

DEPARTMENT OF THE INTERIOR**Office of Surface Mining Reclamation and Enforcement**

30 CFR Parts 700, 724, 773, 785, 816, 817, 845, 846, 870, 872, 873, 874, 875, 876, 879, 880, 882, 884, 885, 886, and 887

RIN 1029-AC56

[Docket ID: OSM-2008-0003]

Abandoned Mine Land Program

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

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are proposing regulation changes to the Abandoned Mine Reclamation Fund (Fund) and the Abandoned Mine Land (AML) program. This proposed rule revises our regulations to be consistent with the Tax Relief and Health Care Act of 2006, Pub. L. 109-432, signed into law on December 20, 2006, which included the Surface Mining Control and Reclamation Act Amendments of 2006 (the 2006 amendments). The proposed rule reflects the extension of our statutory authority to collect reclamation fees for an additional fourteen years and to reduce the fee rates. This proposal also updates the regulations in light of the statutory amendments that change the activities State and Tribal reclamation programs may perform under the AML program, funding for reclamation grants to States and Indian tribes, and transfers to the United Mine Workers of America (UMWA) Combined Benefit Fund (CBF), the UMWA 1992 Benefit Plan, and the UMWA Multiemployer Health Benefit Plan (1993 Benefit Plan). Finally, our proposed rule extends incentives reauthorized by the 2006 amendments pertaining to the re-mining of certain lands and water adversely affected by past mining.

DATES: Comments on the proposed rule must be received on or before August 19, 2008, in order to ensure our consideration. We will accept requests to speak at a public hearing until 5 p.m., Eastern Time on July 11, 2008.

ADDRESSES: You may submit comments by any of the following methods:

- *Federal e-Rulemaking Portal:* <http://www.regulations.gov>. The rule is listed under the agency name "OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT." The proposed rule has been assigned Docket ID: OSM-2008-0003.

If you would like to submit comments through the Federal e-Rulemaking Portal, go to www.regulations.gov and do the following. Click on the "Advanced Docket Search" button on the right side of the screen. Type in the Docket ID OSM-2008-0003 and click the "Submit" button at the bottom of the page. The next screen will display the Docket Search Results for the rulemaking. If you click on OSM-2008-0003, you can view the proposed rule and submit a comment. You can also view supporting material and any comments submitted by others.

- *Mail/Hand-Delivery/Courier to:* Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 252-SIB, 1951 Constitution Avenue, NW., Washington, DC 20240. Please include the rule Docket ID (OSM-2008-0003) with your comment.

We cannot ensure that comments received after the close of the comment period (see **DATES**) will be included in the docket for the rulemaking and considered. Comments sent to an address other than those listed above (see **ADDRESSES**) will not be included in the docket for the rulemaking.

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

If you wish to comment on the information collection aspects of this proposed rule, you may submit your comments to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Interior Desk Officer, via e-mail to OIRA_DOCKET@omb.eop.gov, or via facsimile to 202-365-6566.

FOR FURTHER INFORMATION CONTACT: Danny Lytton, Chief, Reclamation Support Division, 1951 Constitution Ave., NW., Washington, DC 20240; Telephone: 202-208-2788; E-mail: dlytton@osmre.gov.

SUPPLEMENTARY INFORMATION:

- I. Background on the Reclamation Fee and the Abandoned Mine Land Program
- II. Outreach, Guidance, and Comments
- III. Description of the Proposed Rule
- IV. Public Comment Procedures
- V. Procedural Determinations

I. Background on the Reclamation Fee and the Abandoned Mine Land Program*A. How did the reclamation fee work before the 2006 amendments?*

Title IV of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) created an AML reclamation program

funded by a reclamation fee assessed on each ton of coal produced. The fees collected have been placed in the Fund. We, either directly or through grants to States and Indian tribes with approved AML reclamation plans under SMCRA, have been using money from the Fund primarily to reclaim lands and waters adversely impacted by mining conducted before the enactment of SMCRA and to mitigate the adverse impacts of mining on individuals and communities. Also, since Fiscal Year (FY) 1996, an amount equal to the interest earned by and paid to the Fund has been available for direct transfer to the UMWA CBF to defray the cost of providing health care benefits for certain retired coal miners and their dependents. See Energy Policy Act of 1992, Pub. L. 102-486, 106 Stat. 2776, 3056, § 19143(b)(2) of Title XIX.

Section 402(a) of SMCRA fixed the reclamation fee for the period before September 30, 2007, at 35 cents per ton (or 10 percent of the value of the coal, whichever is less) for surface-mined coal other than lignite, 15 cents per ton (or 10 percent of the value of the coal, whichever is less) for coal from underground mines, and 10 cents per ton (or 2 percent of the value of the coal, whichever is less) for lignite. As originally enacted, section 402(b) of SMCRA authorized collection of reclamation fees for 15 years following the date of enactment (August 3, 1977); thus, our fee collection authority would have expired August 3, 1992. However, Congress extended the fees and our fee collection authority through September 30, 1995, in the Omnibus Budget Reconciliation Act of 1990 (Pub. L. 101-508, 104 Stat. 1388, § 6003(a)). The Energy Policy Act of 1992 (Pub. L. 102-486, 106 Stat. 2776, 3056, § 19143(b)(1) of Title XIX), extended the fees through September 30, 2004. A series of short interim extensions in appropriations and other acts extended the fees through September 30, 2007.

B. How did the AML program work before the 2006 amendments?

SMCRA established the AML reclamation program in response to concern over extensive environmental damage caused by past coal mining activities. Before the 2006 amendments, the AML program reclaimed eligible lands and waters using money appropriated by Congress from the Fund, which came from the reclamation fees collected from the coal mining industry. Eligible lands and waters were those which were mined for coal or affected by coal mining or coal processing, were abandoned or left inadequately reclaimed prior to the

enactment of SMCRA on August 3, 1977, and for which there was no continuing reclamation responsibility under State or other Federal laws.

SMCRA established a priority system for reclaiming coal problems. Before the 2006 amendments, the AML program had five priority levels, but reclamation was focused on eligible lands and waters that reflected the top three priorities. The first priority was “the protection of public health, safety, general welfare, and property from extreme danger of adverse effects of coal mining practices.” 30 U.S.C. 1233(a)(1) (unamended). The second priority was “the protection of public health, safety, and general welfare from adverse effects of coal mining practices.” 30 U.S.C. 1233(a)(2) (unamended). The third priority was “the restoration of land and water resources and the environment previously degraded by adverse effects of coal mining practices * * *.” 30 U.S.C. 1233(a)(3) (unamended).

As the law required, the Fund was divided into State or Tribal and Federal shares. Each State or Indian tribe with a Federally approved reclamation plan was entitled to receive 50 percent of the reclamation fees collected annually from coal operations conducted within its borders. The “Secretary’s share” of the Fund consisted of the remaining 50 percent of the reclamation fees collected annually and all other receipts to the Fund. The Secretary’s share was allocated into three shares as required by the 1990 amendments to SMCRA. See Omnibus Budget Reconciliation Act of 1990, Pub. L. 101–508, 104 Stat. 1388, § 6004. First, we allocated 40% of the Secretary’s share to “historic coal” funds to increase reclamation grants to States and Indian tribes for coal reclamation. However, all the funds which were allocated may not have been appropriated. Second, we allocated 20% to the Rural Abandoned Mine Program (RAMP), operated by the Department of Agriculture, which was authorized to receive AML funding but has not been appropriated AML funds since the mid 1990’s. Last, SMCRA required us to allocate 40% to “Federal expense” funds to provide grants to States for emergency programs that abate sudden dangers to public health or safety needing immediate attention, to increase reclamation grants in order to provide a minimum level of funding to State and Indian tribal programs with unreclaimed coal sites, to conduct reclamation of emergency and high-priority coal sites in areas not covered by State and Indian tribal programs, and to fund our operations that administer Title IV of SMCRA.

States with an approved State coal regulatory program under Title V of SMCRA and with eligible coal mined lands may develop a State program for reclamation of abandoned mines. The Secretary may approve the State reclamation program and fund it. At the time the 2006 amendments were enacted, 23 States received annual AML grants to operate their approved reclamation programs. Three Indian tribes (the Navajo, Hopi and Crow Indian tribes) without approved regulatory programs have received grants for their approved reclamation programs as authorized by section 405(k) of SMCRA.

Before the 2006 amendments, only a State or Indian tribe was authorized to certify that it had addressed all known coal problems within the State or on Indian lands within its jurisdiction. These certified States and Indian tribes were able to use AML grant funds to abate the impacts of mineral mining and processing. SMCRA established the following priorities for the certified programs:

- (1) The protection of public health, safety, general welfare, and property from extreme danger of adverse effects from mineral mining and processing practices.
 - (2) The protection of public health, safety, and general welfare from adverse effects of mineral mining and processing practices.
 - (3) The restoration of land and water resources and the environment previously degraded by the adverse effects of mineral mining and processing practices.
- 30 U.S.C. 1240a(c). Certified States and Indian tribes could also use these funds to improve or construct utilities adversely affected by mineral mining and to construct public facilities in communities impacted by coal or mineral mining or processing. 30 U.S.C. 1240a(e). Certified States and Indian tribes could also use these funds for activities or construction of specific public facilities related to the coal or minerals industry in areas impacted by coal or minerals development. 30 U.S.C. 1240a(f).

In contrast, uncertified States and Indian tribes could use AML grant funds on noncoal projects only to abate extreme dangers to public health, safety, general welfare, and property that arose from the adverse effects of mineral mining and processing and only at the request of the Governor or the governing body of the Indian tribe. 30 U.S.C. 1239.

The minimum program funding level provided additional grant funding to uncertified States and Indian tribes so

that each reclamation program would receive enough annual AML funding to support a viable program. Before the 2006 amendments, SMCRA set the minimum program level at \$2 million. 30 U.S.C. 1232(g)(8) (as amended by the Omnibus Budget Reconciliation Act of 1990, Pub. L. 101–508, § 6004). However, appropriations have generally only funded the minimum program level at \$1.5 million. See, e.g., Department of the Interior, Environment, and Related Agencies Appropriations Act, 2006, Pub. L. 109–54, 119 Stat. 513 (2005) (“[G]rants to minimum program States will be \$1,500,000 per State in fiscal year 2006.”). The Federal Fiscal Year runs from October 1 through September 30, so that FY 2006 is October 1, 2005, through September 30, 2006. SMCRA did not mandate a particular share of the Fund be used to support the minimum program, and we chose to use moneys from the Federal expenses share of the Fund for this purpose.

Before the 2006 amendments, States and Indian tribes were allowed to deposit up to 10 percent of their State or Tribal share and 10 percent of their historic coal share funds into set-aside accounts for either future coal reclamation or acid mine drainage treatment programs or both. 30 U.S.C. 1232(g)(6) (as amended by the Omnibus Budget Reconciliation Act of 1990, Pub. L. 101–508, § 6004). In addition, uncertified States and Indian tribes were allowed to spend up to 30% of their funds on water supply projects that protect, repair, replace, construct, or enhance water supply facilities adversely affected by coal mining practices. 30 U.S.C. 1233(b)(1) (as amended by the Omnibus Budget Reconciliation Act of 1990, Pub. L. 101–508, § 6005).

C. How did the 2006 amendments change these programs?

The Surface Mining Control and Reclamation Act Amendments of 2006 were signed into law as part of the Tax Relief and Health Care Act of 2006, on December 20, 2006. Pub. L. 109–432. The 2006 amendments revise Title IV of SMCRA to make significant changes to the reclamation fee and the AML program. The changes are summarized as follows:

- OSM’s reclamation fee collection authority is extended through September 30, 2021. The statutory fee rates are reduced by 10 percent from the current levels for the period from October 1, 2007, through September 30, 2012. The fee rates are reduced by an additional 10 percent from the original levels for the period from October 1,

2012, through September 30, 2021. 30 U.S.C. 1232(a).

- The Fund allocation formula is changed. Beginning October 1, 2007, certified States will no longer be eligible to receive State share funds. 30 U.S.C. 1231(f)(3)(B). Instead, amounts which would have been distributed as State share for fee collections for certified States will be distributed as historic coal funds. 30 U.S.C. 1240a(h)(4). The RAMP share is eliminated. *See* 30 U.S.C. 1232(g). The historic coal allocation is further increased by the amount that previously was allocated to RAMP. 30 U.S.C. 1232(g)(5).

- Distributions of annual fee collections are made outside of the appropriations process. Once fully phased in, most fee collections will go to States and Indian tribes in annual mandatory distributions. Mandatory distributions from the Fund for uncertified States and Indian tribes include the State or Tribal share of all fees collected for coal produced the previous fiscal year, historic coal funds allocated from previous fiscal year production and also transferred from collections for certified States and Indian tribes for the previous fiscal year, and minimum program make up funding. 30 U.S.C. 1232(g)(1), (g)(5), and (g)(8)(A). These mandatory distributions are phased in at 50 percent for FY 2008 and FY 2009, and 75 percent for FY 2010 and FY 2011; full funding will be reached in FY 2012. 30 U.S.C. 1231(f)(5). After the end of the fee collection period, mandatory distributions of money from the Fund for FY 2023 and subsequent years will continue from balances in the Fund at the same level as FY 2022 to the extent funds are available. 30 U.S.C. 1231(f)(2)(B).

- Certified States and Indian tribes will receive mandatory distributions of Treasury funds in lieu of the State and Tribal share they will no longer be eligible to receive. 30 U.S.C. 1240a(h)(2). This mandatory distribution will be phased in at 25 percent for the first year, 50 percent for the second year, 75 percent for the third year, and fully distributed in the fourth year and thereafter. 30 U.S.C. 1240a(h)(3)(B). These funds may be used to address coal problems that arise after certification and for other purposes.

- All States and Indian tribes with approved reclamation plans are paid amounts equal to their unappropriated prior balance of State and Tribal share funds from fees collected on coal produced before October 1, 2007. 30 U.S.C. 1240a(h)(1)(A)(i). Payments will be made in seven equal annual

installments beginning in FY 2008. 30 U.S.C. 1240a(h)(1)(C). Payments are mandatory distributions from Treasury funds. These payments must be used by uncertified States and Indian tribes for the purposes of section 403 of SMCRA. 30 U.S.C. 1240a(h)(1)(D)(ii). These payments must be used by certified States and Indian tribes for purposes established by the State legislature or Tribal council, with priority given for addressing the impacts of mineral development. 30 U.S.C.

1240a(h)(1)(D)(i). Amounts in the Fund previously designated as State or Tribal share equal to the unappropriated balance payments will be transferred to historic coal funds as payments are made and used for reclamation grants in FY 2023 and thereafter. 30 U.S.C. 1240a(h)(4).

- The minimum funding level for each State or Indian tribe with an approved reclamation plan and unfunded high priority coal reclamation problems is increased to \$3 million. 30 U.S.C. 1232(g)(8)(A). This funding is also a mandatory distribution. However, like the rest of the distributions from the Fund, these distributions will be phased in at 50 percent for FY 2008 and FY 2009, and 75 percent for FY 2010 and FY 2011; full funding will be reached in FY 2012. 30 U.S.C. 1231(f)(5).

- The States of Tennessee and Missouri are each authorized to receive minimum program make up funding for their approved State reclamation programs even if they do not meet other requirements, such as having an approved coal regulatory program. 30 U.S.C. 1232(g)(8)(B).

- Other than for minimum program make up funding, expenditures from the Secretary's share must be appropriated by Congress. 30 U.S.C. 1231(d)(a). These uses for Federal expense funding include the emergency reclamation program, Federal reclamation programs, the Watershed Cooperative Agreement Program, and our AML administrative expenses.

- The limit on set aside funding for acid mine drainage (AMD) treatment programs is increased from 10 percent to 30 percent of State or Tribal share funds and historic coal funds. 30 U.S.C. 1232(g)(6). In addition, States and Indian tribes are no longer required to get our approval for AMD plans. *Id.* Set aside funding for future coal reclamation is no longer authorized. *Id.* The previous cap of 30 percent for water supply restoration projects is eliminated. 30 U.S.C. 1233(b).

- There are only three AML coal reclamation priorities because the previous priorities 4 and 5 have been removed. 30 U.S.C. 1233(a). Also,

“general welfare” is eliminated as a component of priorities 1 and 2. 30 U.S.C. 1233(a)(1) and (a)(2). OSM now ensure strict compliance with the coal priorities until the State or Indian tribe is certified. 30 U.S.C. 1232(g)(2). States and Indian tribes may initiate Priority 3 reclamation projects before completing all Priority 1 and 2 projects only if the Priority 3 reclamation is performed in conjunction with a Priority 1 or 2 project. 30 U.S.C. 1232(g)(7). Priority 3 lands and waters adjacent to past, present, and future Priority 1 and 2 project sites may be reclassified to Priority 1 or 2. 30 U.S.C. 1233(a)(1)(B)(ii) and 1233(a)(2)(B)(ii).

- The previous prohibition on filing a lien against the beneficiary of an AML reclamation project if the person owned the surface before May 2, 1977, is eliminated. 30 U.S.C. 1238(a). The automatic lien waiver is now extended to all landowners who did not consent to, participate in, or exercise control over the mining operations that necessitated the reclamation.

- We must approve amendments to the AML inventory system. 30 U.S.C. 1233(c).

- We may certify that a State or Indian tribe has completed coal reclamation without prior request from the State or Indian tribe. 30 U.S.C. 1240a(a)(2).

- There is a cap of \$490 million on total annual Treasury funding under this legislation. 30 U.S.C. 1232(i)(3)(A). This cap limits payments to States and Indian tribes under 30 U.S.C. 1240a(h) and the payments to the CBF, 1992 Benefit Plan, and the 1993 Benefit Plan, collectively known as the “UMWA health care plans,” under 30 U.S.C. 1232(h) and 1232(i)(1).

- Subject to certain limitations, to the extent payments from premiums and other sources do not meet the financial needs of the UMWA health care plans, all estimated Fund interest earnings for each fiscal year must be transferred to these plans. 30 U.S.C. 1232(h). The unappropriated balance of the RAMP allocation as of December 20, 2006, is also available for transfer to the UMWA health care plans. 30 U.S.C. 1232(h)(4)(B). These additional transfers to the CBF began in FY 2007, while transfers to the 1992 and 1993 Benefit Plans began in FY 2008. 30 U.S.C. § 1232(h)(1). Transfers to the 1992 and 1993 Benefit Plans are phased in, with transfers in FY 2008–2010 limited to 25%, 50%, and 75% respectively, of the amounts that would otherwise be transferred. 30 U.S.C. 1232(h)(5)(C). If necessary to meet their financial needs, the UMWA health care plans are also entitled to payments from

unappropriated amounts in the Treasury, subject to the overall \$490 million cap on all transfers from the Treasury under the 2006 amendments. 30 U.S.C. 1232(i)(1)(B) and (i)(3)(A). All interest earned by the Fund before December 20, 2006, and not previously transferred to the CBF is set aside in a reserve fund that will be used to make payments to the UMWA health care plans in the event that their financial needs exceed the annual cap. 30 U.S.C. 1232(h)(4)(A).

- The 2006 amendments removed the expiration date for remining incentives initially authorized on October 24, 1992, when SMCRA was amended to include a new section 510(e) that created an exemption from the section 510(c) permit-block sanction for remining operations and a new section 515(b)(20)(B) that provided incentives for certain eligible remining operations in the form of reduced revegetation responsibility periods (2 years in the East and 5 years in the West). Energy Policy Act of 1992, Pub. L. 102-486, § 2503. Until the 2006 amendments, those remining incentives had a statutorily defined expiration date of September 20, 2004, under 510(e) of SMCRA. *Id.*

- The 2006 amendments authorized us to develop regulations to promote remining of eligible land under section 404 in a manner that leverages the use of amounts from the Fund to achieve more reclamation. 30 U.S.C. 1244

- Upon our approval, an Indian tribe may develop “a tribal program under section 503 [of SMCRA] regulating in whole or in part surface coal mining and reclamation operations on reservation land under the jurisdiction of the Indian tribe using the procedures of section 504(e).” 30 U.S.C. 1300(j).

II. Outreach, Guidance, and Comments

Since the enactment of the 2006 amendments, we have notified potentially affected parties of the statutory amendments and solicited comments on issues related to the 2006 amendments. In January and September 2007, we notified all fee payers in writing of the fee rate changes. In January, February, and May 2007, we met with representatives of States and Indian tribes with approved reclamation programs at meetings hosted by the Interstate Mining Compact Commission (IMCC) and the National Association of Abandoned Mine Land Programs (NAAMLPL) to notify the States and Indian tribes of the 2006 amendments' changes to SMCRA and to seek their input on the amendments. The IMCC and NAAMLPL subsequently submitted joint written comments on specific

provisions of the amendments. The IMCC and the NAAMLPL, among others, raised the following major issues in their written comments.

First, the commenters proposed that we allow individual States and Indian tribes to choose between receiving Treasury moneys under section 411(h) through a traditional grant or by a “direct payment mechanism.” The commenters recognized that we might prefer to use grants to pay the section 411(h) funds rather than some type of “direct distribution of cash from the Treasury.” However, the commenters noted that SMCRA does not directly address this issue and stated that the “Secretary has the discretion to design a payment mechanism that meets the needs of the States and tribes.” They urged us to develop some type of “direct payment mechanism” similar to that used to pay mineral royalties to States under the Mineral Leasing Act. The commenters stated that the State legislatures and Tribal councils will ensure States and Indian tribes use the funds legally and appropriately under SMCRA and State and Tribal contracting law and that Federal audits will scrutinize project selection and expenditures.

