnic Institute and State University, American Society of Mining and Reclamation, 2005.

<sup>6</sup> *Influence on Grading Intensity on Ground Cover Establishment, Erosion, and Tree Establishment on Steep Slopes*, Torbert, J.L., Burger, J.A., Virginia Polytechnic Institute and State University, International Land Reclamation and Mine Drainage Conference and the Third International Conference on the Abatement of Acidic Drainage, 1994.

In proposing these changes, we have also considered many additional studies conducted to determine the effects of vegetation and reclamation practices on the development of trees planted on reclaimed minesites.

Our regulations are clear in providing that erosion from minesites must be controlled. At the same time, research has found that ground covers in excess of those required for controlling erosion could be detrimental to tree growth and natural succession which would impede establishing postmining land uses of wildlife habitat, undeveloped land, recreation, or forestry. We believe the best way to ensure creation of a planting plan that controls erosion and encourages tree survival, growth and natural succession, would be to eliminate the current arbitrary success standard of 80% ground cover, which applies to all sites regardless of local site conditions and proposed land uses. Conditions at each site are unique and methods to reclaim them will vary. Allowing OSM the latitude to determine the success standards on a site-by-site basis will ensure that localized conditions are taken into account, successful postmining land uses are achieved, and erosion is effectively controlled. As a result, we are proposing to revise 30 CFR 942.816(f)(3) and 30 CFR 942.817(e)(3) as noted below by eliminating the 80% ground cover standard. Please note that paragraphs (i)-(iii) of those sections are not affected by this rulemaking.

We are also proposing to expand the postmining land uses to which the regulations at 30 CFR 942.816(f)(3) and 30 CFR 942.817(e)(3) apply by including undeveloped land and by modifying the postmining land use of forest products to forestry. We are proposing these changes to accurately reflect the postmining land uses that involve the establishment of forested lands.

*C. Revision to 30 CFR 942.816(f)(4) and 30 CFR 942.817(e)(4)*

We propose to exempt sites to be developed for wildlife habitat, undeveloped land, recreation, or forestry from the bare area provisions of 30 CFR 942.816(f)(4) and 942.817(e)(4). The Forestry Reclamation Approach calls for using herbaceous ground covers that are compatible with growing trees. Using less competitive ground covers at lower seeding rates, or in some cases no herbaceous groundcover at all, will result in areas that may be essentially bare except for tree seedlings and volunteer herbaceous vegetation. As we noted earlier in this preamble, reduced levels of herbaceous ground cover are necessary for natural succession of

native forest plants and to reduce competition between grasses and tree seedlings for water, nutrients and sunlight. While striving to achieve this goal, some areas will be void of herbaceous ground cover. This is desirable because many native woody plants and forbs require bare soil conditions in order to seed-in naturally. Also, most traditionally planted herbaceous ground cover species are not expected to be part of the mature forest plant community.

We noted in the October 1, 1984, **Federal Register** our reason for requiring the bare area standard was to avoid releasing bond on localized areas on reclaimed minesites that are not yet stabilized from soil erosion. The Forestry Reclamation Approach calls for loosely graded growth media, which will increase water infiltration and reduce runoff thereby decreasing or eliminating erosion. In any event, 30 CFR 816.45 and 817.45 require the construction and maintenance of appropriate sediment control measures to minimize erosion and runoff outside the permit area. As a result, we believe that exempting sites to be developed for wildlife habitat, undeveloped land, recreation, or forestry from the bare area standard of 30 CFR 942.816(f)(4) and 942.817(e)(4), coupled with the revegetation success standards in the approved mining and reclamation plan as specified in the proposed revision of 30 CFR 942.816(f)(3) and 942.817(e)(3), will supply sufficient standards to both prevent erosion and to provide a proper environment for tree growth and natural succession.

### III. Public Comment Procedures

Under the provisions of 30 CFR 736.12, we are seeking your comments on the proposed revisions to the regulations. Because the proposed revisions are limited to the Tennessee Federal Program, our regulations at 30 CFR 736.12(a)(2) allow for a 30 day comment period. Comments and requests for a public hearing may be submitted as noted below.

#### Written Comments

Send your written or electronic comments to OSM at the address given above. Your written comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations in support of your recommendations. We will make every attempt to log all comments into the administrative record, but comments delivered to an address other than the Knoxville Field Office may not be logged in, and comments received after

the close of the comment period may not be considered.

#### Electronic Comments

Please submit Internet comments as an ASCII or Word file avoiding the use of special characters and any form of encryption. Please also include "Attn: RIN 1029-AC50" and your name and return address in your Internet message. If you do not receive a confirmation that we have received your Internet message, contact the Knoxville Field Office at 865-545-4103.