Second, the commenters expressed concern that States and Indian tribes at the minimum program funding level would receive less than \$3 million until FY 2012. The commenters pointed out that uncertified States that receive funding at the “minimum program” level often have serious Priority 1 and 2 abandoned coal mine problems. They also discussed the fact that SMCRA historically guaranteed States and Indian tribes at least \$2 million, but that this minimum funding level was rarely, if ever, met. The IMCC and NAAMLPL asserted that the \$3 million floor amount in section 402(g)(8)(A) only mandates that we cannot spend more than \$3 million from the Federal expense funds. In addition, they contend that section 401(f)(5)(B) of SMCRA requires us to phase in only those Federal expense funds that we might provide in excess of the \$3 million floor level of funding provided for in section 402(g)(8)(A).

Third, the commenters specifically objected to any limitations that would prohibit uncertified States and Indian tribes from using prior balance replacement funds from Treasury under section 411(h)(1) to abate high priority noncoal hazards or for placement in an AMD set aside account. The commenters expressed concern that requiring uncertified States and Indian tribes to use prior balance replacement funds for coal reclamation only would

prevent those States and Indian tribes from using the moneys to reclaim equally or even more dangerous hazards associated with noncoal mining and hinder the treatment of AMD. In addition, they pointed out that the prior balance replacement funds are received in place of State or Tribal share funds from reclamation fees previously collected in each State and on Indian lands that Congress never appropriated for distribution to the respective States and Indian tribes. Because uncertified States and Indian tribes are permitted to use section 402(g)(1) funds for noncoal reclamation and for AMD set-aside funds, the commenters maintain that they should be allowed to use the prior balance replacement funds for the same purposes.

The IMCC and NAAMLPL also raised many other issues in their comments. They suggested that the first certified in lieu payments should be for FY 2009. They suggested that the terms “adjacent” and “in conjunction” should be applied to AML Priority decisions using simple definitions without additional monetary or timing criteria. They urged OSM to make fund distributions as early in the FY as possible.

We considered all the comments we received in developing this proposed rule.

In order to facilitate distribution of funds for FY 2008, as required in the 2006 amendments, the Director of OSM issued written guidance in December, 2007. To the extent feasible, we have restated and expanded upon the content of that guidance in this proposed rule. We intend to make that December 2007 written guidance part of the docket for this rulemaking to be available for public inspection.

The December 2007 written guidance was based in part on a December 2007 memorandum opinion (M opinion), from the Department of the Interior, Office of the Solicitor, which analyzed three issues related to AML funding. *See Funding to States and Indian Tribes Under the Surface Mining Control and Reclamation Act of 1977, as Amended by the Tax Relief and Health Care Act of 2006, M-37014 (December 5, 2007).* In this M-opinion, the Office of the Solicitor advised us that:

- We are required to use grants to pay prior balance replacement funds and certified in lieu funds to eligible States and Indian tribes under sections 411(h)(1) and (h)(2) of SMCRA;

- Uncertified States and Indian tribes may not use prior balance replacement funds that they receive under section 411(h)(1) of SMCRA for noncoal

reclamation and for the AMD set aside authorized by section 402(g)(6); and

- The minimum program make up funds that eligible uncertified States and Indian tribes are entitled to receive under section 402(g)(8)(A) of SMCRA are subject to the four year phase-in provision of section 401(f)(5)(B).

III. Description of the Proposed Rule

This proposed rulemaking seeks to revise our regulations to be consistent with all of the revisions to SMCRA contained in the 2006 amendments, except for those provisions relating to the re-mining incentives provisions leveraging amounts from the Fund. The re-mining incentives provisions that leverage amounts from the Fund are the subject of a separate rulemaking published on May 1, 2008, at 73 FR 24120.

Generally, this rulemaking sets forth proposed standards and procedures for the coal reclamation fee, the Fund, and the AML program. This proposed rule includes extensive proposals for long term operations of the amended Title IV program, including provisions of the 2006 amendments that will become effective at later dates. We are also taking advantage of this rulemaking opportunity to propose other changes that we believe are needed to update and clarify related Parts of our existing regulations. Throughout this proposed rule, the terms “money” and “moneys” are interchangeable with the terms “fund” or “funds,” but not with the term “Fund,” as defined in proposed § 700.5.

The proposed changes generally fall into three categories:

- Align our existing regulations to be consistent with the 2006 amendments to SMCRA as interpreted by the M-opinion;
- Use plain English to make the regulations easier to understand where no substantive change is intended; and
- Provide further guidance and clarification on implementation of the 2006 amendments where appropriate or needed.

A detailed discussion of all of the proposed revisions follows.

Part 700—General

Definitions (§ 700.5)

We are proposing to revise the definitions in § 700.5 in several ways. First, we are proposing to add two new definitions (“AML” and “AML inventory”). The addition of these two definitions will improve the clarity of the proposed regulations contained in this rulemaking.

Second, we are moving six existing definitions (“eligible lands and water,”

“emergency,” “extreme danger,” “left or abandoned in either an unreclaimed or inadequately reclaimed condition,” “project,” and “reclamation activity”) to § 700.5 because these terms apply to all of the regulations in Chapter VII of Title 30 of the Code of Federal Regulations. These terms were previously codified in § 870.5, which only applies to regulations related to AML reclamation fee collection. We are not proposing any substantive changes to the text of the definitions of these six terms. We are, however, correcting a mistake in the definition of eligible lands and water. The existing definition states, in part, that “[f]ollowing certification of the completion of all known coal problems, eligible lands and water for noncoal reclamation purposes are those sites that meet the eligibility requirements specified” in § 874.14 of this chapter. The reference to § 874.14 was incorrect. The correct reference is § 875.14—Eligible lands and water subsequent to certification. In addition, we propose to reword two definitions (“eligible lands and water,” and “left or abandoned in either an unreclaimed or inadequately reclaimed condition”) using plain English.

Third, to eliminate some redundancy between two definitions, we combined two definitions from § 870.5 (“Indian reclamation program” and “State reclamation program”) into one definition in § 700.5 (“reclamation program”). The substance of the definition did not change.

Fourth, we moved the definition of “expended” from § 870.5 to § 700.5. In order to make the definition consistent with the entire chapter, we removed the existing limitation that it only applies to costs for reclamation.

Last, we are proposing to expand the definition of “Fund” in § 700.5. Previously, this term was defined slightly differently in both §§ 700.5 and 870.5. Under the proposed rule, the definition of this term in § 700.5 will be expanded to include additional information that was contained in § 870.5 (“Abandoned Mine Reclamation Fund or Fund”). We believe this will eliminate any confusion that may have resulted from having different terminology and definitions to describe the same source of money in two Parts of the regulations.

Part 724—Requirements for Permits and Permit Processing

Payment of Penalty (§ 724.18)

We propose to revise § 724.18(d) to update the references in that section to reflect our proposal to split existing § 870.15 into separate sections within

part 870 and to update information on how to find the interest rate for late payments.

Part 773—Requirements for Permits and Permit Processing

Unanticipated Events or Conditions at Remining Sites (§ 773.13(a)(2))

On October 24, 1992, SMCRA was amended to include a new section 510(e) that created an exemption from the section 510(c) permit-block sanction for re-mining operations. At that time section 510(e) had a statutorily defined expiration date of September 30, 2004. Because the 2006 amendments removed the expiration date, we are revising § 773.13(a)(2) to reflect continued applicability of the provision.

Part 785—Requirements for Permits for Special Categories of Mining

Lands Eligible for Remining (§ 785.25(c))

On October 24, 1992, SMCRA was amended to include a new section 515(b)(20)(B) that provided incentives for certain eligible re-mining operations in the form of reduced revegetation responsibility periods (2 years in the East and 5 years in the West). Those re-mining incentives had a statutorily defined expiration date of September 30, 2004, under section 510(e) of SMCRA. Because the 2006 amendments removed the expiration date, we propose to remove paragraph (c) to reflect the continued applicability of this section.

Part 816—Permanent Program Performance Standards—Surface Mining Activities

Revegetation: Standards for Success (§ 816.116)

On October 24, 1992, SMCRA was amended to include a new section 515(b)(20)(B) that provided incentives for certain eligible re-mining operations in the form of reduced revegetation responsibility periods (2 years in the East and 5 years in the West). Those re-mining incentives had a statutorily defined expiration date of September 30, 2004, under section 510(e) of SMCRA. Because the 2006 amendments removed the expiration date, we propose to revise § 816.116(c)(2)(ii) and (c)(3)(ii) to reflect continued applicability of the provisions. We also reworded this section using plain English.

Part 817—Permanent Program Performance Standards—Underground Mining Activities

Revegetation: Standards for Success (§ 817.116)

On October 24, 1992, SMCRA was amended to include a new section 515(b)(20)(B) that provided incentives for certain eligible re-mining operations in the form of reduced revegetation responsibility periods (2 years in the East and 5 years in the West). Those re-mining incentives had a statutorily defined expiration date of September 30, 2004, under section 510(e) of SMCRA. Because the 2006 amendments removed the expiration date, we propose to revise § 817.116(c)(2)(ii) and (c)(3)(ii) to reflect continued applicability of the provisions. We also reworded this section using plain English.

Part 845—Civil Penalties

Use of Civil Penalties for Reclamation (§ 845.21)

We propose to revise § 845.21(b)(1) to reflect our proposal to move the definition of “emergency” from § 870.5 to § 700.5 of this chapter.

Part 846—Individual Civil Penalties

Payment of Penalty (§ 846.18)

We propose to revise § 846.18(d) to update the references in that section to reflect our proposal to split existing § 870.15 into separate sections within Part 870 and to update information on how to find the interest rate for late payments.

Part 870—Abandoned Mine Reclamation Fund—Fee Collection and Coal Production Reporting

Part 870 describes the requirements and process for you, the coal mine operator, to report coal production and to pay the AML reclamation fee.

Scope (§ 870.1)

We propose to add coal production reporting to this paragraph, because this is a major topic of this Part, and also to change the term “Abandoned Mine Reclamation Fund” to “Fund” to be consistent with our definition in proposed § 700.5.

Definitions (§ 870.5)

We propose to correct a defect in the Part 870 definitions section. The current § 870.1 specifies that the scope of Part 870 is limited to the procedures for the collection of reclamation fees, but existing § 870.5 provides that the definitions apply to Parts 870 through 888. In order to correct this issue, we

propose to revise § 870.5 to state that the definitions apply only to Part 870 and to move definitions unrelated to Part 870 to the regulations where they are used. As such, we moved 17 existing definitions out of this section. In addition, one definition (“OSM”) was essentially a duplicate of a preexisting definition in § 700.5; thus, we deleted that term from § 870.5. Any substantive changes made to the definitions are described in the preamble related to the section where the definitions are moved.

As described in the preamble discussion regarding proposed revisions to § 700.5, six definitions from § 870.5 that apply to multiple Parts of the chapter were moved to § 700.5 (“eligible lands and water,” “emergency,” “extreme danger,” “left or abandoned in either an unreclaimed or inadequately reclaimed condition,” “project,” and “reclamation activity”). Two definitions from existing § 870.5 (“Indian reclamation program” and “State reclamation program”) were combined into one definition (“reclamation program”) and were moved to proposed § 700.5. In addition, because “Fund” or “Abandoned Mine Reclamation Fund” was defined in both existing §§ 700.5 and 870.5, we deleted the definition in existing § 870.5 and merged the two definitions into the one proposed at § 700.5.

Furthermore, we propose to move four definitions (“allocate,” “Indian Abandoned Mine Reclamation Fund or Indian Fund,” “reclamation plan,” and “State Abandoned Mine Reclamation Fund or State Fund”) to Part 872. One of these terms (“reclamation plan”) is defined again in §§ 874.5, 875.5, 879.5, 880.5, 884.5, 885.5, 886.5, and 887.5, but it is defined first and discussed in greater detail in the preamble discussion of § 872.5. We also propose to move one definition (“qualified hydrologic unit”) to proposed § 876.12(c), and one definition (“permanent facility”) to proposed § 879.11(a)(2). We propose to delete two definitions: one (“OSM”) which is already defined in existing § 700.5; and one (“agency”) which is no longer used because of plain English rewording.

Information Collection (§ 870.10)

We propose to reword this paragraph using plain English and to use the current format approved by the Office of Management and Budget (OMB). It describes OMB’s approval of information collections in Part 870, our use of that information, and the estimated reporting burden associated with those collections.

Fee Rates (§ 870.13)

The 2006 amendments both extended the AML reclamation fee for 14 years and provided for a two-step reduction in the amount of the fee rate. 30 U.S.C. 1232(a). We propose revising § 870.13 to conform these regulations to the changes made by the 2006 amendments.

First, we propose revising paragraph (a) of § 870.13, which sets forth the reclamation fee rates per ton for coal produced by surface, underground, and lignite mining that were in effect from August 3, 1977, until September 30, 2007. We also propose to indicate that the rates expired on September 30, 2007, rather than September 30, 2004, as formerly provided in the regulations. We propose to retain these expired rates for historical purposes and for use in future audits of production from the years in which those rates applied.

We propose to delete the existing paragraph (b), which set out the procedure for us to set fees and the first fee rate in the event that the AML reclamation fee was not extended. As mentioned in the section of this preamble entitled “Background on the Reclamation Fee and the Abandoned Mine Land Program”, Congress extended the fee before it expired. Thus, paragraph (b) never came into effect, and the fee extension in the 2006 amendments has made it obsolete.

In its place, we propose to add a new paragraph (b), with a table that sets out the fee rates established by the 2006 amendments for coal produced in the period from October 1, 2007, through September 30, 2012. The new fee rates per ton for surface and underground coal and lignite are each reduced by 10% from the previous rates. Similarly, we propose a new paragraph (c) with a table showing the fee rates reduced by an additional 10% of the original rates for coal produced in the period from October 1, 2012, through September 30, 2021.

SMCRA and the 2006 amendments specifically prescribe fee rates for surface, underground, and lignite coal mining. As in the previous regulation, we propose to show rates for in situ mining, which means gasification of the coal at the mine. We continue to consider in situ mining to be covered by SMCRA because it is included in the definition of “surface coal mining operations” in section 701(28) of SMCRA and is therefore subject to the AML reclamation fee. As we have done in the past, when developing these proposed regulations, we classified in situ mining as underground mining (*see* § 785.22 and Part 828). In these proposed regulations, we continue to

include a separate paragraph for the fee rates for in situ mining in order to clarify that the fees are set at the same rate as the fees for underground mining.

Determination of Percentage-Based Fees (§ 870.14)

We propose rewording this paragraph using plain English. We also propose updating the reference in paragraph (b) to conform this provision to our proposed revisions of existing § 870.15.

Reclamation Fee Payment (§ 870.15)

We propose to break out the information from the existing § 870.15 into four separate sections to better organize this varied material and make it easier to find and understand. Paragraph (a) was reworded using plain English. We divided existing paragraph (b) into 3 new paragraphs (b), (c), and (d) within proposed § 870.15. This division separates these related, but distinct, topics for easier understanding. We also reworded these provisions using plain English. The remaining paragraphs (existing paragraphs 870.15(c) through (g)) were moved: existing paragraphs (c), (f), and (g) related to late payments were moved to proposed § 870.21; existing paragraph (d) related to acceptable payment methods was moved to proposed § 870.16; existing paragraph (e) related to the consequences of noncompliance was moved to proposed § 870.23.

Acceptable Payment Methods (§ 870.16)

We propose to move the contents of existing § 870.16 on production records to new § 870.22 to better organize related topics. In turn, we propose to move the contents of existing § 870.15(d) to proposed § 870.16, and reword those provisions using plain English. The proposed reorganization will keep information related to payment methods immediately after the fee payment information contained in § 870.15.

Filing the OSM-1 Form (§ 870.17)

This section proposes to expand on the existing § 870.17, which covers the electronic filing of the coal reclamation fee report, known as the OSM-1 Form. We kept existing § 870.17 and made it proposed § 870.17(a). However, we added a paragraph (b) on filing a paper OSM-1 Form. Now, under the proposed rule, both options for filing the OSM-1 Form are listed together in the same section.

In addition, section 402(c) of SMCRA requires that "all operators of coal mine operations shall submit a statement of the amount of coal produced during the calendar quarter, the method of coal

removal and the type of coal, the accuracy of which shall be sworn to by the operator and notarized." 30 U.S.C. 1232(c). Although SMCRA states that your OSM-1 Form is to be notarized, we believe that 28 U.S.C. 1746 allows us to accept the OSM-1 Form along with a statement made under penalty of perjury that the information contained in the form is true and correct. Section 1746 provides that any matter required to be sworn may with like force be established by an unsworn written declaration consistent with the statute. Currently, if you file your report electronically on our Web site, we allow you to choose whether to keep a paper notarized copy or to make an unsworn statement using acceptable certification language that the system provides. See also 66 FR 28634. We are adding a similar unsworn statement option in paragraph (b) to reduce your burden if you choose to file your OSM-1 Form on paper.

General Rules for Calculating Excess Moisture (§ 870.18)

The only change we propose to make in this section is to update a reference in paragraph (b) to reflect our proposed division of existing § 870.15 into four sections. We are not considering any substantive changes to this section. We only intend to make those changes needed to correct any cross-references to other sections that may be altered by this rulemaking.

Late Payments (§ 870.21)

We propose to move this information from the existing paragraphs § 870.15(c), (f), and (g) to new § 870.21 and reword these provisions using plain English. This reorganization will make proposed § 870.15 more focused on the payment of the reclamation fee while grouping the specific information on the interest and penalties that we may charge on delinquent reclamation fees into this new section.

Maintaining Required Production Records (§ 870.22)

We propose to move the information in the existing § 870.16 to this new section for better organization because it allows us to group the payment and reporting sections together. We also propose to reword this section using plain English.

Consequences of Noncompliance (§ 870.23)

We propose to move existing § 870.15(e)(1)–(5) to this new section. We believe this section should be separated from the late payments section because it also applies to the

failure to comply with the record maintenance provisions. In addition, we reworded this section using plain English.

Part 872—Moneys Available to Eligible States and Indian Tribes

Our proposed revision of Part 872 describes the moneys that make up the Fund and other sources of money, including otherwise unappropriated funds in the U.S. Treasury as specified by the 2006 amendments, that are available to you, the eligible States and Indian Tribes with approved reclamation programs. This part also describes how we will convey these funds to you and what you may use them for.

We are proposing regulations to address the changes to SMCRA that the 2006 amendments made. In addition, we are proposing to divide, remove, and renumber parts of existing §§ 872.11(a) through 872.11(c) and § 872.12, change headings, add new sections and headings as appropriate, and more clearly describe the different types of funds available under this Part. We propose these additional changes to make the regulations easier to read and understand. Each proposed change is described below in more detail.

What does this Part do? (§ 872.1)

In this section, we explain that the purpose of Part 872 is to set forth the responsibilities for administering reclamation programs and the procedures for managing funds used to finance these programs. We propose to change the section heading to "What does this Part do?", to reword the section using plain English, and to remove a reference to the Fund, instead referring more generically to "funds." We believe removing the reference to the Fund recognizes that the 2006 amendments provide funds to you both from the Fund and from otherwise unappropriated funds of the U.S. Treasury. Throughout this Part, the terms "money" and "moneys" are interchangeable with the terms "fund" or "funds," but not with the term "Fund," as defined in proposed § 700.5.

Definitions (§ 872.5)

We propose adding § 872.5 to contain definitions pertinent to Part 872. This proposed section contains four definitions ("allocate," "Indian Abandoned Mine Reclamation Fund or Indian Fund," "reclamation plan," and "State Abandoned Mine Reclamation Fund or State Fund") moved from existing § 870.5 and two new definitions ("award" and "distribute"). As described below, we also propose to

revise the existing definitions that were moved from § 870.5 and to use plain English for these definitions.

First, we propose to revise the definitions of “Indian Abandoned Mine Reclamation Fund or Indian Fund” and “State Abandoned Mine Reclamation Fund or State Fund” to include references to Parts 885 and 886. Those Parts address grants for certified and uncertified States and Indian tribes.

Second, we propose to revise the definition of “reclamation plan” to refer to States and Indian tribes and to have the same meaning as “State reclamation plan.” As proposed, a “reclamation plan or State reclamation plan” means “a plan that a State or Indian tribe submitted and that we approved under section 405 of SMCRA and Part 884 of this subchapter.” Our definition makes “reclamation plan” and “State reclamation plan” interchangeable wherever those terms appear in this subchapter, recognizing that certain Parts still use “State reclamation plan.” We included a reference to section 405 of SMCRA to be consistent with its use of the term “State reclamation plan” as well. 30 U.S.C. 1235. Our proposed definition also is consistent with section 405(k) of SMCRA, which considers Indian tribes that have eligible lands under section 404 the same as States for the purposes of Title IV, except for the purposes of section 405(c). 30 U.S.C. 1235(k).

Next, we propose two changes to the definition of “allocate.” The revised definition now states that “allocate” means “to identify moneys in our records at the time they are received by the Fund.” We also added a statement to clarify that the allocation process identifies the type of funds or the specific State or Indian tribal share.

The definition of “allocate” is distinguishable from the new definitions of “distribute” and “award” that we propose to add. We define “distribute” as meaning “to annually assign funds to a specific State or Indian tribe. After distribution, funds are available for award in a grant to that specific State or Indian tribe.” We define “award” as meaning “to approve our grant agreement authorizing you to draw down and expend program funds.”

We use the terms “allocate,” “distribute,” and “award” throughout Part 872 to describe the process that we follow to make funds available to States and Indian tribes. Our accounting process first *allocates* funds to a particular share (State and Tribal shares or historic coal funds, for example) as soon as we receive the collected fees. Next, we *distribute* funds annually after

the end of each Federal FY to specific States and Indian tribes according to the statutory provisions and the regulations governing those funds (for example, we will follow proposed § 872.15 to distribute State share funds). After the funds are distributed, we *award* funds to States and Indian tribes in grants following the procedures of proposed Part 885 for certified States and Indian tribes and Part 886 for uncertified States and Indian tribes if and when they apply for such grants.

Information Collection (§ 872.10)

We propose to update this section and reword it using plain English. It describes the OMB’s approval of information collections in Part 872, our use of that information, and the estimated reporting burden associated with those collections.

Where do moneys in the Fund come from? (§ 872.11)

This proposed section describes the funds we collect, recover, and otherwise receive that are the sources of revenue to the Fund. Here we propose to change the section heading to “Where do moneys in the Fund come from?” and to renumber existing §§ 872.11(a) through (a)(6) as §§ 872.11 through 872.11(f). We also reworded this section in plain English.

In addition, we propose to remove language from existing § 872.11(a)(6) (now renumbered as proposed § 872.11(f)) that makes interest earned after September 30, 1992, available for possible future transfer to the UMWA CBF under section 402(h) of SMCRA. The 2006 amendments to SMCRA added new provisions related to our payments to the UMWA health care plans. However, this rulemaking does not address those changes.

In addition, we propose to revise and reorganize the information in existing §§ 872.11(b), including paragraphs (b)(1) through (b)(8), into various other sections. Existing § 872.11(b)(1) is included in proposed §§ 872.14 and 872.15 on State share funds and § 886.20 on unused funds. Similarly, existing § 872.11(b)(2) is included in proposed §§ 872.17 and 872.18 on Tribal share funds and § 886.20 on unused funds. Existing § 872.11(b)(3) related to the RAMP program is moved to proposed § 872.20. Existing § 872.11(b)(4) is included in proposed §§ 872.21 and 872.22 on historic coal funds. Existing § 872.11(b)(5), as well as §§ 872.11(b)(7) and (b)(8), are moved to §§ 872.24 and 872.25 on Federal expense funds. Existing § 872.11(b)(6) is included in proposed §§ 872.26 and 872.27 on minimum program makeup

funds. We propose to move existing § 872.11(c) to § 872.12(c). We propose to revise all these provisions to be consistent with the 2006 amendments and to reword them using plain English.

Where do moneys distributed from the Fund and other sources go? (§ 872.12)

We propose to change the heading of existing § 872.12 to “Where do moneys distributed from the Fund and other sources go?”, and to reword the section using plain English. We also propose to add paragraph § 872.12(c) for information moved from existing § 872.11(c) and to make a conforming change. The conforming change involves the requirement in existing § 872.11(c) that States and Indian tribes use money deposited in their State or Indian Abandoned Mine Reclamation Funds to carry out their reclamation plans approved under Part 884 and projects approved under Part 888. On February 22, 1995, we removed Part 888, which related to special Indian land procedures, and replaced it with § 886.25, but did not change the cross-reference in existing § 872.11(c). 60 FR 9974. In § 872.12(c), we now propose to replace that cross-reference with a reference to proposed § 886.27, which is the proposed renumbering of existing § 886.25.

What money does OSM distribute each year? (§ 872.13)

We propose to add new § 872.13 to describe how we distribute moneys each year to States and Indian tribes under SMCRA, as revised by the 2006 amendments. We address each type of funding elsewhere in this proposed rule in greater detail.

Paragraph (a) lists the funds that we must distribute because they are not subject to prior Congressional appropriation. These distributions include State share (§ 872.14), Tribal share (§ 872.17), historic coal (§ 872.21), minimum program make up (§ 872.26), prior balance replacement (§ 872.29), and certified in lieu funds (§ 872.32).

Paragraph (b) explains we use fee collections for coal produced in the previous Federal FY on a net cash basis to calculate the annual distribution. In other words, collections from the most recent FY include any adjustments to fees collected in previous years. In order to meet our customer service obligation, we must quickly determine how much money we collected each FY so that we can complete the mandatory distribution of AML funds to the States and Indian tribes as early in the FY as possible. When we make adjustments to the fees collected in an earlier FY, we must add or subtract the changes from

collections for the year in which we actually receive them because we cannot go back and revise the prior year fee collection amounts and distributions that we have already made to the States and Indian tribes.

Paragraph (c) briefly states that we distribute Congressionally-appropriated Federal expense funds when the appropriation becomes available.

Last, paragraph (d) states that you may apply for funds any time after we distribute them. Certified States and Indian tribes will apply for grants using the procedures of Part 885 and uncertified States and Indian tribes will use the procedures of Part 886.

What are State share funds? (§ 872.14)

We are proposing to remove and replace the existing §§ 872.11(b) and 872.11(b)(1) with §§ 872.14 and 872.15. The new sections include language consistent with the 2006 amendments and are worded in plain English. Proposed § 872.14 replaces the first and second sentences of existing § 872.11(b)(1), which included provisions for what commonly have been called “State share” funds and that are provided for under section 402(g)(1)(A) of SMCRA. Specifically, this proposed provision explains that State share funds are 50 percent of the reclamation fees collected on coal mined in your State (excluding Indian lands) and allocated to you under section 402(g)(1)(A) of SMCRA for coal produced in the previous fiscal year.

How does OSM distribute and award State share funds? (§ 872.15)

Proposed § 872.15 explains how we distribute and award State share funds to you if you are eligible to receive them. Section 872.15(a)(1) replaces the third sentence of existing § 872(b)(1) and states that to be eligible to receive State share funds you must have and maintain an approved reclamation plan. Section 872.15(a)(2) adds that to be eligible you cannot be certified under section 411(a) of SMCRA because under section 401(f)(3)(B) of SMCRA, as revised by the 2006 amendments, certified States are ineligible to receive moneys from their State share of the Fund as of October 1, 2007. 30 U.S.C. 1231(f)(3)(B).

We did not distribute State share funds to certified States in the 2008 distributions because section 401(f)(3)(B) of SMCRA, as revised by the 2006 amendments, prohibits us from distributing any moneys from the Fund to certified States beginning on October 1, 2007. So, consistent with SMCRA, proposed § 872.13(a)(1) prohibits certified States from receiving any State

share funds from the Fund after September 30, 2007.

In proposed § 872.15(b), we describe how we distribute and award State share funds if you meet the eligibility criteria of paragraph (a). In paragraph (b)(1), we include a table explaining the distributions, which will be phased-in under 401(d)(3) and (f) of SMCRA, as amended. 30 U.S.C. 1231(d)(3) and (f). Although section 402(g)(1) of SMCRA generally requires us, acting on behalf of the Secretary, to distribute annually to an uncertified State 50 percent of the reclamation fees we collect in that State for the previous FY without prior Congressional appropriation, section 401(f)(5) of SMCRA, as added by the 2006 amendments, requires us to phase-in the mandatory distribution of these funds. 30 U.S.C. 1231(f)(5)(B). As a result, for FY 2008 and FY 2009, which begin on October 1, 2007, and October 1, 2008, respectively, we will distribute to each uncertified State only 50 percent of the State share allocated to it. Because the State share is 50 percent of the reclamation fees collected on production in that State, for FY 2008 and FY 2009, uncertified States will receive only 25 percent of the reclamation fees collected on coal produced in their State (a 50 percent phase-in of the 50 percent in reclamation fees for the State share). Likewise, State shares that we distribute in FY 2010 and FY 2011, which begin October 1, 2009, and October 1, 2010, respectively, will be 75 percent of the 50 percent share, which is 37.5 percent of the reclamation fees collected on coal produced in that State. We will distribute to uncertified States their full 50 percent State share from the Fund each year beginning with FY 2012, which starts on October 1, 2011, and lasting through FY 2022, which ends on September 30, 2022. In FY 2023, we expect to distribute to uncertified States all moneys remaining in their State share of the Fund.

Proposed § 872.15(b)(2) explains that we will continue to award funds under this paragraph in grants in accordance with Part 886. Awarding State share funds in grants is consistent with section 402(g)(1)(C) of SMCRA. 30 U.S.C. 1232(g)(1)(C). In addition, we note that many States were awarded State share funds in prior year grants, before the 2006 amendments. Those funds would continue to be subject to the provisions of Part 886.

What may States use State share funds for? (§ 872.16)

Proposed § 872.16 describes what you, the uncertified State, may use your State share grant funds for. You may

only use them for the following purposes: (1) To reclaim coal lands and waters under § 874.12; (2) to restore water supplies under § 874.14; (3) to reclaim noncoal lands and waters under § 875.12 as requested by the Governor under section 409(c) of SMCRA; (4) to deposit into an acid mine drainage abatement and treatment fund under Part 876; and (5) to acquire land under § 879.11.

We note that the Fund consists mostly of reclamation fees we collect on each ton of coal produced. Although we have been collecting those fees under Title IV of SMCRA for almost 30 years, many abandoned coal problems remain to be addressed nationwide. The 2006 amendments emphasize the need to abate the country's remaining abandoned coal mine problems. *See, e.g.,* 30 U.S.C. 1232(g)(2) and 1240a(h)(1)(D)(ii). We believe that under the 2006 amendments, the Fund is to be used primarily to abate coal problems. We intend proposed § 872.16 to emphasize abandoned coal mine reclamation while continuing to allow uncertified States to abate Priority 1 noncoal hazards using moneys from the Fund in accordance with sections 402(g)(1)(A)(ii) and (C), 402(g)(6), and 409(b) and (c) of SMCRA.

What are Tribal share funds? (§ 872.17)

We are proposing to revise the first three sentences of existing § 872.11(b)(2) and divide it into §§ 872.17 and 872.18. Existing § 872.11(b)(2) includes provisions for what commonly have been called “Tribal share” funds that are provided by section 402(g)(1)(B) of SMCRA. The new sections include language to address the 2006 amendments and are worded in plain English.

In proposed § 872.17 we explain that “Tribal share funds” are moneys we distribute to you each year from your Tribal share of the Fund. Your Tribal share of the Fund is 50 percent of the reclamation fees we collect and allocate under 402(g)(1)(A) of SMCRA to you, the Indian tribe(s), in the Fund for coal produced in the previous fiscal year from the Indian lands in which you have an interest.

How does OSM distribute and award Tribal share funds? (§ 872.18)

This section largely is a duplicate of proposed § 872.15 except that it applies to Indian tribes and the Tribal share funds. So, the explanations in the preamble for § 872.15 are largely the same for distributing and awarding Tribal share funds under this section (including the phase-in provisions), and we will not repeat them. However, we

will discuss a few distinctions involving the distribution of Tribal share funds to Indian tribes.

As of October 1, 2007, under amended section 401(f)(3)(B) of SMCRA, States that are certified under section 411(a) are ineligible to receive State share funds. 30 U.S.C. 1231(f)(3)(B). This exclusion does not specifically say whether it applies to Indian tribes. However, to be consistent, we propose in § 872.18 to exclude all certified Indian tribes from receiving Tribal share funds after October 1, 2007.

At this time, only the Crow, Hopi, and Navajo Indian tribes have approved reclamation programs and have Tribal share funds. All three of those Indian tribes are certified under section 411(a) of SMCRA. Section 405(k) of SMCRA generally requires us to consider Indian tribes "as a 'State' for the purposes of this title * * *." 30 U.S.C. 1235(k). So, because section 405(k) considers the Crow, Hopi, and Navajo Indian tribes as States for the purposes of Title IV and because they are certified under section 411(a), we must apply section 401(f)(3)(B) to those three Indian tribes. The Hopi and Navajo Indian tribes were certified before October 1, 2007, and they cannot receive Tribal share funds as of that date. 30 U.S.C. 1231(f)(3)(B), 1235(k). Therefore, we did not include Tribal share funds in their 2008 distributions. The Crow Indian tribe was uncertified as of December 17, 2007, which was when we made the 2008 AML distribution, so it received Tribal share funds. Since then, however, the Crow Indian tribe certified under section 411(a)(1) of SMCRA (73 FR 17247, April 1, 2008), so it cannot receive any additional Tribal share funds. Presently, there are no uncertified Indian tribes. However, at some future date, it is possible an uncertified Indian tribe could qualify for Tribal share funds.

What may Indian tribes use Tribal share funds for? (§ 872.19)

Proposed § 872.19 describes what you, the uncertified Indian tribe, may use your Tribal share grant funds for. You may only use Tribal share funds for the following purposes: (1) To reclaim coal lands and waters under § 874.12; (2) to restore water supplies under § 874.14; (3) to reclaim noncoal lands and waters under § 875.12 as requested by the governing body of the Indian tribe according to section 409(c) of SMCRA; (4) to deposit into an acid mine drainage abatement and treatment fund under Part 876; and (5) to acquire land under § 879.11. Our explanation in the preamble for § 872.16, which allows States to use State share funds for

noncoal reclamation, also applies to Indian tribes' use of Tribal share funds. Therefore, we will not repeat it here.

What will OSM do with unappropriated AML funds currently allocated to the Rural Abandoned Mine Program? (§ 872.20)

We are proposing to renumber existing § 872.11(b)(3) as § 872.20 under the new heading "What will OSM do with unappropriated AML funds currently allocated to the Rural Abandoned Mine Program?" and to remove the existing provisions for transferring money from the Fund to the Rural Abandoned Mine Program (RAMP). The 2006 amendments removed the statutory provisions that provided funding for RAMP and created section 402(h)(4)(B) of SMCRA. That section requires us to take any funds that were allocated to RAMP but that were not appropriated before December 20, 2006, and set them aside for possible transfer to the UMWA health care plans. Proposed § 872.20 is consistent with this provision. Note that the only funds currently allocated to RAMP and affected by this section are those we collected and allocated between October 1, 2005, and December 20, 2006, because the RAMP balance on September 30, 2005, was reallocated to the Federal expense funds (section 402(g)(3) of SMCRA) by the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2006, (Pub. L. 109-54, 119 Stat. 513 (2005)).

What are historic coal funds? (§ 872.21)

We are proposing to remove existing § 872.11(b)(4) and its subsections (b)(4)(i) and (ii) and to replace them with §§ 872.21 and 872.22. These new sections describe what commonly are known as "historic coal funds." These sections address the 2006 amendments for historic coal funds and are worded in plain English.

Proposed § 872.21 describes historic coal funds and reflects the requirements of sections 401(d)(3), 401(f)(3)(A)(i), 401(f)(5)(B), 402(g)(5), 411(h)(1)(A)(ii), and 411(h)(4) of SMCRA, as revised by the 2006 amendments. 30 U.S.C. 1231(d)(3), 1231(f)(3)(A)(i), 1231(f)(5)(B), 1232(g)(5), 1240a(h)(1)(A)(ii), and 1240a(h)(4). Historic coal funds are part of the Fund. They are provided for under section 402(g)(5) of SMCRA based on the amount of coal produced before August 3, 1977, in your State or on Indian lands in which you have an interest. Section 401(d)(3) mandates that we distribute historic coal funds annually and that the distribution of historic coal funds is not

subject to prior Congressional appropriation. To determine the amount of the historic coal funds, section 402(g)(5)(A) now requires us to allocate 60 percent of the amount of money left in the Fund after we allocate the 50 percent of reclamation fees to the State or Tribal shares under section 402(g)(1). This is an increase from the pre-2006 amendments amount of historic coal funds, which only allowed us to allocate 40 percent of the amount of money left in the Fund after the State or Tribal share funds were allocated. We distribute the historic coal funds for each FY to supplement grants awarded to uncertified States and Indian tribes that have not completed reclamation of their Priority 1 and 2 coal problems as defined by section 403(a).

We are proposing to word § 872.21(a) to more clearly describe the source and percentages of funds that will make up the historic coal funds. Only 50 percent of the reclamation fees collected annually is left in the Fund after the State or Tribal share funds are allocated. Under section 402(g)(5)(A), 60 percent of that remaining 50 percent (for a total of 30 percent), of reclamation fees is used to supplement grants. That section also provides for using 60 percent of all other revenue to the Fund for the same purpose. So, proposed § 872.21(a) states that, each year, 30 percent of AML fee collections for coal produced in the previous FY plus 60 percent of all other revenue to the Fund become historic coal funds.

Proposed § 872.21(b) describes other moneys included in historic coal funds as a result of the reallocations we must make during our annual fund distribution under sections 401(f)(3)(A)(i), 411(h)(1)(A)(ii), and 411(h)(4) of SMCRA. 30 U.S.C. 1231(f)(3)(A)(i), 1240a(h)(1)(A)(ii), and 1240a(h)(4). Paragraph (b)(1) specifies that moneys we reallocate to historic coal funds based on the prior balance replacement funds, which are distributed under § 872.29, will be available for grants beginning with Federal FY 2023. Paragraph (b)(2) states that moneys we reallocate to historic coal funds based on certified in lieu funds we distribute under § 872.32 will be available for grants in FY 2009 through FY 2022. 30 U.S.C. 1231(f)(3)(A)(i). As we explained in our discussions of §§ 872.15 and 872.18, after September 30, 2007, certified States and Indian tribes are no longer eligible to receive their State or Tribal share funds, which would have been 50 percent of the reclamation fees paid for coal mined on lands in their State or on Indian lands within their jurisdiction. 30 U.S.C. 1231(f)(3)(B). In addition,

section 402(g)(5)(A) prohibits certified States and Indian tribes from receiving historic coal funds. 30 U.S.C. 1232(g)(5)(A).

Although the certified States and Indian tribes no longer receive a portion of the reclamation fees paid for coal mined on their lands, we still collect reclamation fees from coal mining operators in certified States and on Indian lands as authorized by section 402(a) of SMCRA. Section 411(h)(4) of SMCRA, as revised by the 2006 amendments, directs us to reallocate to the historic coal funds money that would formerly have constituted a certified State's or Indian tribe's State or Tribal share, i.e., 50 percent of the amount of reclamation fees that coal mining operations in certified States and on Indian lands paid for coal produced in each FY. 30 U.S.C. 1240a(h)(4). Sections 411(h)(1)(A)(ii) and 411(h)(4) also require us to reallocate certified States' or Indian tribes' prior unappropriated balance of State or Tribal share funds to the historic coal funds. 30 U.S.C. 1240a(h)(4).

How does OSM distribute and award historic coal funds? (§ 872.22)

We propose to add § 872.22 to describe how we distribute and award historic coal funds. We distribute historic coal funds by determining which States and Indian tribes are eligible for historic coal funds. We also determine the total amount of funds available from fee collections for coal produced in the previous FY and from reallocations based on Treasury payments. Then we divide the available total between the eligible States and Indian tribes according to each State's or Indian tribe's percentage of the total tons of coal produced prior to August 3, 1977, from all eligible States and Indian tribal lands. We also propose to remove existing § 872.11(b)(4)(i) and (ii) and to include similar provisions at §§ 872.22(d) and (e) as explained below.

Section 872.22(a) includes three criteria you must meet to be eligible to receive historic coal funds. First, in paragraph (a)(1), you must have and maintain an approved reclamation plan under Part 884 to be eligible to receive historic coal funds. Second, you cannot be certified under section 411(a) of SMCRA. Third, because section 402(g)(5)(A) of SMCRA states that you can receive historic coal funds only if you have unfunded Priority 1 and 2 coal problems under section 403(a), to meet the criterion of paragraph (a)(2) you cannot have reclaimed all your Priority 1 and 2 coal problems. Thus, if you are an uncertified State or Indian tribe that

has no remaining unfunded Priority 1 or 2 problems, you cannot receive historic coal funds.

Proposed § 872.22(b) says that once the eligibility criteria listed in § 872.22(a)(1) and (2) are met, we calculate the historic coal funds you receive using a formula based on the amount of coal historically produced before August 3, 1977, in your State or from the Indian lands concerned.

The table in proposed § 872.22(c) describes how we distribute historic coal funds. Section 401(f)(5)(B) of SMCRA requires that we phase in these distributions over four years beginning October 1, 2007. For the years beginning October 1, 2011, and continuing through September 30, 2022, we will distribute the full amount we calculated using the formula mentioned in paragraph (b). For the years beginning October 1, 2022, and continuing thereafter, we will distribute to you the amount needed to reclaim your remaining Priority 1 and 2 coal problems to the extent the funds are available.

Section 401(f)(2)(B) of SMCRA requires us to distribute the same overall amount from the Fund in FY 2023 and thereafter that we distribute in FY 2022, if the money is available. 30 U.S.C. 1231(f)(2)(B). Most of the moneys remaining in the Fund by that time will be historic coal funds. These moneys will be available for distribution in FY 2023 and later years because of the reallocation of prior balance replacement fund amounts to historic coal funds under sections 401(f)(3)(A)(i), 411(h)(1)(A)(ii) and 411(h)(4) of SMCRA. 30 U.S.C. 1231(f)(3)(A)(i), 1240a(h)(1)(A)(ii), and 411(h)(4). We will continue to use the formula described in paragraph (b) of this section to distribute historic coal funds to you in FY 2023 and afterward.

Proposed § 872.22(d) states that we will only distribute the historic coal funds you need to reclaim your unfunded Priority 1 or 2 coal problems. This paragraph includes the provisions that we propose to move from existing § 872.11(b)(4)(i) and (ii). It addresses the situation where the cost to reclaim all remaining Priority 1 and 2 coal problems in an uncertified State or Indian tribe is more than the amount that the State or Indian tribe receives for its State or Tribal share alone, but is less than the amount that the State or Indian tribe receives for its State or Tribal share, unused funds from prior allocations, and historic coal funds combined. In this situation, we will reduce the amount of historic coal funds the State or Indian tribe receives to the amount it needs to fund reclamation of

its remaining Priority 1 or 2 coal problems.

Under proposed § 872.22(e), we will continue the long-standing practice of awarding historic coal funds to you in grants following the provisions of Part 886.

What may you use historic coal funds for? (§ 872.23)

Proposed § 872.23 describes how you may use historic coal funds. Consistent with sections 402(g)(5), 402(g)(6)(A), and 409(b) of SMCRA, this section allows you to use historic coal funds for the following purposes only: (1) Abandoned coal mine reclamation under § 874.12; (2) water supply restoration under § 874.14; (3) abating noncoal problems prior to certification under § 875.12 based on requests made under section 409(c) of SMCRA; (4) for deposit into an acid mine drainage abatement and treatment fund under Part 876; and (5) land acquisition under § 879.11.