#### Availability of Comments

We will make comments, including names and addresses of respondents, available for public review during normal business hours. We will not consider anonymous comments. If individual respondents request confidentiality, we will honor their request to the extent allowable by law. Individual respondents who wish to withhold their name or address from public review, except for the city or town, must state this prominently at the beginning of their comments and submit their comments by regular mail, not electronic mail. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public review in their entirety.

#### Public Hearing

If you wish to speak at the public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4 p.m., eastern time on April 21, 2006. If you are disabled and need special accommodations to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT**. We will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an opportunity to speak, we will not hold a hearing.

To assist the transcriber and ensure an accurate record, we request, if possible, that each person who speaks at the public hearing provide us with a written copy of his or her comments. The public hearing will continue on the specified date until everyone scheduled to speak has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after everyone scheduled to speak and others present in the audience who wish to speak, have been heard.

#### Public Meeting

If only one person requests an opportunity to speak, we may hold a public meeting rather than a public hearing. If you wish to meet with us to discuss the amendment, please request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings are open to the public and, if possible, we will post notices of meetings at the locations listed under **ADDRESSES**. We will make a written summary of each meeting a part of the administrative record.

### IV. Procedural Determinations

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

This document is not a significant rule and is not subject to review 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. The revisions to the bonding requirements and revegetation standards 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.

As discussed in the preamble to the proposed rule, the bonding provisions should benefit coal operators who experience unanticipated pollutional discharges by providing them with an alternative financial mechanism for the treatment of AMD. The proposed bonding revisions will not add to the operator's cost of doing business since the existing regulations in 30 CFR 942.800 and 30 CFR part 800 already require that a bond amount be adequate for the cost of reclamation and, when necessary, be adjusted to insure that adequate funds are available. The trust funds or annuities will allow continued treatment of postmining pollutional discharges by the operator and will assist in preventing bankruptcies and potential bond forfeitures since sureties will not likely fund treatment. There are approximately 52 mining operations in Tennessee with AMD problems that may avail themselves of the new bonding provisions.

Our estimates have found that approximately 10 companies will take advantage of the rule that eliminates the arbitrary ground cover requirements on minesites to be reclaimed for wildlife habitat, undeveloped land, recreation, or forestry. Approximately 1000-1500 acres are eligible for Phase III bond release annually in Tennessee. The changes to the rules proposed will encourage reforestation of this acreage and provide the basis for healthy,

vigorous tree growth. While economic benefits of reforestation to mine operators are limited, the benefits to the environment are numerous and include: creating diverse, productive forests that provide watershed protection, wildlife habitat, recreational opportunities, and remove carbon dioxide from the air.

Additionally, there are economic benefits of reforested sites because forests can offer substantial revenue for landowners who own the trees and job opportunities for local residents who harvest the trees and use the lumber.

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 of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients.

d. This rule does not raise novel legal or policy issues.

#### *Regulatory Flexibility Act*

The Department of the Interior certifies that this proposed 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.*). As previously stated, the revisions to the existing provisions may benefit the regulated industry by allowing an alternative source of bonding. Further, the rule produces no adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States enterprises to compete with foreign-based enterprises in domestic or export markets.

#### *Small Business Regulatory Enforcement Fairness Act*

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

a. Does not have an annual effect on the economy of \$100 million or more.

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

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises for the reasons stated above.

#### *Unfunded Mandates*

This proposed 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, Tribal, or local governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*) is not required.

#### *Executive Order 12630—Takings*

In accordance with Executive Order 12630, the proposed rule does not have significant takings implications. The revisions to the bonding and revegetation regulations do not affect the use or value of private property.

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

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

#### *Executive Order 13132—Federalism*

In accordance with Executive Order 13132, the proposed rule does not have significant Federalism implications to warrant the preparation of a Federalism Assessment for the reasons discussed above.

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

In accordance with Executive Order 13175, we have evaluated the potential effects of this proposed rule on Federally-recognized Indian tribes and have determined that the proposed revisions would not have substantial direct effects 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.

#### *Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This proposed rule is not considered a significant energy action under Executive Order 13211. The proposed revisions would not have a significant effect on the supply, distribution, or use of energy.

#### *Paperwork Reduction Act*

This proposed rule does not contain collections of information which require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

#### *National Environmental Policy Act*

This proposed rule does not require an environmental impact statement because section 702(d) of SMCRA (30

U.S.C. 1292(d)) provides that promulgation of Federal programs 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)).