The use of historic coal funds for some noncoal reclamation is clearly authorized in section 409(b) of SMCRA. That section, which was not modified by the 2006 amendments, states that “[f]unds available for use in carrying out the purpose of this section [the reclamation of Priority 1 noncoal sites] shall be limited to those funds which must be allocated to the respective States or Indian tribes under the provisions of paragraphs (1) and (5) of section 402(g).” 30 U.S.C. 1239(b). Because the historic coal funds are allocated to the States and Indian tribes under section 402(g)(5), uncertified States and Indian tribes are able to use historic coal funds provided under section 402(g)(5) to abate Priority 1 noncoal hazards based on requests made under section 409(c). We believe that amended section 402(g)(2), which requires “strict compliance” by uncertified States and Indian tribes with the reclamation of coal problems, does not impact the authorization in section 409(b) that allows historic coal funds to be expended on noncoal reclamation. Although we request comment on this issue, proposed § 872.23(a)(3) explicitly allows uncertified States and Indian tribes to continue using historic coal funds for noncoal reclamation consistent with section 409(b) of SMCRA.

In addition to the use of historic coal funds for coal reclamation, water supply restoration, and noncoal reclamation, paragraph (a)(4) specifies, consistent with section 402(g)(6) of SMCRA, as revised by the 2006 amendments, that you may use historic coal funds for deposit into an acid mine drainage

abatement and treatment fund under Part 876.

What are Federal expense funds? (§ 872.24)

We propose to divide existing § 872.11(b)(5) into two sections and to renumber those sections as §§ 872.24 and 872.25. These sections address what previously were known as “Federal share funds” under section 402(g)(3) of SMCRA. We call them “Federal expense” funds in this proposed rule. The new sections address the 2006 amendments and are worded in plain English.

Proposed § 872.24 replaces the introductory paragraph at existing § 872.11(b)(5) and identifies what Federal expense funds are. Federal expense funds are moneys in the Fund that are not allocated as State share, Tribal share, historic coal, or minimum program make up funds. Under section 401(d)(1) of SMCRA, we may use Federal expense funds only if Congress appropriates them.

What may OSM use Federal expense funds for? (§ 872.25)

Proposed § 872.25 describes how we may use Federal expense funds. Paragraphs (a) through (a)(5) list allowed uses in detail. For example, we may use these funds to perform nonemergency and other projects for States and Indian tribes that do not have approved reclamation programs and for the Secretary’s administration of Title IV of SMCRA and subchapter R of the Federal regulations. Section 872.25 replaces existing §§ 872.11(b)(5)(i) through (v) as well as §§ 872.11(b)(7) and 872.11(b)(8) and is worded in plain English.

We propose to renumber existing § 872.11(b)(7) as § 872.25(b) and to reword it in plain English to describe the Federal expense distributions. This paragraph reflects the provision in the last sentence of section 402(g)(5)(A) of SMCRA, which states “[f]unds made available under paragraph (3) or (4) of this subsection for any State or Indian tribe shall not be deducted against any allocation of funds to the State or Indian tribe under paragraph (1) or under this paragraph.” 30 U.S.C. 1232(g)(5)(A). This paragraph clarifies that we are prohibited from deducting the amount of funds we allocate or distribute as Federal expenses, described at § 872.25, from your State or Tribal share funds and historic coal funds. Proposed § 872.25(b) also would remove a reference in existing § 872.11(b)(7) to minimum program make up funds provided under section 402(g)(8) of SMCRA because, under section

402(g)(3)(E) of SMCRA, as revised by the 2006 amendments, minimum program make up funds are expressly included in Federal expenses so the additional reference is no longer necessary. 30 U.S.C. 1232 (g)(3)(E).

In addition, we are proposing to renumber existing § 872.11(b)(8) as § 872.25(c) and reword it using plain English. This paragraph is consistent with section 402(g)(3)(C) of SMCRA. That section allows us to use Federal expense funds to address Priority 1, 2, and 3 coal problems that meet the eligibility requirements of section 404 in States and on Indian lands where the State or Indian tribe does not have an abandoned mine reclamation program approved under section 405. 30 U.S.C. 1232(g)(3)(C).

What are minimum program make up funds? (§ 872.26)

Our proposed changes to existing § 872.11(b)(6) include removing it and replacing it with §§ 872.26 and 872.27 and wording them in plain English. These sections are consistent with the provisions of section 402(g)(8) of SMCRA, as revised by the 2006 amendments, for what commonly has been called “minimum program funding” or the “minimum program make-up.”

Section 872.26 addresses what we call “minimum program make up funds” in this rule. Paragraph (a) describes these funds as additional moneys that we distribute to eligible States and Indian tribes each year to make up the difference between their total distribution of other funds and \$3 million. It also identifies the source of these moneys as the non-appropriated Federal expense funds. Section 402(g)(3)(E) of SMCRA requires us to use Federal expense funds provided under section 402(g)(3) for this mandatory distribution. 30 U.S.C. 1232(g)(3)(E). However, unlike other Federal expense funds provided under section 402(g)(3) and § 872.24 of the regulations, these funds are not subject to prior Congressional appropriation. 30 U.S.C. 1231(d)(1).

Proposed §§ 872.26(b) through (b)(4) describe four criteria you must meet to be eligible to receive minimum program make up funds. First, you must have and maintain an approved reclamation plan under Part 884. Next, you cannot be certified under section 411(a) of SMCRA. Third, the total amount of State or Tribal share, historic coal, and prior balance replacement funds you receive annually must be less than \$3 million. Last, you must have unfunded Priority 1 and 2 coal problems greater than your total annual amount of State or Tribal

share, historic coal, and prior balance replacement funds.

Consistent with section 402(g)(8)(B) of SMCRA, proposed § 872.26(c) makes the same amount of funding available to the States of Missouri and Tennessee to reclaim Priority 1 and 2 coal problems provided they have abandoned mine reclamation plans under Part 884.

How does OSM distribute and award minimum program make up funds? (§ 872.27)

Proposed § 872.27 describes how we distribute and award minimum program make up funds. Paragraph (a) provides that we distribute these funds to you if you meet the eligibility requirements of § 872.26(b). In paragraph (a)(1), we describe how we calculate the amount of the Federal expense funds, if any, we use to supplement the other funds you receive under Title IV of SMCRA. We add up the annual distributions you receive for your prior balance replacement funding under § 872.29, your State or Tribal share moneys under §§ 872.14 or 872.17, and your historic coal funds under § 872.21. If your distribution of these funds is equal to or greater than \$3 million annually, you will not receive any minimum program funding under this section. If your distribution of these funds is less than \$3 million annually, we add Federal expense funds to increase your total distribution to \$3 million.

Although we use Federal expense funds to ensure that all uncertified States and Indian tribes receive at least \$3 million in their distributions, we are required to reduce the amount of these minimum program make up distributions for the first four years to comply with the phase-in provision of section 401(f)(5)(B) of SMCRA, as revised by the 2006 amendments. 30 U.S.C. 1231(f)(5)(B). The table in paragraph (a)(2) describes how we phase-in funding beginning October 1, 2007, until you reach the full funding level beginning October 1, 2011.

Proposed § 872.27 is consistent with provisions of sections 401(f)(5) and 402(g)(8) of SMCRA, as revised in the 2006 amendments. Section 402(g)(8)(A) requires us to ensure that “[i]n making funds available under this title” your “grant awards total not less than \$3 million annually.” 30 U.S.C. 1232(g)(8)(A). We interpret this provision to mean the full funding level for grants we must annually award to eligible States and Indian tribes under this section is \$3 million. So, we must include the total of funds an uncertified State or Indian tribe receives under all of Title IV—including the State or Tribal share funds (section 402(g)(1)), the

historic coal funds (section 402(g)(5)), and the prior balance replacement funds (section 411(h)(1))—as part of the \$3 million referred to in section 402(g)(8)(A).

All section 402(g)(8) funds are distributed under section 401(d)(3) and (f) of SMCRA. Despite the amounts listed in section 401(f)(3) for distribution to the uncertified State and Indian tribes, this section requires us to phase in all “amount[s] distributed under this subsection” for the first four fiscal years beginning with FY 2008. 30 U.S.C. 1231(f)(5)(B). Section 401(f)(3) clearly covers the money allocated by section 402(g)(8) to ensure the \$3 million distribution to eligible States and Indian Tribes. 30 U.S.C. 1231(f)(3)(A).

We are phasing-in this funding based on sections 401(f)(2)(A)(ii), 401(f)(3)(A)(ii), and 401(f)(5) of SMCRA. There are other ways to calculate the phased-in distribution. We are proposing the method that we chose for the 2008 distribution because we believe it maximizes funding for the minimum program States. To calculate the distribution, we first add up your annual prior balance replacement, State or Tribal share, and historic coal fund distributions. Then we calculate how much additional minimum program make up funding you would need to reach \$3 million. We apply the phase-in only to that additional minimum program make up funding.

The following example illustrates the phase-in method: The distribution of State A’s prior balance replacement funds and its phased-in State share funds and historic coal funds totals \$400,000. The amount of minimum program funds we would add to bring State A’s total distribution to \$3 million is \$2.6 million. In FY 2008 and FY 2009, we would add 50 percent of the \$2.6 million in minimum program make up funds, or \$1.3 million, to the \$400,000 sum of the State’s other funding. State A’s total distributions for FY 2008 and FY 2009 therefore would be \$1.7 million each. In FY 2010 and FY 2011, we would add 75 percent of the \$2.6 million amount of minimum program funds, or \$1,950,000, to the \$400,000 sum of State A’s other funding (assuming, for this example, that those other funding levels remain constant). State A would therefore receive \$2,350,000 in both FY 2010 and FY 2011.

We invite you to comment on other ways to calculate minimum program make up funding that meet SMCRA’s requirements.

The table in § 872.27(a)(2)(iii) shows that beginning in FY 2012, your total

annual distribution will not be less than \$3 million unless the estimated reclamation cost of your remaining Priority 1 and 2 coal problems is less than \$3 million. Section 872.27(a)(2)(iv) explains that if you have Priority 1 and 2 coal problems remaining after September 30, 2022, we will continue to fund your total annual distribution at no less than \$3 million (to the extent funds still are available) until the estimated cost of reclaiming your Priority 1 and 2 coal problems is less than \$3 million. If the estimated cost of reclaiming your Priority 1 and 2 coal problems is less than \$3 million but more than your total annual distribution of all other types of Title IV funds, we will provide minimum program make up funding up to the amount of your total unfunded reclamation cost.

Last, proposed § 872.27(b) states that we will award minimum program make up funds to you in grants following the procedures of Part 886 for uncertified States and Indian tribes, as we have for many years.

What may you use minimum program make up funds for? (§ 872.28)

Consistent with section 402(g)(8)(A) of SMCRA, we propose to add § 872.28 to state that you may only use minimum program make up funds to reclaim Priority 1 and 2 coal problems. You may not use minimum program make up funds for Priority 3 coal problems, AMD set-asides, noncoal problems, or any other work except Priority 1 and 2 coal problems.

What are prior balance replacement funds? (§ 872.29)

Section 872.29 is one of three new sections we propose to add to explain the provisions of section 411(h)(1) of SMCRA, as revised by the 2006 amendments, for what we call “prior balance replacement funds” in this rule. This section describes them as moneys we must distribute to you instead of the moneys that we allocated to your State or Tribal share of the Fund before October 1, 2007, but that we did not actually distribute to you because Congress never appropriated them. It identifies the source of these funds as general funds of the U.S. Treasury that are otherwise unappropriated, not the Fund. Under the 2006 amendments, distributions of prior balance replacement funds from general funds of the U.S. Treasury are mandatory and are not subject to Congressional appropriation. These distributions start in FY 2008 and last for seven years.

We do not propose to add a provision to this section, or to proposed § 872.32 which addresses certified in lieu funds

from Treasury, to reflect the funding cap set forth in section 402(i)(3)(A) of SMCRA. 30 U.S.C. 1232(i)(3)(A). That cap limits to \$490 million in any fiscal year the total amount of Treasury funding for grants to States and Indian tribes and for transfers to the three UMWA health care plans described in sections 402(h) and (i) of SMCRA. In addition, section 402(i)(3)(B) provides that if the cap is exceeded, each transfer would be reduced proportionally. 30 U.S.C. 1232(i)(3)(B). At this time, we project that total needs for this funding will remain below the cap amount; therefore, we have not proposed specific rule language describing how we would reduce our distribution of prior balance replacement funds and certified in lieu funds if the cap were reached. We request your comments on whether we should add such a provision, and, if so, what should it contain.

How does OSM distribute and award prior balance replacement funds? (§ 872.30)

We added § 872.30 to describe how we propose to distribute and award prior balance replacement funds. Under paragraph (a)(1), we propose to distribute U.S. Treasury funds to you, all States and Indian tribes with approved reclamation plans, equal to the moneys that we allocated to your State or Tribal share before October 1, 2007, but that were not distributed before then. Under paragraph (a)(2), we propose to distribute these funds to you if you are, or are not, certified under section 411(a) of SMCRA. Consistent with section 411(h)(1)(C) of SMCRA, proposed paragraph (a)(3) requires us to distribute these funds to you in seven equal annual installments, beginning in FY 2008.

Under proposed § 872.30(b), we will award prior balance replacement funds to you in grants under Part 885 if you are a certified State or Indian tribe or under Part 886 if you are uncertified. Section 411(h)(1) of SMCRA says “* * * the Secretary shall make payments to States or Indian tribes for the amount due * * *.” 30 U.S.C. 1240a(h)(1)(A)(i).

We recognize that SMCRA, as amended, unambiguously requires us to distribute moneys from the general Treasury to the States and Indian tribes, but the 2006 amendments do not specify a *method* of payment for us to use to make the “payments.” See, e.g., 30 U.S.C. 1232(i)(2) (“[O]ut of any funds in the Treasury not otherwise appropriated, the Secretary of the Treasury shall transfer to the Secretary of the Interior for distribution to States and Indian tribes such sums as are

necessary to pay amounts described in paragraphs (1)(A) and (2)(A) of section 411(h).”). We considered many methods for making the payments to States and Indian Tribes under section 411(h)(1). Based on that consideration and the Solicitor’s M-opinion, we are required to make these payments as grants.

Not only are we required to use grants to distribute prior balance replacement funds under section 411(h)(1), but doing so also has advantages. First, using grants allows us to continue the established and effective process we have been using to disburse moneys from the Fund to States and Indian tribes for almost 30 years. Grants policies and procedures currently are described in our Federal Assistance Manual (FAM; OSM Directive GMT–10). They are simplified compared to those procedures used for the grants we award under Title V of SMCRA. The FAM and all grant application forms are available on-line, and States and Indian tribes can develop and submit grant applications to us electronically. Likewise, much of our application processing and all of our grant approval and award actions occur electronically. These capabilities are integrated with the Department of the Interior’s Financial and Business Management System (FBMS). States’ and Indian tribes’ finance and accounting departments are experienced in following these procedures for receiving and managing grant funds we award. In addition, they are well versed in OMB Circular A–102, the “Grants Common Rule” at 43 CFR Part 12, and FAM requirements that we follow for providing financial assistance under Title IV of SMCRA. Those requirements include periodic reporting and auditing that help States, Indian tribes, and us ensure proper accounting for funds and their use.

Second, using grants can help us address our programmatic responsibilities concerning certified and uncertified States and Indian tribes under sections 201(c)(1) and (4) of SMCRA. 30 U.S.C. 1211(c)(1) and (4). Grant requirements for periodic reporting provide some of the information we need to monitor and evaluate States’ and Indian tribes’ accomplishments, determine if they are following their approved grants and reclamation plans, identify the need for assistance, and to help us with our reporting requirement mandated by section 405(j) of SMCRA.

Third, using grants allows us to maintain financial accountability for the prior balance replacement funds. As discussed in proposed § 872.31, the 2006 amendments require that prior balance replacement funds be used for

specific purposes: Certified States and Indian tribes must use them for “the purposes established by the State legislature or tribal council of the Indian tribe, with priority given for addressing the impacts of mineral development”; and uncertified States and Indian tribes must use them for coal reclamation as described in section 403. 30 U.S.C. 1240a(h)(1)(D). Using grants provides us with oversight to ensure that the States and Indian tribes are spending prior balance replacement funds as required by SMCRA, as revised by the 2006 amendments, and specifically that uncertified States and Indian tribes are directing prior balance replacement funds into coal reclamation.

Last, the Treasury regulations associated with grants (31 CFR Part 205) allow States and Indian tribes to draw down prior balance replacement funds to pay expenses while otherwise keeping funds in the U.S. Treasury until needed.

Proposed § 872.30(c) addresses sections 411(h)(1)(A)(ii) and 411(h)(4)(A) of SMCRA, as revised by the 2006 amendments. 30 U.S.C. 1240a(h)(1)(A)(ii) and 1240a(h)(4)(A). It requires us to transfer to historic coal funds the moneys in your State or Tribal share of the Fund that were allocated, but not appropriated to you, before October 1, 2007. The amount of this transfer will be of the same amount that we pay you as prior balance replacement funds under this section and 411(h)(1) of SMCRA. Proposed § 872.30(c) further requires us to make the amounts transferred to the historic coal funds available for annual grants beginning in FY 2023, which is the same time we distribute the remaining moneys under Title IV. Finally, it requires us to allocate, distribute, and award the transferred amounts to you according to the provisions applicable to historic coal funds under §§ 872.21, 872.22, and 872.23.

What may you use prior balance replacement funds for? (§ 872.31)

Consistent with section 411(h)(1)(D)(i) of SMCRA, proposed § 872.31(a) requires you, a certified State or Indian tribe, to use the prior balance replacement funds you receive only for the purposes that your State legislature or Tribal council establishes, giving priority to addressing the impacts of mineral development. 30 U.S.C. 1240a(h)(1)(D)(i). While this language is taken essentially verbatim from the 2006 amendments, we realize this provision may significantly affect certified States’ and Indian tribes’ reclamation programs, and we specifically invite your comments on this proposal.

Under SMCRA, as revised by the 2006 amendments, the State legislature or Tribal council has broad and sole discretion to determine how prior balance replacement funds will be spent. Because OSM has no basis for approving or disapproving individual projects to be undertaken with these funds, we do not believe that projects paid for with prior balance replacement funds would be subject to OSM review requirements under laws such as the National Environmental Policy Act of 1969 (NEPA) and the National Historic Preservation Act (NHPA). Certified States or Indian tribes would be solely responsible for determining what other Federal laws are applicable to their activities. Therefore, we are not proposing that an Authorization to Proceed (ATP) from OSM with an accompanying NEPA review would be required. We invite your comments on this issue.

Proposed §§ 872.31(b) through (b)(3) require that uncertified States and Indian tribes use their prior balance replacement funds only for activities related to abandoned coal mine problems. Section 411(h)(1)(D)(ii) specifies that uncertified States “shall use any amounts provided under this paragraph for the purposes described in section 403.” 30 U.S.C. 1240a(h)(1)(D)(ii). So, uncertified States and Tribes must use prior balance replacement funds to reclaim Priority 1, 2, and 3 coal problems under § 874.12, to restore water supplies under § 874.14, and to maintain the AML inventory under section 403(c) of SMCRA. Though not a required use in proposed § 872.31(b), we believe uncertified States and Indian tribes may use these funds to acquire lands under § 879.11 as needed to address coal problems under section 403.

Congress enacted the 2006 amendments out of a concern for addressing remaining coal problems. Section 409(b) specifies that only certain types of funds can be used to address noncoal problems. 30 U.S.C. 1239(b). Prior balance replacement funds, authorized to be paid under section 411(h)(1), are not among the types of funds specified for noncoal reclamation under section 409(b).

Prior balance replacement funds described in section 411(h)(1) are based on the amount of the reclamation fees we collected in each State and on Indian lands and allocated to those States and Indian tribes under section 402(g)(1), but that Congress did not appropriate through FY 2007. However, the 2006 amendments reallocate those unappropriated section 402(g)(1) moneys to the historic coal funds of

section 402(g)(5). 30 U.S.C. 1240a(h)(1)(A)(ii) and 1240a(h)(4)(A). The prior balance replacement funds that the uncertified States and Indian tribes receive may be of an amount equivalent to the unappropriated balance, but they are paid from U.S. Treasury funds and have not been allocated under section 402(g)(1). There is a fundamental distinction between the prior balance replacement funds and section 402(g) moneys distributed from the Fund.

Therefore, proposed § 872.31(b) requires you, the uncertified State or Indian tribe, to use prior balance replacement funds only for the three purposes described above. This interpretation will not prevent you from abating Priority 1 noncoal hazards to public health and safety with the State or Tribal share funds we distribute to you annually under §§ 872.14 or 872.17 and historic coal funds we distribute under § 872.21.

What are certified in lieu funds? (§ 872.32)

We propose three new sections addressing funds distributed to States and Indian tribes described in section 411(h)(2) of SMCRA. 30 U.S.C. 1240a(h)(2). We call these moneys “certified in lieu funds” in this proposed rule. As the first of these three sections, § 872.32 describes certified in lieu funds as moneys that we will distribute to you, a certified State or Indian tribe, in lieu of moneys otherwise allocated to your State or Tribal share of the Fund after October 1, 2007. We are prohibited from distributing State and Tribal share moneys to you because of the exclusion in section 401(f)(3)(B) of SMCRA. 30 U.S.C. 1231(f)(3)(B). This proposed section also identifies the source of these certified in lieu funds as otherwise unappropriated funds in the United States Treasury, not the Fund. The annual distribution of certified in lieu funds is mandatory and not subject to prior Congressional appropriation. These distributions will start in FY 2009 because section 411(h)(2) of SMCRA specifies that our payments must equal the State and Tribal share funds “allocated on or after October 1, 2007.” 30 U.S.C. 1240a(h)(2)(A). So, the first fees collected that can serve as the basis for calculating certified in lieu payments are those allocated on coal produced during FY 2008. As a result, we will distribute certified in lieu funds for the first time in FY 2009.

How does OSM distribute and award certified in lieu funds? (§ 872.33)

Proposed § 872.33 describes how we will distribute and award certified in lieu funds. Paragraph (a) states that you must be certified under section 411(a) of SMCRA to receive certified in lieu funds, as required in section 411(h)(2) and defined in section 411(h)(2)(B). If you meet that requirement, we will follow the steps described in paragraph (b) to distribute these moneys to you. Under paragraph (b)(1), we will annually distribute to you, beginning in FY 2009, an amount based on 50 percent of the reclamation fees we received for coal produced during the previous FY in your State or on Indian lands within the jurisdiction of your Indian tribe. Proposed paragraph (b)(2) states that the funds we annually distribute to you will be in lieu of moneys you would have received from your State or Tribal share of the Fund if section 401(f)(3)(B) of SMCRA, as revised by the 2006 amendments, did not specifically exclude you from receiving those funds. 30 U.S.C. 1231(f)(3)(B). Although the Fund will not be the source of these moneys that we distribute to you, you will receive moneys each year as though you were still receiving them from your State or Tribal share of the Fund.

Proposed § 872.33(b)(3) explains, using a table, how we intend to phase-in our distribution of certified in lieu funds to you over the first three years beginning October 1, 2008. This paragraph is consistent with section 411(h)(3)(B) of SMCRA, which requires that in the first three fiscal years beginning with FY 2009, the amount we annually distribute to you will be equal to 25 percent, 50 percent, and 75 percent, respectively, of 50 percent of the annual reclamation fee collections in your State or from Indian lands within your jurisdiction. 30 U.S.C. 1240a(h)(3)(B). You will receive an amount equal to 100 percent of your 50 percent State or Tribal share of annual reclamation fee collections in the fiscal year beginning October 1, 2011, and in the following fiscal years.

Proposed § 872.33(c) states our intention to use grants to pay these funds to you. Section 411(h)(2) of SMCRA says “the Secretary shall pay to each certified State or Indian tribe * * *.” 30 U.S.C. 1240a(h)(2)(A). As with the section 411(h)(1) prior balance replacement fund “payments,” we must use grants to pay certified in lieu funds to you. See the discussion of § 872.30 above.

The proposed paragraph § 872.33(d) addresses the provisions of sections

401(f)(3)(A)(i) and 411(h)(4) of SMCRA. It requires us to transfer to historic coal funds the same amount of funds that we distribute to you as certified in lieu funds. The transferred amounts will come from moneys in your State or Tribal share of the Fund that are otherwise allocated to you for the prior fiscal year, but which you are barred from receiving. We must make those transferred amounts available for annual grants beginning in FY 2009, and will do so at the same time we distribute all other moneys under Title IV. Finally, proposed § 872.33(d) requires us to allocate, distribute, and award the transferred amounts to uncertified States and Indian tribes according to the provisions applicable to historic coal funds under §§ 872.21, 872.22, and 872.23.

Section 411(h)(3)(C) of SMCRA requires us to distribute to you, in two equal annual installments in FY 2018 and FY 2019, the amounts we withhold from the first three payments of certified in lieu funds as a result of the phased-in distribution. 30 U.S.C. 1240a(h)(3)(C). Proposed § 872.33(e) incorporates that provision into the regulations.

What may you use certified in lieu funds for? (§ 872.34)

Proposed § 872.34 states that you may use certified in lieu funds for any purpose. We believe that by not specifying any prescribed uses for these moneys, the 2006 amendments allow you to use certified in lieu funds for any purpose. Congress could have easily imposed a requirement to use the funds for a specific purpose as it did for prior balance replacement funds in sections 411(h)(1)(A)(i) and (ii). Because section 411(h)(2) does not specify the purpose(s) for which the funding it provides may be used, we interpret it to mean that the use of the funds it provides is not restricted.

However, we also recognize there is an alternative reading of SMCRA, as amended, and invite comment on whether our proposal reflects the better reading. Section 411(h)(2) of SMCRA, as revised by the 2006 amendments, is silent on how certified in lieu funds can be used. An argument can be made that this section’s silence on the use of these funds does not mean certified States and Indian tribes can use them for any purpose. Instead, it might be viewed as meaning that the other provisions of section 411 of SMCRA, specifically 411(b) through (g), apply to the use of certified in lieu funds. Because this would make a major difference in not only how these funds may be used, but in OSM’s role in overseeing that use, we invite comment on which alternative is

the better reading of the 2006 amendments.

In any case, as a certified State or Indian tribe, you must address coal problems that arise after certification under existing § 875.14(b), and we do not propose to change this requirement. In addition, when each State and Indian tribe became certified under the existing regulations at § 875.13(a)(3), they had to provide an agreement to “give top priority” to any coal problems that occur after certification. So, certified States and Indian tribes must address these coal problems, regardless of the funding source.

Part 873—Future Reclamation Set-Aside Program

Applicability (§ 873.11)

The 2006 amendments eliminated the authority for States and Indian tribes to set-aside funds for future reclamation that was once contained in section 402(g)(6). The proposed changes to §§ 873.11 and 873.12 reflect that change by restricting future set-aside actions to funding received prior to December 20, 2006, while preserving the requirements that existing funds contained in the set-aside account be used for their intended purpose. We reworded this section to account for this change and to use plain English.

Future Set-Aside Program Criteria (§ 873.12)

We propose to revise paragraph (a) to include December 20, 2006, as the cutoff date for deposits to future set-aside fund accounts. As explained above, we are making this change because the 2006 amendments removed the authority for States and Indian tribes to use Fund moneys for this purpose. We are also removing the phrase, “or (2) An acid mine drainage abatement and treatment fund pursuant to 30 CFR part 876,” as the acid mine drainage set-aside program is addressed in that Part of this rule. Likewise, we are deleting paragraph (b) because it repeats the conditions for funds that were previously set aside which are already included in paragraph (a). We are deleting the first sentence of existing paragraph (c) because it is now obsolete. We also reworded this section in plain English.

Part 874—General Reclamation Requirements

Definitions (§ 874.5)

We propose to add this new section to Part 874 to include the definition of the term “Reclamation plan or State reclamation plan” as it is defined in proposed § 872.5.

Information Collection (§ 874.10)

We propose to reword this paragraph using plain English and to use the current format approved by the OMB. It describes OMB’s approval of information collections in Part 874, our use of that information, and the estimated reporting burden associated with those collections.

Applicability (§ 874.11)

We are proposing revisions to this section to clarify how the provisions of Part 874 apply to the types of funding made available under the 2006 amendments and to reword it using plain English. The new paragraph (a) continues to impose the existing requirement for compliance when reclaiming eligible lands and waters with moneys from the Fund. The new paragraph (b) would impose compliance when conducting reclamation projects with the prior balance replacement funds received by uncertified programs from section 411(h)(1) of SMCRA because section 411(h)(1)(D)(ii) states that the funds received must be used for the purposes of section 403. 30 U.S.C. 1240a(h)(1)(D)(ii). Section 403 imposes coal reclamation priorities, authorizes water supply restoration, and requires the maintenance of the AML inventory. 30 U.S.C. 1233. The new paragraph (c) would impose compliance by certified programs when using certified in lieu funds provided under section 411(h)(2) of SMCRA to address eligible coal problems after certification. We are proposing this requirement to ensure that coal problems are uniformly addressed under each program, regardless of certification status under section 411.

The new paragraph (d) requires certified programs to follow the requirements of this Part when expending the prior balance replacement funds provided by section 411(h)(1) of SMCRA to address coal problems after certification. Certified States and Indian tribes are to expend their prior balance replacement funds for the purposes established by the State legislature or Tribal council with priority given to addressing the impacts of mineral development. 30 U.S.C. 1240a(h)(1)(D)(i). However, when certified States and Indian tribes use prior balance replacement funds to address coal problems subsequent to certification, compliance with the provisions under Part 874 will be central to our review and approval process.

Eligible Coal Lands and Water (§ 874.12)

We are proposing to revise existing paragraphs (c), (e), and (f) of § 874.12 to reflect our proposed changes to the funding applicability in § 874.11, to correct minor errors in the existing regulations, and to reword these paragraphs using plain English. First, § 874.12(c) would be updated to allow the use of prior balance replacement funds by uncertified programs to supplement the cost of reclamation at eligible bond forfeiture sites consistent with section 411(h)(1)(D)(ii), which allows funds to be spent for the purposes described in section 403. Next, we propose inserting language in § 874.12(e) to allow uncertified programs to use prior balance replacement funds for the reclamation and abatement of inadequately reclaimed Priority 1 or Priority 2 sites that were mined between August 4, 1977, and the date on which the Secretary approved a State regulatory program, known as “interim program sites,” or where the surety of the mining operator became insolvent as of November 5, 1990, known as “insolvent surety sites.” We also corrected an error in the first sentence by replacing the second “may” with “made” so that the sentence reads: “An uncertified State or Indian tribe may expend funds made available * * *.” Last, the revisions to § 874.12(f) are minor conforming changes and do not alter the existing scope or meaning of that paragraph.

Reclamation Objectives and Priorities (§ 874.13)

We are proposing changes to § 874.13 that reflect expenditure priorities outlined in section 403(a) of SMCRA, as revised by the 2006 amendments, and clarify how reclamation programs should address Priority 3 reclamation objectives. Proposed paragraph (a) of § 874.13 contains the most recent date for our “Final Guidelines for Reclamation Programs and Projects” published in 2001. 66 FR 31250, 31258. In addition, it contains the long-standing requirement in section 403(a) of SMCRA that expenditures must “reflect the * * * priorities in the order stated.” 30 U.S.C. 1233(a).

The remainder of the proposed § 874.13(a) is generally the same as the text of sections 403(a)(1), (a)(2), and (a)(3) of SMCRA, as revised by the 2006 amendments. However, the last sentence of § 874.13(a)(3) was added to clarify the term “adjacent,” which was added by the 2006 amendments. More specifically, sections 403(a)(1)(B)(ii) and (a)(2)(B)(ii) of SMCRA allow for certain lands and waters that have been

degraded by past coal mining practices to be restored as either a Priority 1 or Priority 2 expenditure if they are adjacent to a Priority 1 or Priority 2 site. This new statutory provision also extends to Priority 3 lands and waters adjacent to Priority 1 or 2 sites that have already been reclaimed under the approved reclamation plan. In effect, the 2006 amendments allow reclamation programs to offer amendments to the AML inventory, where applicable, that would reclassify certain current Priority 3 lands and waters as Priority 1 or Priority 2 expenditures.

We propose that the term "adjacent" means Priority 3 eligible lands and waters that are "geographically contiguous." Under our proposal, land and water resources that are spatially connected to a Priority 1 or Priority 2 site, even those sites previously reclaimed, may now be recorded in the AML inventory as Priority 1 or Priority 2 unfunded costs, funded costs, or completed expenditures, as applicable.

Given that our proposed § 874.13(a) contains only geographical considerations, we are also seeking comment on possible alternative definitions of or restrictions to the term "adjacent." For example, we would like to receive comments on whether the term "adjacent" should include all disturbances by a single mining operation or company. Should the term "adjacent" allow for a hydrologic connection even though there may be great distances between the sites? Should the term contain restrictions on the types of Priority 3 problems or costs that can qualify? States can now set up 30% AMD set-aside trusts under 402(g)(6) of SMCRA. In view of that option, should there be any restrictions on how the term "adjacent" is used for Priority 3 AMD problems? Should permanent facility construction and perpetual treatment costs associated with AMD from a Priority 2 mine opening or highwall be elevated to Priority 2 status? Some facilities and perpetual treatment costs can run into hundreds of thousands, if not millions, of dollars. Should the expenditures for large acreages of Priority 3 subsidence be elevated in priority because they are geographically contiguous to a small Priority 2 subsidence event, regardless of cost? What about small Priority 2 tipples connected to large Priority 3 refuse piles? Finally, because the 2006 amendments removed the 30% cap in water supply replacement expenditures under section 403(b), should adversely affected water supplies be elevated in priority when adjacent to other kinds of Priority 1 or 2 reclamation sites? We would like to receive comments on

whether there should be any limitations, monetary or otherwise, on the kinds of AML programs that should be addressed under the term "adjacent."

The proposed paragraph (b) of § 874.13 incorporates the 2006 amendments' complete revision of section 402(g)(7) of SMCRA. Previously, section 402(g)(7) contained the requirements for developing hydrologic unit plans consistent with the AMD set-aside trust provision of section 402(g)(6). The amended language of section 402(g)(7) now addresses how Priority 3 work can be undertaken; it states:

In complying with the priorities described in section 403(a), any State or Indian tribe may use amounts available in grants made annually to the State or tribe under paragraphs (1) and (5) for the reclamation of eligible land and water described in section 403(a)(3) before the completion of reclamation projects under paragraphs (1) and (2) of section 403(a) only if the expenditure of funds for the reclamation is done in conjunction with the expenditure before, on, or after the date of enactment of the Surface Mining Control and Reclamation Act Amendments of 2006 of funds for reclamation projects under paragraphs (1) and (2) of section 403(a).

30 U.S.C. 1232(g)(7)

In effect, section 402(g)(7) prevents uncertified States or Indian tribes from using State or Tribal share funds, as discussed in section 402(g)(1) of SMCRA, and §§ 872.14 and 872.17, and historic coal funds, as discussed in section 402(g)(5) of SMCRA and § 872.21, for the reclamation of Priority 3 lands and water before they have completed their Priority 1 and 2 reclamation projects. However, section 402(g)(7) does provide an exception that allows State or Tribal share funds and historic coal funds to be used for Priority 3 lands and waters, but only if that reclamation is done in conjunction with the expenditure of funds before, on, or after December 20, 2006, for Priority 1 and Priority 2 reclamation.

To be consistent with this section, we propose to apply section 402(g)(7) of SMCRA in a manner that is slightly more restrictive than the way we have promoted Priority 3 land and water reclamation in the past. Our longstanding approach, based on the first sentence of section 403(a), has been that reclamation programs can reclaim Priority 3 land and water projects before the completion of all Priority 1 and 2 projects as long as the overall reclamation program generally reflects the priorities in section 403(a) of SMCRA. The Department of the Interior initially expressed this approach in a May 18, 1982, memorandum by the

Office of the Solicitor that recognized the discretion program officials have in selecting projects based upon a wide range of qualitative and quantitative data. This memorandum also concluded that the States and the Secretary have ample authority and rationale to select projects based upon such factors as are outlined in § 874.13 and to fund lower priority projects together with higher priority projects as long as the total program reflects the achievement of objectives in section 403(a) of SMCRA.

Through the life of the AML program, we published and maintained an advisory document titled "Final Guidelines for Reclamation Programs and Projects" (see latest version 66 FR 31250, June 11, 2001). These guidelines direct that, generally, reclamation of lower priority projects should not begin until all known higher priority projects have been completed, are in the process of being reclaimed, or have been approved for funding by the Secretary. See 66 FR 31252, ("Reclamation Site Ranking"). Our guidance further explains that lower priority projects or contiguous work may be undertaken in conjunction with high priority projects, but it sets forth factors to weigh to determine if the lower priority projects should be considered over higher priority projects. Examples of these factors include: When a landowner consents to participate in post reclamation maintenance activities of the area; when the reclamation provides many benefits to the landowner and those benefits have a greater cumulative value than other projects; and when reclamation provides offsite public benefits. *Id.* We also promote the reclamation of lower priority lands and waters when it is cost effective. See 66 FR 31253 ("Reclamation Extent"). To date, we have encouraged stand-alone Priority 3 projects and Priority 3 work that is contiguous with higher priority work based upon the efficiencies gained for the program and the environmental and community benefits.

To be consistent with the revised language of section 402(g)(7) of SMCRA, we are proposing to replace the existing language under § 874.13(b) with language that specifies that this provision applies to uncertified States and Indian tribes who seek to use State or Tribal share funds and historic coal funds for Priority 3 reclamation. However, based on section 402(g)(7) and our past experience, this proposed provision also requires uncertified States and Indian tribes to meet one of two conditions before being allowed to reclaim Priority 3 sites.

Under the first condition, described in proposed § 874.13(b)(1), uncertified

States and Indian tribes may only complete stand alone Priority 3 projects after the State or Indian tribe has completed all Priority 1 and 2 reclamation projects in its jurisdiction. We believe this proposal to be slightly more restrictive than the existing regulations because, if finalized, it would prohibit stand-alone Priority 3 projects until all known Priority 1 or 2 sites have been completed, unless the uncertified State or Indian tribe meets the conditions detailed in proposed § 874.13(b)(2).

Proposed § 874.13(b)(2) allows uncertified States and Indian tribes to reclaim Priority 3 lands and waters before all higher priority sites are reclaimed, as long as they are being done “in conjunction with” a Priority 1 or Priority 2 project. Specifically, proposed § 874.13(b)(2) allows you to expend State or Tribal share and historic coal funds for the reclamation of Priority 3 lands and water that are related to past, present, or future projects, but only if you determine that such expenditures would or would have (i) facilitate(d) the Priority 1 or Priority 2 reclamation or, (ii) provide(d) reasonable savings at the time of the project towards the objective of reclaiming all Priority 3 land and water problems. We are proposing these two conditions because they will promote Priority 3 reclamation while emphasizing the elevated Priority 1 and 2 reclamation objectives contained in the 2006 amendments. Under our proposed revision, program officials could not only use State and Tribal share and historic coal funds for Priority 3 sites that would aid in the reclamation of higher priority sites or would be cost efficient to do so, but they could also revisit each completed project and determine if there are Priority 3 lands and waters related to those past projects that still need to be reclaimed. These Priority 3 sites could then be reclaimed before the all Priority 1 and 2 problems have been addressed.

While we anticipate that most Priority 3 lands that fall within § 874.13(b)(2)(i) would have been addressed during the initial project, there may be areas where, at the time, the efficiencies of combined contracting or other cost saving factors would have satisfied § 874.13(b)(2)(ii). Reasons why such lands may not have been incorporated in the initial project could include past landowner restrictions, shortage of available grant funding, staffing and administrative considerations, or the potential for remining.

We believe that the language of § 874.13(b)(2), as proposed, does not specifically preclude allowing Priority 3

work as a separate phase of construction within a Priority 1 or 2 project. However, Priority 3 work that is undertaken as a separate phase may not realize the administrative and contracting efficiencies of combined design and development, one-time mobilization and demobilization costs, or reduced unit costs that can be attributed to larger projects. These types of factors would be central to an analysis to determine whether there are reasonable savings under proposed § 874.13(b)(2)(ii). We welcome comments on the effect of our proposed language on construction project phasing.

As described above, the 2006 amendments substantially elevated and redirected resources towards the uncertified programs with the most hazardous—Priority 1 and 2—coal sites. This was accomplished through the mandatory distributions of State or Tribal share funds and historic coal funds, the reallocation of the section 402(g)(1) funding away from certified programs, and raising the minimum program make up funding level. 30 U.S.C. 1231(f)(3)(B), 1232(g)(1)(A), 1232(g)(1)(B), 1232(g)(5), 1232(g)(8)(A), and 1240a(h)(4). In addition, the 2006 amendments strengthened our responsibilities towards oversight of reclamation by obliging us to ensure that uncertified States and Indian tribes strictly comply with the priorities in section 403, by requiring us to review amendments to the AML inventory, by granting us the authority to unilaterally certify the completion of coal problems, and by restricting the use of prior balance replacement funds to address coal problems under section 403. 30 U.S.C. 1232(g)(2), 1233(c), 1240a(a)(A), and 1240a(h)(1)(D)(ii).

Given these new funding directives and our enhanced oversight responsibilities, we believe that limiting the number and types of Priority 3 projects that could be addressed under the “in conjunction with” provision is consistent with the intent of SMCRA, as revised by the 2006 amendments. To ensure that high priority site reclamation is promoted while we observe our long term commitment to eliminate all coal problems, we are proposing that you may use State or Tribal share funds or historic coal funds to reclaim Priority 3 sites even if you have not completed all Priority 1 and Priority 2 problems if the reclamation of those sites facilitates the reclamation of Priority 1 and 2 problems or if you determine that there would be reasonable savings towards the objective of reclaiming all Priority 3 land and water problems.

Generally, we would expect reasonable savings to be composed of a number of reduced expenditures in project development and construction, such as reduced design costs, reduced mobilization and demobilization charges, reduced unit prices, and administrative efficiencies, and that as the Priority 3 work increases in size or cost, the amount of potential savings would diminish. As part of our oversight and inventory management responsibilities, we will review individual State or Indian tribe determinations under § 874.13(b)(2)(ii) that the reclamation of specific Priority 3 lands and waters is appropriate because they facilitate reclamation or provide reasonable savings towards the long-term objective of reclaiming all coal problems.