#### *Clarity of This Regulation*

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this proposed rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the proposed rule clearly stated? (2) Does the proposed rule contain technical language or jargon that interferes with its clarity? (3) Does the format of the proposed rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Would the rule be easier to understand if it were divided into more (but shorter) sections? (A "section" appears in bold type and is preceded by the symbol "\$" and a numbered heading; for example, § 942.800). (5) Is the description of the proposed rule in the **SUPPLEMENTARY INFORMATION** section of this preamble helpful in understanding the proposed rule? What else could we do to make the proposed rule easier to understand? Send a copy of any comments that concern how we could make this proposed rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street NW., Washington, DC 20240. You may also e-mail the comments to this address: [Exsec@ios.doi.gov](mailto:Exsec@ios.doi.gov).

#### **List of Subjects in 30 CFR Part 942**

Intergovernmental relations, Surface mining, Underground mining.

Dated: March 21, 2006.

**R.M. "Johnnie" Burton,**  
*Acting Assistant Secretary, Land and Minerals Management.*

For the reasons given in the preamble, we are proposing to amend 30 CFR part 942 as set forth below:

#### **PART 942—TENNESSEE**

1. The authority citation for part 942 continues to read as follows:

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

2. Amend § 942.800 by adding new paragraph (b)(4) to read as follows:

**§ 942.800 Bond and insurance requirements for surface coal mining and reclamation operations.**

\* \* \* \* \*

(b) \* \* \*

(4) Special consideration for sites with long-term postmining pollutional

discharges. With the approval of the Office, the permittee may establish a trust fund or annuity to guarantee treatment of long-term postmining pollutional discharges. The trust fund or annuity will be subject to the following conditions:

- (i) The Office will determine the amount of the trust fund or annuity, which must be adequate to meet all anticipated treatment needs, including both capital and operational expenses;
- (ii) The trust fund or annuity must be in a form approved by the Office and contain all terms and conditions required by the Office;
- (iii) The trust fund or annuity must provide that the Office is irrevocably established as the beneficiary of the trust fund or of the proceeds from the annuity;
- (iv) The Office will specify the investment objectives of the trust fund or annuity;
- (v) Termination of the trust fund or annuity may occur only as specified by the Office upon a determination that no further treatment or other reclamation measures are necessary or that a replacement bond or other financial instrument has been posted;
- (vi) Release of money to the permittee from the trust fund or annuity may be made only upon written authorization of the Office;
- (vii) A financial institution serving as a trustee or issuing an annuity must be one of the following: a bank or trust company chartered by the Tennessee Department of Financial Institutions; a national bank chartered by the Office of the Comptroller of the Currency; an operating subsidiary of a national bank

chartered by the Office of the Comptroller of the Currency; any other financial institution with trust powers and with offices located in Tennessee, provided that institution's or company's activities are examined or regulated by a State or Federal agency;

(viii) Trust funds and annuities, as described in this paragraph, must be established to guarantee that moneys are available for the Office to pay for treatment of postmining pollutional discharges or reclamation of the mine site or both; and

(ix) When a trust fund or annuity is fully in place, the Office may approve final bond release under § 800.40(c)(3) for conventional bonds posted for a permit or permit increment, provided that, apart from the pollutional discharge, the area fully meets all applicable reclamation requirements and the trust fund is sufficient for treatment of pollutional discharges and reclamation of all areas involved in such treatment.

3. In § 942.816, revise paragraph (f)(3) introductory text and paragraph (f)(4) as follows:

**§ 942.816 Performance standards—Surface mining activities.**

\* \* \* \* \*

(f) \* \* \*

(3) For areas developed for wildlife habitat, undeveloped land, recreation, or forestry the stocking of woody plants shall be at least equal to the rates specified in the approved mining and reclamation plan. In order to minimize competition with woody plants, herbaceous ground cover should be limited to that necessary to control

erosion and support the postmining land use. Seed mixes and seeding rates will be specified in the permit.

\* \* \* \* \*

(4) Bare areas shall not exceed one-sixteenth (1/16) acre in size and total not more than ten percent (10%) of the area seeded, except for areas developed for wildlife habitat, undeveloped land, recreation, or forestry.

\* \* \* \* \*

4. In § 942.817, revise paragraph (e)(3) introductory text and paragraph (e)(4) as follows:

**§ 942.817 Performance standards—Underground mining activities.**

\* \* \* \* \*

(e) \* \* \*

(3) For areas developed for wildlife habitat, undeveloped land, recreation, or forestry, the stocking of woody plants shall be at least equal to the rates specified in the approved mining and reclamation plan. In order to minimize competition with woody plants, herbaceous ground cover should be limited to that necessary to control erosion and support the postmining land use. Seed mixes and rates shall be specified in the permit.

\* \* \* \* \*

(4) Bare areas shall not exceed one-sixteenth (1/16) acre in size and total not more than ten percent (10%) of the area seeded, except for areas developed for wildlife habitat, undeveloped land, recreation, or forestry.

\* \* \* \* \*

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