We do not believe that our efforts to define the use of “in conjunction with” will significantly reduce the types of Priority 3 projects that are reclaimed. While our proposed § 874.13(b)(2) is intended to address Priority 3 reclamation undertaken as part of the process of developing and undertaking traditional reclamation projects under 403(a) of SMCRA, there are a number of activities that are performed by reclamation programs to address eligible lands and waters that are not subject to this provision, including water supply restoration, the 30 percent set-aside for AMD projects, the use of prior balance replacement funds, projects authorized under the AML Enhancement Rule, Appalachian Clean Streams projects, Watershed Cooperative Agreement projects, and any AML sites reclaimed under the remining incentives provided under section 415 of SMCRA, as revised by the 2006 amendments. These activities primarily address Priority 3 lands and waters but are not affected by the limitation contained in § 874.13(b)(2) for a variety of reasons. Water supply restoration projects and the AMD 30 percent set-aside program are authorized by sections 403(b) and 402(g)(6)(A) of SMCRA, respectively. 30 U.S.C. 1233(b) and 1232(g)(6)(A). Prior balance replacement funds may be used for Priority 3 reclamation because they are specifically directed to be used for the purposes of section 403 of SMCRA, as provided in § 872.31. Although funded from the Federal expense share of the Fund, Appalachian Clean Streams projects and Watershed Cooperative Agreement projects are authorized through specific Congressional appropriations. AML Enhancement Rule projects were established through a specific rulemaking process where the Secretary used the powers and authority

under section 413(a) of SMCRA to provide States and Indian tribes with the authority to reduce project costs to the maximum extent practicable on abandoned mine sites which have deposits of coal or coal refuse remaining. 30 U.S.C. 1242(a); *see also* 64 FR 7470. Qualifying sites are specifically provided for as an exception to SMCRA under section 528. 30 U.S.C. 1278. Neither section 413(a) nor section 528 was revised by the 2006 amendments, and we do not believe anything in the 2006 amendments would affect the existing AML Enhancement Rule. Finally, many of the AML sites that may be reclaimed pursuant to the remaining incentives contained in the 2006 amendments would be Priority 3 sites. These remaining incentives are specifically authorized by section 415 of SMCRA, as amended. In conclusion, while our proposed requirements at § 874.13(b)(2) would prevent the reclamation of some stand-alone Priority 3 sites previously undertaken as part of the traditional reclamation program, the programs discussed above would still offer many Priority 3 land and water reclamation opportunities.

We welcome all comments on how these regulations should incorporate section 402(g)(7) of SMCRA, as amended. Specifically, we encourage comments on how we should promote the responsible reclamation of Priority 3 lands and waters while we advance the objectives of reclaiming all Priority 1 and 2 health and safety problems within the administrative boundaries of each approved AML program. We also encourage comments relating to the standards that we have proposed in § 874.13(b) for Priority 3 sites reclaimed in conjunction with past, present, and future Priority 1 and 2 projects. We recognize there is a likelihood of confusion because “conjunction” typically means an “occurrence together in time and space.” (Merriam-Webster Collegiate Dictionary, 11th ed. 2003). Thus, we would particularly like to encourage comments on how we can be consistent with the statutory standard while minimizing confusion.

Our proposed § 874.13(b)(2) contains only a general direction that qualifying Priority 3 work should either facilitate the higher priority work or represent reasonable savings towards the goal of reclaiming all Priority 3 coal problems. Thus, we are also seeking comments on possible alternatives or refinements to our proposal. We would like your opinion on whether Priority 3 work requested by a property owner as a condition of his or her agreement to provide written entry to address health

and safety problems should fall within the scope of paragraph (b)(2)(i). What kinds of activities do you think should be considered as facilitators of higher priority reclamation? Also, what kinds of cost savings should be considered as “reasonable” for our proposed § 874.13(b)(2)(ii)? Should there be any restrictions on the types of Priority 3 problems or overall cost under § 874.13(b)(2)? Given that States and Indian tribes can set aside up to 30 percent of State share or Tribal share funds and historic coal funds for AMD trusts under section 402(g)(6) of SMCRA, should there be any restrictions on the expenditure of moneys from the Fund for Priority 3 AMD projects when applying the “in conjunction with” provision? Should the construction of permanent facilities with perpetual treatment costs qualify? Should the expenditures for Priority 3 reclamation be allowed to exceed the cost of reclaiming the Priority 1 and 2 problems? Should there be any physical or administrative barriers, such as watershed or mine permit boundaries, property lines, or environmental constraints associated with § 874.13(b)(2)?

Water Supply Restoration (§ 874.14)

We propose to change the title of this section from “Utilities and other facilities” to “Water supply restoration” in order to reflect more accurately the purpose of this section and the changes made by the 2006 amendments to section 403(b) of SMCRA. The existing title of this section, “Utilities and other facilities,” related to former section 403(a)(4) of SMCRA, which made certain public facilities eligible for reclamation. This was sometimes referred to as “Priority 4” reclamation. The 2006 amendments removed section 403(a)(4) and retitled section 403(b) “Water Supply Restoration.” We are changing this section in a similar fashion.

We note that the language similar to “utilities and other facilities” is also used to describe some noncoal restoration work that may be completed by certified States and Indian tribes under § 875.15(c). We do not propose to change the language of § 875.15 because the scope of that section involves certified States and Indian tribes using funds that are not subject to section 403(b) for utilities, roads, and other community infrastructure. Unlike § 875.15, however, this section only applies to water supplies adversely affected by coal mining in uncertified States and Indian tribes.

We are proposing to revise paragraph (a) of this section, consistent with the

2006 amendments, to remove the 30 percent limitation on grant funds that States and Indian tribes may expend on water supply restoration. Beginning with grants awarded on or after December 20, 2006, uncertified States and Indian tribes may expend any or all of their grants from State or Tribal share funds, historic coal funds, and prior balance replacement funds for water supply restoration. Prior balance replacement funds are eligible for such expenditures because they are specifically directed to be used for the purposes of section 403 of SMCRA. States and Indian tribes may use minimum program makeup funding for water supply projects as long as they represent Priority 1 or 2 problems. Expenditures for water supply restoration are an optional feature of the reclamation program, and uncertified States and Indian tribes can decide to what extent they want to expend funds for water supply projects. The remainder of the existing section, including eligibility of projects, would remain the same.

Contractor Eligibility (§ 874.16)

We are proposing revisions to § 874.16 to reflect our proposed changes to the funding applicability section in § 874.11. Our proposed change would impose the requirement that successful bidders for an AML contract must also be eligible under §§ 773.12, 773.13, and 773.14 to receive a permit or be provisionally issued a permit to conduct surface coal mining operations at the time of the contract award to conduct reclamation projects using moneys from the Fund, prior balance replacement funds provided to uncertified States and Indian tribes under § 872.29, or a combination of both types of AML funds.

Part 875—Certification and Noncoal Reclamation

We propose to amend the title of this Part to more accurately describe the subject matter covered by these regulations. Also, our proposed revisions to this Part contain an addition of a new definition section at § 875.5 and changes to existing §§ 875.11 (Applicability), 875.12 (Eligible lands and water prior to certification), 875.13 (Certification of completion of coal sites), 875.14 (Eligible lands and water subsequent to certification), 875.16 (Exclusion of certain noncoal reclamation sites), and 875.20 (Contractor eligibility). These revisions propose changes to fund applicability, certification procedures, and how certified States and Indian tribes must address remaining or newly discovered coal problems. One

substantive change we propose is to acknowledge that this Part may not apply to certified States and Indian tribes when they expend certified in lieu funds and prior balance replacement funds received under section 411(h) of SMCRA. Consistent with revised Part 884, certified States and Indian tribes may choose to modify their reclamation plan to expend funding on activities not related to the reclamation of noncoal mine problems, or to undertake noncoal reclamation outside the framework of this Part.

In addition to requesting your comments on the sections discussed below, we are also seeking comments on any other sections within this Part that you may feel are affected by our proposed changes or the 2006 amendments. For example, we are not revising any of the language in § 875.15 (Reclamation priorities for noncoal program) because we believe that fund applicability requirements in Part 872 along with any reclamation plan revisions completed under Part 884 will properly define how the section applies to a project conducted by a certified program under this Part. In addition, we are making revisions to § 875.20 (Contractor eligibility) to make clear that contractor eligibility requirements for certified States and tribes only apply to coal reclamation work. We did not revise this section to address the applicability of certified in lieu or prior balance replacement funds received by certified States and Indian tribes because we believe that matter is addressed best through revisions to the reclamation plan under Part 884. We are interested in any comments you may have concerning that approach.

Definitions (§ 875.5)

We propose to add a new section to Part 875 to include the definition of the term "Reclamation plan or State reclamation plan." The definition is identical to that in proposed § 872.5.

Information Collection (§ 875.10)

We propose only to reword this paragraph using plain English and to use the current format approved by the OMB. It describes OMB's approval of information collections in Part 875, our use of that information, and the estimated reporting burden associated with those collections.

Applicability (§ 875.11)

Except in connection with the sources of funding that may be used for reclamation, our proposed revisions to this section make minimal changes for uncertified States and Indian tribes with approved reclamation plans. Generally,

our proposed changes relate to the use of certified in lieu funds and prior balance replacement funds by certified State and Indian tribes because, as explained in Part 872 (Moneys Available to Eligible States and Indian Tribes) and Part 884 (State Reclamation Plans), certified States are not required to spend these funds according to Part 875.

In paragraph (a) we are proposing that when you, an uncertified State or Indian tribe, expend State share funds, Tribal share funds, and historic coal funds for noncoal reclamation, you are subject to the limitations on the use of those funds contained in this Part and in proposed §§ 872.16, 872.19, or 872.23. This portion of our proposal does not change the existing requirements and is consistent with section 409 of SMCRA, which requires that moneys provided by sections 402(g)(1) and (g)(5) of SMCRA may be used to address high priority noncoal hazards at the request of the Governor or governing body of an Indian tribe. 30 U.S.C. 1239(b) and (c). We did not include minimum program makeup funds or prior balance replacement funds as a source of moneys that uncertified States may use for noncoal reclamation under this Part for the reasons discussed in the preamble to proposed §§ 872.28 and 872.31, respectively.

In paragraph (b) we are proposing that you, a certified State or Indian tribe, may use prior balance replacement funds provided to you under § 872.29 and certified in lieu funds provided to you under § 872.32 to address eligible coal problems to maintain certification as required by §§ 875.13 and 875.14.

As discussed in the preamble to proposed § 872.34, before proposing this regulation, we also considered an alternative where Part 875 requirements would apply to certified in lieu funds received under § 872.32, but not to prior balance replacement funds unless so directed by the State legislature or Tribal council. Under this alternative approach, certified States and Indian tribes would continue to conduct noncoal reclamation under this Part and would be mandated to use certified in lieu funds for the reclamation of lands or water affected by the mining of minerals and materials other than coal. Reclamation programs would be required to follow the eligibility requirements of § 875.14, the priorities of § 875.15, the requirements related to land acquisition in § 875.17, the contractor eligibility provision in § 875.20, and the limited liability aspects of § 875.19. Overall, this alternative approach would require that the certified States and Indian tribes use

their certified in lieu funds to address mining related impacts inside their boundaries. We specifically request comments on this alternative approach.

Eligible Lands and Water Prior to Certification (§ 875.12)

We are proposing minor revisions to § 875.12. We are revising the title using plain English. In addition, we are revising § 875.12(c) so that the word "monies" will become "moneys." Finally, we are removing the reference to former Part 888. None of these revisions result in substantive changes in the application of the paragraph.

Certification of Completion of Coal Sites (§ 875.13)

We are proposing some minor changes to paragraph (a) of this section that do not result in any change in the authority or scope of the existing regulation. We are revising the introductory paragraph to create a lead sentence that clearly states that certification is for the completion of coal sites, and to reword it using plain English. In § 875.13(a)(1), we are eliminating the reference to Priorities 4 and 5 of section 403(a) of SMCRA because the 2006 amendments removed Priorities 4 and 5. 30 U.S.C. 1233(a). No changes were made in paragraphs (a)(2) and (a)(3) of this section.

We are proposing to add a new paragraph (d) under § 875.13 that would allow us, on behalf of the Secretary of the Interior, to make the certification of completion of coal reclamation projects without a certification request from the Governor of a State or the equivalent head of an Indian tribe. This paragraph is needed in order to be consistent with section 411(a)(2) of SMCRA, as revised by the 2006 amendments. 30 U.S.C. 1240a(a)(2). Our proposed paragraph (d) requires a determination by the Director of OSM based upon the information in the AML inventory that all coal reclamation projects in your State or Tribal jurisdiction, which meet the priorities described in § 874.13(a), have been completed. We also propose, consistent with section 411(a) of SMCRA, to require an opportunity for public comment, announced through the **Federal Register**, before we certify a State or Indian tribe.

Furthermore, we believe that we have the authority to suspend or remove certification from a State or Indian tribe that is unable or unwilling to address coal problems once they are known to exist after certification. At this time we have not proposed specific language to set forth a certification suspension or removal process. However, we request comment on whether we should add a

suspension or removal process in these regulations, and if so, where such a provision should be added and what it should contain.

Eligible Lands and Water Subsequent to Certification (§ 875.14)

We are proposing revisions to the introductory paragraph of § 875.14(a) and paragraph (a)(1) to clarify eligibility dates for noncoal reclamation performed on Federal lands, waters, and facilities under the jurisdiction of the Forest Service and the Bureau of Land Management. We are also revising the title and the section using plain English. There is no substantive change in the applicability or scope of these paragraphs.

We are proposing § 875.14(b) to clarify the timing of reclamation efforts and the sources of funds that may be used to address coal problems after certification. Under existing § 875.14(b), you, the certified State or Indian tribe, are required to address coal problems no later than the next grant cycle, subject to the availability of funds distributed. Under our proposed changes you must submit to us a plan that describes the approach and funding sources that you will use to address any coal problems in a timely manner. While we are not requiring you to use certified in lieu or prior balance replacement funds, we anticipate that those sources will most likely be identified in any plans submitted to us. Plans submitted to us will be reviewed to ensure they represent a timely approach to reclamation of existing coal problems, and we will monitor your progress towards completion of the plan. We are retaining the requirement that any coal reclamation projects, regardless of funding source, must conform to sections 401 through 410 of SMCRA. 30 U.S.C. 1231–1240.

We are interested in receiving comments on our proposed revisions to this section. We would like to receive comments on how we might review any plans submitted and how we might make determinations that the plans represent timely approaches to addressing remaining coal reclamation. We would also like comments on whether we should require the plans submitted under this section to be reviewed and processed as part of a formal reclamation plan amendment under § 884.15.

Exclusion of Certain Noncoal Reclamation Sites (§ 875.16)

We are proposing revisions to § 875.16 to exclude you, an uncertified State or Indian tribe, from expending moneys from the Fund or prior balance

replacement funds provided under § 872.29 for the reclamation of sites and areas designated for remedial action pursuant to the Uranium Mill Tailings Radiation Control Act of 1978, 42 U.S.C. 7901 *et seq.*, or that have been listed for remedial action pursuant to the Comprehensive Environmental Response Compensation and Liability Act of 1980, 42 U.S.C. 9601 *et seq.* Our proposal is to maintain consistency with the existing prohibitions on the use of moneys from the Fund and the statutory restrictions on the use of prior balance replacement funds as explained in the preamble to § 872.29. Certified States and Indian tribes may use prior balance replacement funds or certified in lieu funds for these purposes provided they comply with the general statutory and regulatory restrictions of those funds. We are also rewording this section using plain English. We invite you to comment on whether this paragraph is still needed.

Contractor Eligibility (§ 875.20)

We are proposing revisions to § 875.20 for clarity and to limit its applicability. We removed the phrase “To receive AML funds for noncoal reclamation” to clarify that prior balance replacement funds received by uncertified States and Indian tribes are also subject to the restrictions of this section. Contracts by certified States and Indian tribes are also subject to the restrictions of this section when used to address coal problems as necessary to maintain certification. However, this section is not intended to apply to use of section 411(h) funds by certified States and Indian Tribes for any purpose other than coal AML reclamation.

Part 876—Acid Mine Drainage Treatment and Abatement Program

Along with some minor changes, we are proposing three major changes to this Part consistent with the 2006 amendments. First, to comply with amended section 402(g)(6)(A), we propose to raise the previous 10% limitation on grants for AMD abatement and treatment set-asides to 30% of annual State or Tribal share and historic coal funds. Second, we propose to specify the requirements for an uncertified State or Indian tribe to establish an AMD abatement and treatment fund. Third, we propose to eliminate the requirements for a State or Indian tribe to prepare AMD abatement and treatment plans and for those plans to be approved by the Director of OSM.

The decision by an uncertified State or Indian tribe to establish an AMD abatement and treatment fund, or to deposit moneys into an established

fund, is optional. Section 403(a) of SMCRA established health and safety coal AML problems as the top two priorities for reclamation programs. SMCRA, as revised by the 2006 amendments, provides uncertified States and Indian tribes with a mechanism for abating AMD while working on high priority reclamation projects, if the water resources are adjacent to a high priority problem. 30 U.S.C. 1233(a)(1)(B)(ii) and (a)(2)(B)(ii). We are seeking comments on this section and under § 874.13 as to whether AMD abatement and treatment should be included in the types of Priority 3 reclamation projects subject to the “adjacent to” and “in conjunction with” provisions discussed in § 874.13.

Information Collection (§ 876.10)

We propose only to reword this paragraph using plain English and to use the current format approved by the OMB. It describes OMB’s approval of information collections in Part 876, our use of that information, and the estimated reporting burden associated with those collections.

Eligibility (§ 876.12)

In the first sentence of paragraph (a), we propose to delete the reference to the three year time limit for grant expenditures. The 2006 amendments provide for different time limits based on the FY in which the funds were distributed. Detailing the time restrictions in this Part is unnecessary because the limits are set out in section 402(g)(1)(D) of SMCRA and § 886.14. Also in this sentence, we propose to raise the existing 10% cap on deposits to AMD abatement and treatment funds to 30%, as required by the 2006 amendments, and to make minor revisions using plain English. We have proposed to delete paragraph (a)(1) because it referred to the future reclamation set-aside fund, which is addressed in proposed Part 873. Therefore, we have moved the requirement that States and Indian tribes create the AMD funds under their State or Tribal law, which is located in existing paragraph (a)(2), to the text of the last sentence of proposed § 876.13(a).

In addition, we have revised this subsection to clarify that section 402(g)(6) of SMCRA establishes that the only moneys from the Fund that you may set aside for AMD treatment under this section are those that you receive as State or Tribal share funds under section 402(g)(1) of SMCRA, §§ 872.14 and 872.17, or as historic coal funds under section 402(g)(5) of SMCRA, § 872.21. Therefore, the funds you

receive as minimum program make up funds under § 872.26 and prior balance replacement funds under § 872.29, may not be set aside under this Part. As indicated in our discussion of § 872.29, we believe that section 411(h)(1) of SMCRA clearly requires uncertified States and Indian tribes to use prior balance replacement funds only for the purposes of section 403 of SMCRA. We have also explained that generally up to 10% of the funds we awarded to you before December 20, 2006, may be deposited into an AMD abatement and treatment fund.

We have proposed to eliminate former paragraph (b), because it required States and Indian tribes to spend their AMD abatement and treatment funds according to a plan approved by the Director. Under the 2006 amendments, the requirements to prepare a plan, consult with the Natural Resources Conservation Service, or get the Director's approval were eliminated, so paragraph (b) is no longer needed.

We propose adding a new paragraph (b) that requires an uncertified State or Indian tribe to establish a special fund account providing for the earning of interest as required by section 402(g)(6)(A) of SMCRA, U.S.C. 1232(g)(6)(A). This AMD fund must specify that moneys in it may only be used for the abatement of the causes and the treatment of the effects of AMD in a comprehensive manner. We used the modifier "comprehensive" in the regulatory text of proposed paragraph (b)(2) because we propose to delete § 876.13 where "comprehensive abatement of the causes and treatment of the effects of acid mine drainage" was previously contained.

Also, paragraph (b)(2) requires AMD abatement and treatment projects to occur within "qualified hydrologic units." We propose to define "qualified hydrologic unit" in new paragraph (c). We removed this definition from existing § 870.5 of this chapter and added it to this section for clarity and ease of use because the phrase is used only in this section. In addition, we reworded the definition slightly in an attempt to make it easier to understand. We also propose to add a new paragraph (d) providing that deposits into the State or Tribal AMD accounts are considered State or Indian tribal moneys.

Plan Content (§ 876.13)

We propose to remove this section because the 2006 amendments eliminated the previous requirement for States and Indian tribes to prepare AMD abatement and treatment plans.

Plan Approval (§ 876.14)

We also propose to remove this section because the 2006 amendments eliminated the previous requirement for the Secretary to approve AMD abatement and treatment plans that were prepared by the States and Indian tribes.

Part 879—Acquisition, Management, and Disposition of Lands and Water Definitions (§ 879.5)

We propose to add a new section to Part 879 to include the definition of the term "Reclamation plan or State reclamation plan." This definition is identical to the one contained in proposed § 872.5.

Information Collection (§ 879.10)

We propose to remove § 879.10 because the information collection requirements contained in Part 879 have been approved by OMB under the grants provisions for Part 886 and assigned clearance number 1029–0059.

Land Eligible for Acquisition (§ 879.11)

In addition to minor plain English revisions, this proposed section is modified to incorporate the appropriate references to prior balance replacement funds received by uncertified programs under section 411(h)(1) of SMCRA and § 872.29. We are proposing to revise § 879.11(a), (b), and (c) to remove references that restrict land acquisition to moneys that States and Indian tribes receive from the Fund because the prior balance replacement funds to uncertified States are derived from the Treasury. We believe that uncertified States and Indian tribes can use prior balance replacement funds to acquire land as part of their obligation under section 411(h)(1)(D)(ii) to use the moneys for the purposes described in section 403 of SMCRA.

We are also proposing to move the definition of "permanent facility" from § 870.5 to § 879.11(a)(2) for clarity and ease of use because that term is primarily used in that section. In addition, we modified the definition slightly by changing the phrase "any manipulation or modification of the surface" to "any manipulation or modification of the site" to accommodate the possibility that permanent facilities may not always be located on the surface of the land. Some permanent facilities may be located underground to control drainage or prevent AMD.

While our revisions indicate that this proposed section only applies to uncertified States and Indian tribes and us, we are seeking comment on how this

Part would be implemented under certified State and Indian tribal reclamation plans that commit certified in lieu funds, prior balance replacement funds, or both towards the reclamation of noncoal problems under the requirements of Part 875. For example, we would like to receive comments on how land acquisition, management, and disposal requirements would apply to certified programs using prior balance replacement funds or certified in lieu funds under §§ 872.29 and 872.32, respectively. Furthermore, we would like comments on how to handle any proceeds resulting from the disposition of property by certified States and Indian tribes when implementing § 879.15.

Disposition of Reclaimed Land (§ 879.15)

We propose to revise the language in existing § 879.15 to remove the provision (h) which states that "all moneys received from disposal of land under this Part shall be deposited in the appropriate Abandoned Mine Reclamation Fund in accordance with 30 CFR Part 872 of this chapter." We propose to replace this provision with the requirement that funds be returned to us, and that we will implement the requirements of §§ 885.19 and 886.20. Proposed §§ 885.19 and 886.20 direct the disposition of unused funds, particularly those that are deobligated. This revision is necessary because States and Indian tribes may acquire land with moneys from the Fund or from the Treasury when implementing coal and noncoal reclamation under their approved reclamation plan.

Part 880—Mine Fire Control Definitions (§ 880.5)

We propose to add a new section to Part 880 to include the definition of the term "Reclamation plan or State reclamation plan." This definition is identical to the one contained in proposed § 872.5.

Part 882—Reclamation on Private Land Information Collection (§ 882.10)

We propose only to reword this paragraph using plain English and to use the current format approved by the OMB. It describes OMB's approval of information collections in Part 882, our use of that information, and the estimated reporting burden associated with those collections.

Liens (§ 882.13)

Consistent with the 2006 amendments' revision of section 408(a) of SMCRA, in paragraph (a)(1) we propose to remove the authority for

liens to be placed against property for the sole reason that the owners purchased the property after May 2, 1977. 30 U.S.C. 1238(a). We are also replacing the word “shall” with “must” in accordance with plain English.

Part 884—State Reclamation Plans

With the exception of § 884.11 and § 884.17, both discussed specifically below, and the addition of a definitions section at § 884.5, we are not proposing any changes to the regulations under Part 884. However, we do want to clarify and seek comments on the implementation of Part 884 provisions as they relate to the prior balance replacement funds and certified in lieu funds as discussed in the preamble to Part 872.

As discussed under Part 872, prior balance replacement funds and certified in lieu funds provided under sections 411(h)(1) and 411(h)(2) of SMCRA, respectively, are Treasury funds and not moneys from the Fund. Consistent with the language of section 411(h)(1), we are proposing revisions to Part 872 that specify that 411(h)(1) funds are to be used by uncertified States and Tribes for the purposes of section 403 of SMCRA and by certified States and Tribes for purposes established by the State legislature or Tribal council with priority given to the impacts of mineral development. In addition, our revised Part 872 proposes that certified programs may use certified in lieu funds for any purpose, even purposes not covered by this subchapter.

In light of these changes to Part 872, we propose to clarify in Part 884 that the requirement to maintain an approved reclamation plan continues to apply to all States and Indian tribes, regardless of certification status under section 411(a) of SMCRA. This proposed clarification is consistent with section 405(h) of SMCRA which requires a State or Indian tribe to have an approved reclamation plan to receive a grant. 30 U.S.C. 1235(h).

Because certified and uncertified States and Indian tribes will receive funding from different sources (the Fund and Treasury funds) and for different purposes, we expect that their reclamation plans may vary in scope and content. For example, prior balance replacement funds provided to uncertified States and Indian tribes must be used for the purposes of section 403 of SMCRA and are not subject to the Priority 3 reclamation restrictions under section 402(g)(7). Because we have historically interpreted section 403 of SMCRA to mean that expenditures must “reflect the * * * priorities in the order stated,” the reclamation plans for

uncertified programs may reflect different approaches to addressing Priority 3 problems with prior balance replacement funds.

Under these proposed rules, the reclamation plans for certified programs will potentially show an even greater range of variability with little specificity required beyond undertaking the coal work necessary to maintain certification. In addition, if certified States and Indian tribes choose to conduct noncoal reclamation in accordance with Part 875 using certified in lieu funds or prior balance replacement funds, their reclamation plan must continue to provide all of the information and the assurances that are central to operating under the Part 875 umbrella. Only under these circumstances could State or Indian tribe noncoal reclamation activities continue to enjoy the protection of the limited liability provisions of § 875.19 for those efforts.

On the other hand, certified programs may also modify their reclamation plans to disclose how they would commit their grant funding to purposes other than noncoal reclamation in accordance with Part 875. In such instances, reclamation plans must contain the basic information needed for these programs to continue to receive grants, disclose how any existing or newly discovered coal problems will be addressed, and contain descriptions in sufficient detail to demonstrate that activities to be funded do not fall under the reclamation objectives of subchapter R.

Because our proposed changes and clarifications under this and other Parts represent a change in application of reclamation plan requirements, we are seeking your comments on how we should implement the Part 884 requirements for certified and uncertified States and Indian tribes. We would like your comments on the types of information you believe that uncertified programs and certified programs should maintain in approved reclamation plans.

Definitions (§ 884.5)

We propose to add a new section to Part 884 to include the definition of the term “Reclamation plan or State reclamation plan.” This definition is identical to the one contained in proposed § 872.5.

State Eligibility (§ 884.11)

Existing § 884.11 requires a State with eligible lands and water to submit a reclamation plan, which we cannot approve unless the State has an approved regulatory program that is

consistent with other requirements of SMCRA and its implementing regulations except as discussed below. We are proposing several revisions to this section. First, we are updating the citation to the definition of “eligible lands and water” because we have proposed to move that definition from § 870.5 to § 700.5. In addition, we are adding the appropriate reference to Indian tribes because section 405(k) of SMCRA authorizes the Navajo, Hopi, and Crow Indian tribes to have an approved reclamation plan without having an approved regulatory program. 30 U.S.C. 1235(k); see also 30 CFR Part 756.

More substantively, we also want to use this proposed section to clarify how Tennessee and Missouri are affected by this requirement to have and maintain a reclamation plan in light of the statutory direction under section 402(g)(8) of SMCRA, as revised by the 2006 amendments. As discussed in the preamble to § 872.26, section 402(g)(8)(A) of SMCRA provides that each State and Indian tribal reclamation program will receive a minimum amount of funding to address Priority 1 and 2 problems. Section 402(g)(8)(B) states that the minimum program make up funding will apply to Tennessee and Missouri “notwithstanding any other provision of law.” 30 U.S.C. 1232(g)(8)(B). Previously, we did not award reclamation grants to States when they no longer maintained an approved regulatory program under section 503 of SMCRA.

We believe that the 2006 amendments now mandate that Tennessee and Missouri receive minimum program make up funding under section 402(g)(8)(A), and that they should receive grants in spite of the section 405(c) requirement to have an approved State regulatory program under section 503 of SMCRA. We propose to clarify in § 884.11 that so long as Tennessee and Missouri maintain an approved reclamation program, they may receive grants and modify their reclamation plans as long as the funds are necessary according to section 402(g)(8)(A) of SMCRA. We are interested in receiving your comments on our provisions and preamble discussion relative to providing section 402(g)(8) funding to Tennessee and Missouri.

Other Uses by Certified States and Indian Tribes (§ 884.17)

The proposed revisions to paragraph (b) of this section change the grant application reference from § 886.15 to § 885.13 to be consistent with our proposal to create a new Part 885 for certified State and Indian tribal program

grant application procedures. Under our proposed regulations, certified States and Indian tribes have significant discretion in how to use certified in lieu or prior balance replacement funds. Therefore, we have changed the heading and wording of this section to reflect that greater discretion.

Part 885—Grants to Certified States and Indian Tribes

We propose to add this new Part to provide different rules for Title IV grants to certified States and Indian tribes. Previously, Title IV grants to all States and Indian tribes were administered pursuant to Part 886. This Part recognizes that the 2006 amendments gave certified States and Indian tribes broad authority and discretion over grant activities and expenditures. In proposed § 872.31, we propose that certified States and Indian tribes may spend prior balance replacement funds for the purposes established by the State legislature or the Tribal council with priority given to addressing the impacts of mineral development. In addition, § 872.34 allows certified States and Indian tribes to spend certified in lieu funds for any purpose. Because of the wide flexibility and discretion given to States and Indian tribes in the 2006 amendments, we recognize that certified States and Indian tribes should not be required to comply with all the restrictions governing uncertified States and Indian tribes using AML funds under existing Part 886. Instead, we have drafted Part 885 to reflect OSM's limited role after coal reclamation is completed.

What does this Part do? (§ 885.1)

This proposed section specifies that this Part provides procedures for grants to certified States and Indian tribes only. It includes a reference to OSM's guidance on reclamation programs (66 FR 31250), but provides it as an optional information source that certified States and Indian tribes may use if they choose to conduct reclamation projects.

Definitions (§ 885.5)

We propose this section to include definitions of the terms "award," "distribute," and "reclamation plan or State reclamation plan." These definitions are identical to those in proposed § 872.5.

Information Collection (§ 885.10)

The information collection section refers to all Title IV grants because we currently have an information collection clearance from OMB for existing Part 886, which covers all Title IV grants to all eligible certified and uncertified

States and Indian tribes. We propose to change Part 886 by limiting it to grants to uncertified States and Indian tribes and to add new Part 885 for grants to certified States and Indian tribes. Though the information collection burden for grants will be split between the two Parts, the total burden will remain the same. We expect to notify OMB of the change and to reflect both Parts in future clearance actions.

Who is eligible for a grant? (§ 885.11)

This proposed section establishes that only certified States or Indian tribes with an approved reclamation plan are eligible for grants under this Part. We believe that certified States and Indian tribes are still required by section 405 of SMCRA to have an approved reclamation plan in order to receive grants under SMCRA.

What can I use grant funds for? (§ 885.12)

This proposed section describes how you, a certified State or Indian tribe, may use funds awarded in Title IV grants. Paragraph (a) proposes that grant funds awarded to certified States and Indian tribes can only be used for activities authorized in SMCRA and either included in your reclamation plan or described in your grant application. The description in the plan or application may be very general; for example, we expect that a certified State could amend its plan to specify that it will expend prior balance replacement funds for purposes established by the State legislature, with priority given to addressing the impacts of mineral development. In addition, we propose to include the option of describing activities in the grant application in order to provide you with a method to request funds under the new authorities in the 2006 amendments before your plan has been amended. This paragraph also allows you to choose to use these grant moneys to administer your program.

Paragraph (b) provides that you may use grant funds in the ways established for each type of funding you receive. It describes the types of funds and refers you to the sections in Part 872 of this chapter describing how you may use the various types of funds. We expect most funding for certified States and Indian tribes to come from prior balance replacement funds and certified in lieu funds. We are including a provision in this paragraph to allow you to receive and use other moneys from the Fund because we recognize that you may still have State share or Tribal share funds that were distributed to you before October 1, 2007, but not awarded or

expended. We do not plan to use the provision in section 401(f)(3)(B) of SMCRA that certified States and Indian tribes are no longer eligible to receive State or Tribal share funds after October 1, 2007, retroactively to take back funds that were already distributed to you before that date. These moneys from the Fund will still be subject to noncoal reclamation rules in Part 875.

Paragraph (c) proposes that you may use grant funds for any costs determined to be allowable under OMB's cost principles.

What are the maximum grant amounts? (§ 885.13)

Proposed paragraph (a) allows you to apply for a grant of any or all available funds at any time.

Paragraph (b) states how we determine the amount of Title IV funds available to your State or Indian tribe, which is:

- The current annual AML distribution;
- Plus any funds distributed in previous years that were not awarded in a grant;
- Plus any funds distributed in previous years that were awarded but were subsequently deobligated from a grant; but
- Minus any funds already awarded to you this fiscal year.

Paragraph (c) provides that current FY funds will not be available for award until after we complete the annual distribution, which will occur after we receive fee collections for coal produced in the final quarter of the previous fiscal year.

Paragraph (d) requires us to give you current information on the amounts and types of funds that are available for award. In the immediate future, we expect to meet this requirement by providing a report similar to our current share balance report to you whenever you request it, but the report and the process will likely change over time. If you have suggestions about how we can better meet your financial information needs, we encourage you to comment.

How long is my grant? (§ 885.14)

The performance period of your grant will be the period of time you request in your grant application. This proposed section does not establish any requirements for how long your grants should be or how many grants you may have open at any time. The proposed rule would allow you to change the pattern under Part 886 of annual awards of new grants with one year for administrative costs and three years for project costs. However, we are concerned about the administrative

burden of managing grants which are open for very long periods. We would appreciate your comments on this proposal. If we were to set a period limitation, would you prefer 3 years, 5 years, 10 years, or some other period?

How do I apply for a grant? (§ 885.15)

In this section, we are proposing the application procedures for certified States and Indian tribes to receive Title IV grant awards. Our goal is to make these procedures as brief and simple as possible. We encourage your suggestions for further streamlining these procedures.

Paragraph (a) mandates that you must use the application forms and procedures that we specify. We are not proposing to specify in these rules exactly what information we will require because the information we need is likely to evolve over time based upon changing laws and OMB requirements for Federal grants. Based on current grant requirements, we expect that your current application will include:

(1) Cover page, the government-wide SF-424 form or an electronic equivalent, with a signature or electronic approval, and summary information about you and the proposed project, which we need to complete reports which we are required to make public on all assistance awards;

(2) High-level budget breakdown separating the award into general categories or subaccounts, such as noncoal reclamation costs and non-reclamation activity costs, which we need to enter the award into our accounting system and generate national information on Title IV program funds;

(3) Narrative explanation of your program, which may be as brief as “carry out our approved reclamation plan”; and

(4) Certifications and assurances required by law. You must certify that you meet legal requirements for lobbying, drug-free workplace, and debarment and suspension. You must assure us that you will comply with Federal laws and regulations such as nondiscrimination statutes.

Paragraph (b) requires us to award your grant agreement as soon as practicable, but no later than 30 days after we receive your complete application. This timeline is reduced from 60 days in Part 886 for uncertified States and Indian tribes because we expect it will take us less time to process awards to you. Paragraph (c) proposes that if your application is not complete, we must notify you as soon as practicable of what additional information we need to process the

award. Paragraph (d) proposes that you agree to perform the grant in accordance with SMCRA, all applicable Federal laws, including nondiscrimination statutes, and applicable Federal regulations, including those issued by OMB and Treasury.

After OSM approves my grant, what responsibilities do I have? (§ 885.16)

This proposed section covers the formal grant agreement and your operations under it. Paragraph (a) requires us to send you a written grant agreement when we award you a grant. The agreement sets out the terms of the award, such as the amount of funds and the grant beginning and ending dates. Paragraph (b) provides that you may subgrant functions and funds to other organizations, but that you will still be responsible for administration of the grant, including funds and reporting. Paragraph (c) provides that funds are obligated when we approve the grant agreement. It goes on to provide that you accept the grant by starting work or drawing down funds under it. This is a change from the procedure in the existing Part 886 that requires you to countersign the award and return it to us to document your acceptance of the grant.

In paragraph (d), we are proposing that you are responsible for ensuring that all applicable laws, clearances, permits, or requirements are met before you expend funds. This provision is intended as a new requirement for certified States and Indian tribes conducting activities other than coal reclamation under our regulations in Part 874 of this chapter. A certified State or Indian tribe has very wide discretion over the use of grant funds. When you conduct activities other than coal reclamation as necessary to maintain certification, you will decide which activities to fund. Because no Federal decision authorizing individual expenditures will be made, OSM will not conduct or approve NEPA or other clearance procedures for such activities. In contrast, paragraph (e) proposes that when you reclaim coal projects under our regulations in Part 874, we are jointly responsible with you for compliance with NEPA and any other laws, clearances, permits or requirements. This alternate provision is the same as the existing requirement for grants under Part 886. We believe that OSM has responsibility and involvement for compliance matters only for coal reclamation projects meeting our regulations in Part 874.

Proposed paragraph (f) requires that public facilities constructed with grant funds should use fuel other than

petroleum or natural gas to the extent technologically and economically feasible. This requirement is included in these rules because of Executive Order 12185, which is applicable to all Federal funds. Proposed paragraph (g) requires you not to commit or spend more funds than we have awarded. It provides that our award of a grant does not obligate us to award continuation grants or grant amendments providing more funds to cover cost overruns. This does not affect our annual mandatory distributions to you under section 411(h) of SMCRA.

How can my grant be amended? (§ 885.17)

This proposed section describes the procedures to amend an existing grant. In paragraph (a), we define an amendment as a change to the terms or conditions of your grant agreement. We note that either you or we may initiate an amendment action. Paragraph (b) requires either you or us to inform the other in writing as soon as practicable when an amendment becomes necessary. Paragraph (c) requires that all requirements and procedures for grant amendments follow the “Grants Common Rule.” Among other matters, the Grants Common Rule includes provisions about what types of changes do and do not require our approval. Proposed paragraph (d) requires us to award your amendment within 20 days of receiving your request. This timeline is reduced from 30 days in Part 886.

What audit, accounting, and administrative requirements must I meet? (§ 885.18)

This proposed section requires you and us to follow standard procedures from OMB for grants management actions. We propose to adopt these procedures as they stand without adding any additional agency or program requirements. Paragraph (a) requires you to comply with OMB’s audit requirements. Paragraph (b) requires you to follow the procedures in the “Grants Common Rule” for accounting, advance or reimbursement cash payments, records, and property.

What happens to unused funds from my grant? (§ 885.19)

This proposed section describes how we will handle any funds awarded in grants but not expended. Unused funds must be taken out of the completed grant when we close it out. At your request, we will either award the funds in a new grant or in a grant amendment to increase funding in an existing grant. Because section 402(i)(4) of SMCRA provides that Treasury funds for payments under sections 411(h)(1) and

(2) will remain available until expended, any distributed funds that you do not request or expend in an award will be reserved for use only by your State or Indian tribe until you do expend them. 30 U.S.C. 1232(i)(4).

What must I report? (§ 885.20)

This proposed section describes the information you must report to us about your grant. This proposal attempts to reduce reporting requirements to the minimum information we need in order to report the accomplishments and expenditures of the national Title IV program. We encourage you to comment with any suggestions for streamlining these procedures.

Paragraph (a) mandates that you annually report to us about each of your grants. You must report performance information, telling us what your program has accomplished, and financial information, telling us what grant funds your program has spent. Proposed paragraph (b) requires you to report performance and financial information to us at the end of each grant so that we can close out the grant in our system. Proposed paragraph (c) requires you to maintain a current list in the AML inventory of any known AML problems. Paragraph (1) requires you, if you complete any mine reclamation projects, to report project accomplishments with grant funds in the AML inventory annually as required by section 403(c) of SMCRA. Paragraph (2) reflects the new requirement in section 403(c) that we must approve proposed amendments to the AML inventory made by States and Indian tribes. 30 U.S.C. 1233(c). The provision is included here because it is possible that certified States and Indian tribes will need to make amendments to the AML inventory. In this paragraph, we are proposing to define “amendment” to mean any new coal problem under section 403(a) or section 403(b) of SMCRA that is added to the system after December 20, 2006. We do not intend for this provision to require our approval to add noncoal problems, but if you conduct projects under Part 875 you must enter them in the AML inventory.

What happens if I do not comply with applicable Federal law or the terms of my grant? (§ 885.21)

This section proposes that if you fail to comply with your grant award or a Federal law or regulation, we will take appropriate action. The Grants Common Rule provides remedies for noncompliance including withholding cash payments, suspending or terminating the grant, and taking other

legal actions. We must follow the procedures in the Grants Common Rule when we take any enforcement action.

When and how can my grant be terminated for convenience? (§ 885.22)

This section proposes to allow either you or us to terminate the grant for convenience if that should become appropriate. We must follow the procedures in the Grants Common Rule.

Part 886—Reclamation Grants to Uncertified States and Indian Tribes

This Part describes the procedures for you, the uncertified State or Indian tribe, and for us, OSM, to use in applying, awarding, managing, and closing grants authorized by SMCRA, as revised by the 2006 amendments. Existing Part 886 covered all reclamation grants, but because we are proposing a new Part 885 for grants to certified States and Indian tribes, we propose to limit this Part to grants to uncertified States and Indian tribes only. Throughout this Part, we changed section titles to a question format in order to make it easier to use.

What does this Part do? (§ 886.1)

In this section, we added “uncertified” to limit this Part to grants to uncertified States and Indian tribes. We updated the reference to “OSM’s Final Guidelines for Reclamation Programs and Projects” from the 1980 version in the existing regulations to the current version published in 2001. 66 FR 31250. In addition, we reworded this section using plain English.

Authority (§ 886.3)

We propose to delete this section because it is unnecessary and duplicative. Information about grant amounts is provided in proposed § 886.13.

Definitions (§ 886.5)

We propose to add a new section to Part 886 defining the terms “award,” “distribute,” and “reclamation plan or State reclamation plan.” These definitions are identical to those in proposed § 872.5.

Information Collection (§ 886.10)

We propose to reword this paragraph using plain English and to use the current format approved by OMB. It describes OMB’s approval of information collections under Part 886, our use of that information, and the estimated reporting burden associated with those collections. In the future, these information collections will apply to fewer States and Indian tribes because of the new Part 885. We expect

to notify OMB of the change and to reflect both Parts in future clearance actions.

Who is eligible for a grant? (§ 886.11)

We added language to this paragraph to specify that this Part applies to grants to uncertified States and Indian tribes only. This Part will no longer apply to States and Indian tribes that have certified completion of coal reclamation under section 411(a) of SMCRA and will receive grants under the new Part 885.

What can I use grant funds for? (§ 886.12)

We propose to reword existing paragraph (a) using plain English. We also propose to move the existing provision about OMB cost principles from this paragraph to new paragraph (e). In proposed paragraph (b), we reworded the provision about our reclamation grants. We also propose to move the existing provision about fuels to be used in public facilities to proposed § 886.16(f), because it is more closely related to that section than to the main topic of this paragraph. We propose to add a new paragraph (c) to this section requiring you to use each type of funds according to the provisions in Part 872 of this chapter. The paragraph lists each type of funds that may be awarded in an AML grant to an uncertified State or Tribe and references the section number which governs its use. We propose to move existing paragraph (c) to paragraph (d), reword it using plain English, and correct a spelling error. Finally, we propose to add new paragraph (e) requiring you to use grant funds only for costs that are allowable according to OMB cost principles in Circular A–87. This expands the provision in existing paragraph (a) that costs for services and materials from other State, Federal and local agencies are governed by the cost principles. OMB cost principles must be used to determine the allowability of costs from all sources.

What are the maximum grant amounts? (§ 886.13)

We propose to move existing § 886.13 to proposed § 886.14 and to add this new section establishing and clarifying our current grant procedures. Proposed paragraph (a) allows you to apply for a grant of any or all available funds at any time. Paragraph (b) states how we determine the amount of funds available to your State or Tribe:

- The current annual AML distribution;
- Plus any funds distributed in previous years that were not awarded in a grant;

- Plus any funds distributed in previous years that were awarded but were subsequently deobligated from a grant; but

- Minus any funds already awarded to you this fiscal year.

Proposed paragraph (c) provides that current FY funds will not be available for award until after we complete the annual distribution, which will occur after we receive fee collections for coal produced in the final quarter of the previous fiscal year. This provision reflects the change from appropriated funding to mandatory distributions as established in the 2006 amendments.

Proposed paragraph (d) requires us to give you current information on the amounts and types of funds that are available for award. In the immediate future, we expect to meet this requirement by providing a report similar to our current share balance report to you whenever you request it, but the report and the process will likely change over time. If you have suggestions about how we can better meet your financial information needs, we encourage you to comment.

How long will my grant be? (§ 886.14)

We propose to delete existing § 886.14, "Annual submission of budget information," which requires you to submit budget estimates and information for our use in preparing appropriation requests for reclamation grants. We no longer need estimates for appropriation requests. Instead we propose to recodify existing § 886.13 as § 886.14 and revise it to reflect the way we are currently organizing AML grants. Since 1993, we have used the "simplified" grants concept to combine all AML grant funding in a single annual grant. Each grant normally lasts for three years. Each grant has subaccounts for different functions such as administration costs, coal reclamation projects, water projects, and emergency administration and project costs. These subaccounts remain open for different periods of time. Administrative accounts normally stay open for one year, so that only one account is active at any one time. Project cost accounts normally last for three years to allow for planning, design, construction, and completion of reclamation projects.

Proposed § 886.14(a) is the existing § 886.13(b) reworded using plain English. Proposed § 886.14(b) establishes three years as the normal grant period. Proposed § 886.14(c) allows us to extend the grant period if you request it. We will normally extend a grant once for up to one additional year, following our established practice.

We may allow more or longer extensions in special or unusual circumstances. Proposed § 886.14(d), which establishes one year as the normal period for administrative accounts, is the existing § 886.13(a) reworded using plain English.

We also propose to add § 886.14(e) to allow us to lengthen the time period for new or amended AML grants that contain State share or Tribal share funds distributed during FY 2008, 2009, and 2010 for up to five years at your request. We proposed this revision to comply with the new provision in section 402(g)(1)(D) of SMCRA that requires that State share and Tribal share funds that are not expended within 3 years after the date of any grant award (except for grants during FY 2008, 2009, and 2010 to the extent not expended within 5 years), will be transferred to historic coal share funds. 30 U.S.C. 1232(g)(1)(D).

An alternative approach to this provision would be to award all grants in FY 2008–2010 for five years. However, we expect that in many cases uncertified States and Indian tribes will be able to expend the State or Tribal share funds within the normal three year grant period. If we were to automatically award all grants to five years, the administrative burden on you and us to track, manage, and report on open grants would increase. We believe that our proposal to allow new awards or extension amendments for up to five years at your request when you need the additional time will eliminate an unnecessary burden in managing all the grants that can be completed sooner.

How do I apply for a grant? (§ 886.15)

In paragraph (a), we propose to remove a provision that a preapplication is not required under certain conditions. We do not require a preapplication for AML grants. In paragraph (b), we propose to remove the requirement that we must prepare and sign the grant agreement because this provision was duplicated in § 886.16, which is a more appropriate location. We reworded this entire section using plain English.

After OSM approves my grant, what responsibilities do I have? (§ 886.16)

We revised this entire section to reflect the electronic processing of our grant awards, to remove references to signatures and other paper-based procedures, and to use plain English. In addition, we added language to paragraph (e) to reflect the 2006 amendments' changes to the AML inventory under section 403(c) of SMCRA. We describe specific changes to the content of this regulation below.

To begin, we propose revising paragraph (a) to remove the requirements that a grant agreement include a statement of the work to be covered and a statement of required approvals and conditions. We removed these requirements because our electronic grant system does not display such information clearly and effectively in agreement documents. All required information is normally included in your application and reclamation plan, as well as our regulations and directives.

Next, we propose to revise paragraph (c) in order to remove the requirement that you countersign the grant agreement within 20 days to accept the award or we will deobligate the grant amount. Instead, we propose that you accept the agreement when you initiate work under the grant or first draw down any funds. We made this change when we implemented our electronic grant system to eliminate unnecessary processing.

We propose to revise paragraph (d) to clarify our existing ATP process. Although funds are obligated when the grant is awarded, you must not expend construction funds on an individual project until you and we have ensured that we are in compliance with NEPA and all other applicable laws and requirements. We send you a written ATP to confirm that we have completed the compliance actions and that you may expend funds on construction of that project.

We propose revising paragraph (e) to reflect section 403(c) of SMCRA that now requires proposed amendments to the AML inventory that are made by States and Indian tribes to be approved by OSM, acting for the Secretary. 30 U.S.C. 1233(c). In this paragraph, we are proposing to define "amendment" to mean any new coal problem under section 403(a) or section 403(b) of SMCRA that is added to the system after December 20, 2006. In addition, we are proposing that the term "amendment" would also include instances where you, the State or Indian tribe, elevate a Priority 3 coal problem contained in the AML inventory to either Priority 1 or Priority 2 status. We are proposing these changes to be consistent with section 403(c) of SMCRA, and also section 402(g)(2), which requires us to ensure strict compliance by uncertified States and Indian tribes with the priorities described in section 403(a) of SMCRA. Problems will normally be approved and entered in the AML inventory when identified, before you begin development, design and construction activities, but our approval may occur during the ATP process if the problem

has not previously been approved. Non-emergency problems must be approved and entered in the AML inventory before we approve the ATP.

We do not intend for this provision to require our approval for a 30% AMD set-aside, or noncoal work conducted by uncertified States under section 409 of SMCRA, or for salaries or administrative costs of the AML program. With the exception of those instances where Priority 3 inventory problems are being elevated to a Priority 1 or Priority 2, we also do not intend for this provision to require our approval for subsequent revisions to coal problems once they have been included in the AML inventory. This provision does not change existing procedures where States and Indian tribes routinely update the AML inventory at the time projects are funded or completed.

Under § 886.16(e)(1), we are proposing that our approval of an emergency project under section 410 of SMCRA, which is our ATP for the emergency project, also constitutes our approval to place the coal problems being addressed by the emergency into the AML inventory. We are proposing this process for emergency projects because the declaration of an emergency by us confirms that the problem is a danger to the public health, safety, or general welfare under section 410(a)(1) of SMCRA.

In paragraph (e)(2), we propose to add the approval requirement in section 403(c) so that you cannot use funds for project development, design, or construction of new coal reclamation projects before we have approved the problems for inclusion in the AML inventory. This paragraph would apply only to coal reclamation problems added to the AML inventory after December 20, 2006. We believe this proposal helps fulfill our responsibility under section 402(g)(2) to ensure strict compliance by uncertified States and Indian tribes with the priorities described in section 403(a) of SMCRA. 30 U.S.C. 1232(g)(2). Requiring AML coal problems to be in the AML inventory prior to the development of designs will promote coordination between us and uncertified States and Indian tribes early in the planning process. This early coordination will help eliminate the potential for agency conflict after property owners have been promised reclamation and substantial design funding has been spent. Finally, requiring AML coal problems to be in the AML inventory before the development of designs would spread out our review workload and potentially expedite later project ATP reviews

because field staff would already be familiar with the proposed project area.

The provision in paragraph (f) was moved here from the last sentence of existing regulation § 886.12(b) because we believe it is more appropriate in this section as a separate paragraph. The requirement that public facilities constructed with grant funds should use fuel other than petroleum or natural gas to the extent technologically and economically feasible is from Executive Order 12185 and applies to all Federal funds.

In proposed paragraph (g), we added an introductory sentence advising you that you must not expend more funds than we have awarded. The remainder of the paragraph is existing § 886.16(f), which provides that we are not committed to award additional funds for cost overruns.

How can my grant be amended? (§ 886.17)

We propose to move the requirement that grant amendment procedures must follow the Grants Common Rule from the last sentence of existing paragraph (a) to new paragraph (c). In paragraph (b), we deleted the second sentence, with specific conditions which require an advance amendment, because we believe it is unnecessary. The Grants Common Rule provides sufficient information on amendment requirements, and we will address how these requirements apply to many specific types of grant changes in our directives. We renumbered existing paragraph (c) to (d). We also reworded this section using plain English.

What audit and administrative requirements must I meet? (§ 886.18)

We propose to move and divide existing § 886.18 into proposed §§ 886.20, 886.23, 886.24, 886.25, and 886.26. Proposed § 886.18 is a combination of two short existing sections, §§ 886.19 and 886.20. Proposed paragraph (a) contains the audit requirement from existing § 886.19, which we updated by deleting the reference to the General Accounting Office and adding OMB Circular A-133. Paragraph (b) is from the existing § 886.20 on administrative procedures. We deleted the existing requirement that you use our property inventory form because the form is now optional. In addition, this section now refers to the Grants Common Rule, which provides sufficient information on property management requirements. Specific requirements and forms will be addressed in our directives. We reworded this section using plain English.

How must I account for grant funds? (§ 886.19)

As explained above, we moved existing § 886.19 to proposed 886.18(a). We moved the content of existing § 886.22, "Financial management," to this proposed section in order to group the management sections together. We also reworded it using plain English.

What happens to unused funds from my grant? (§ 886.20)

We propose to move existing § 886.20 to proposed § 886.18(b) and add a new section here to clarify how we will treat unused grant funds. However, portions of this section are based on existing § 886.18(a)(2) and on the fourth and fifth sentences of existing §§ 872.11(b)(1) and (b)(2). Grant funds may be left unexpended at the end of a grant due to changes during the grant period such as increases or decreases in project scope or reclamation costs. Changes may also occur after the end of a grant period that reduce the total funds expended under the grant, such as the receipt of funds from the sale of property. We also consider unawarded funds, moneys which have been distributed to a State or Indian tribe but not awarded in a grant, as unused funds.

Proposed paragraph (a) explains that we will deobligate all unexpended funds from a completed grant agreement in order to close it out and describes how we will treat unexpended funds. Paragraph (a)(1) is based on existing § 886.18(a)(2), which allows us to reduce your grant if you fail to obligate funds within three years of the grant award. We propose to modify this provision to address section 402(g)(1)(D) of SMCRA, as revised in the 2006 amendments, which mandates that State and Tribal share funds that are not spent within 3 years, or 5 years for funds distributed in FY 2008, 2009, or 2010, must be made available for expenditure as historic coal funds. 30 U.S.C. 1232(g)(1)(D). Our proposed paragraph (1) of this section requires us to transfer any State share funds or Tribal share funds that uncertified States and Indian tribes do not expend within 3 years, or 5 years for FY 2008, 2009, or 2010 funds, from that State or Indian tribe to historic coal funds. We will distribute transferred funds to uncertified States and Indian tribes at the next annual distribution using the prescribed historic coal formula described in proposed § 872.22. In proposed paragraph (a)(2), we propose to hold any unused Federal expense funds, such as State emergency program funds, for distribution to any State or Indian tribe which needs them for the specific

activity for which Congress appropriated the funds. Finally, paragraph (3) specifies that unused funds of all other types will be made available for inclusion in a grant to the State or Indian tribe for which we originally distributed the funds.

Paragraph (b) provides that we will transfer any State or Tribal share funds that have not been awarded in a grant within three years of the date we distributed them to you, or five years for funds distributed in FY 2008, 2009, or 2010, to historic coal funds in the same way that we transfer unused funds under paragraph (a)(1). We are proposing to add this paragraph because we believe that funds that have not been requested and approved for award within 3 or 5 years of the distribution date are unneeded and should be transferred to other States and Indian tribes that can use them more efficiently. We are interested in your comments on this proposal.

What must I report? (§ 886.21)

We propose to delete existing § 886.21 because this topic is addressed in § 886.12. This proposed section was moved from § 886.23 to improve readability. The existing paragraph (a) in § 886.23 required you to submit to us every year the reporting forms that we specified. We are proposing to replace this paragraph with a requirement that each year you report to us the program performance and financial information that we specify. We propose not to establish a uniform method for you to submit this information because allowing you to use various forms, formats, and methods to submit your annual reports will make it less of a burden on you.

The existing paragraph (b) combines two different reporting requirements by requiring you to submit an OSM-76 inventory form upon project completion and any other closeout reports we specify. We propose to clarify this requirement by separating the AML inventory and grant closeout requirements. Proposed paragraph (b) covers the reports you must provide us upon completion of each grant. These are final performance and financial reports, as well as property and any other reports that we specify. Proposed paragraph (c) requires you to update the AML inventory upon completing each reclamation project. Removing this item from the grant closeout requirements clarifies that you must update the AML inventory as you complete each project rather than waiting until the grant is completed.

What records must I maintain? (§ 886.22)

As proposed, existing § 886.22 was moved to § 886.19. This proposed section was moved from existing § 886.24 and reworded using plain English. To clarify that this section covers all records, programmatic as well as accounting, we added a sentence noting that your records must support all the information you reported to us for your grant.

What actions can OSM take if I do not comply with the terms of my grant? (§ 886.23)

We propose to move existing § 886.23 to proposed § 886.21 and to divide the existing § 886.18, "Grant reduction, suspension and termination," into five sections for clarification. One section was already described in proposed § 886.20. This is the first of four additional proposed new sections, which will be followed by §§ 886.24, 886.25, and 886.26.

Proposed paragraph (a) of this section begins with the existing paragraph § 886.18(b), which lists various actions we may choose to take for noncompliance, ranging from temporarily withholding cash payments to terminating your grant. We deleted the existing paragraph § 886.18(a)(1), which duplicated some of these provisions.

Proposed § 886.23(b) is based on existing paragraph (a)(3) and requires us to terminate your reclamation grant if we terminate your regulatory administration and enforcement grant. We propose to modify this to state the exceptions to this requirement provided in SMCRA for the States of Missouri and Tennessee in section 402(g)(8)(B), and for the Navajo, Hopi, and Crow Indian tribes in section 405(k). In addition, we reworded this entire section using plain English.

Proposed § 886.23(c) is moved from existing § 886.18(a)(5). Likewise, proposed § 886.23(d) is moved from existing paragraph (a)(6). This proposed paragraph is modified to require us to take appropriate remedial action for overdue reports up to terminating the grant, rather than providing no option but termination. Proposed § 886.23(e) was moved from existing § 886.18(a)(7). Similarly, proposed § 886.23(f) was moved from existing § 886.18(a)(4). These paragraphs were reworded using plain English.

What procedures will OSM follow to reduce, suspend, or terminate my grant? (§ 886.24)

We propose to move existing § 886.24 to § 886.22. This proposed § 886.24 is

another section we have separated from existing § 886.18. This section was taken from the existing § 886.18(c)(1) through (c)(6) and reworded using plain English. Existing § 886.18(c)(7) was taken out of this section and moved to proposed new § 886.26 because termination for convenience does not require the procedures for adverse actions provided in this section.

How can I appeal a decision to reduce, suspend, or terminate my grant? (§ 886.25)

Under our proposal, existing § 886.25 was reworded and renumbered as § 886.27. This section, split from existing § 886.18, was taken from paragraph (d) of that section. In addition, the final appeal authority was changed from the Secretary to the Department of the Interior's Office of Hearings and Appeals. The section was reworded using plain English.

When and how can my grant be terminated for convenience? (§ 886.26)

This proposed new paragraph was separated from the existing § 886.18(c)(7) to distinguish it from the unilateral reduction, suspension, or termination procedures in that section. A termination for convenience is a joint decision and procedures are much simpler.

What special procedures apply to Indian lands not subject to an approved Tribal reclamation program? (§ 886.27)

This proposed new section was renumbered from § 886.25. The reference in paragraph (d) to a particular type of funding in Part 872 was also updated.

Part 887—Subsidence Insurance Program Grants

Throughout this Part, we added references to Indian tribes to clarify that Indian tribes may choose to establish a subsidence insurance program under the same rules as States.

Scope (§ 887.1)

We added references to Indian tribes wherever the existing rule says States.

Authority (§ 887.3)

We propose to delete this section because it is unnecessary and duplicative.

Definitions (§ 887.5)

We propose to expand the term "State administered" defined in this section to "State or Indian tribe administered." We also propose to reword two definitions ("Self-sustaining" and "State or Indian tribe administered") to add other

references to Indian tribes and to use plain English. We also propose to include the definition of the term “reclamation plan or State reclamation plan” as it is defined in proposed § 872.5.

Information Collection (§ 887.10)

We propose rewording this paragraph to add references to Indian tribes, to use plain English, and to use the current format approved by the OMB. This paragraph describes OMB’s approval of information collections in Part 887, our use of that information, and the estimated reporting burden associated with those collections.

Eligibility for Grants (§ 887.11)

The existing section allows only State or Tribal share funds to be used for subsidence insurance programs. We propose adding language to allow certified States and Indian tribes to fund this program with prior balance replacement funds if their State legislature or Tribal council establishes that use, or with certified in lieu funds.

Coverage and Amount of Grants (§ 887.12)

We are proposing to revise paragraph (b) to add a reference to the proposed new Part 885 for grants to certified States and Indian tribes. We are proposing to revise paragraph (c) to clarify that the funding limit of \$3 million is cumulative over the lifetime of the program. In addition, we also reworded this section using plain English.

Grant Period (§ 887.13)

Grant Administration Requirements and Procedures (§ 887.15)

We reworded these sections using plain English and updated § 887.15 to include proposed Part 885.

IV. Public Comment Procedures

Written Comments: If you submit written comments, they should be specific, confined to issues pertinent to the proposed rule, and explain the reason for any recommended changes. We appreciate all comments, but those most useful and likely to influence decisions on any revisions will be those that either involve personal experience or include citations to and analyses of SMCRA, its legislative history, its implementing regulations, the 2006 amendments, case law, or other pertinent State or Federal laws or regulations.

We cannot ensure that comments received after the close of the comment period (see **DATES**) will be included in the docket for the rulemaking and

considered. Comments sent to an address other than those listed above (see **ADDRESSES**) will not be included in the docket for the rulemaking.

Public Availability of Comments: Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Public hearings: We will only hold a public hearing on the proposed rule upon request. The time, date, and address for any hearing will be announced in the **Federal Register** at least 7 days prior to the hearing.

Any person interested in participating in a hearing should inform Mr. Lytton (see **FOR FURTHER INFORMATION CONTACT**), either orally or in writing by 5 p.m., Eastern Time, on July 11, 2008. If no one has contacted Mr. Lytton to express an interest in participating in a hearing by that date, a hearing will not be held. If there is only limited interest, a public meeting or teleconference rather than a hearing may be held, with the results included in the docket for this rulemaking.

The public hearing on the specified date will continue until all persons scheduled to speak have been 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 all persons scheduled to speak and persons present in the audience who wish to speak have been heard. To assist the transcriber and ensure an accurate record, we request, if possible, that each person who testifies at a public hearing provide us with a written copy of his or her testimony.

Public meeting: If there is only limited interest in a hearing at a particular location, a public meeting or teleconference, rather than a public hearing, may be held. People wishing to meet with us to discuss the proposed rule may request a meeting by contacting Mr. Lytton (See **FOR FURTHER INFORMATION CONTACT**). All meetings will be open to the public and, if possible, notice of the meetings will be posted at the appropriate locations listed under **ADDRESSES**. A written summary of each public meeting or teleconference will be made a part of the docket for this rulemaking.

V. Procedural Determinations

Executive Order 12866—Regulatory Planning and Review

This proposed rule is considered an “economically significant regulatory action” under the criteria of section 3(f) of Executive Order 12866 and has been reviewed by the Office of Management and Budget. Based on the criteria for an “economically significant regulatory action” found in section 3(f), we have made a preliminary determination that:

a. The rule may raise novel legal or policy issues arising from legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

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

c. The rule would not materially alter the budgetary impacts of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients. However, as discussed below, grants to States and Indian tribes have increased, as required by the provisions of the 2006 amendments.

d. The rule would 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. The rule would align our regulations with statutory provisions contained in the 2006 amendments pertaining to the collection of reclamation fees and the distribution of money from the Fund and Treasury in the form of mandatory grants to States and Indian tribes. The provisions of the 2006 amendments have an annual effect on the economy of \$100 million or more. Coal operators subject to the extension of the fee and the new rates received actual notice before they became effective. These new fees have already been collected for the two quarters beginning October 1, 2007 and ending March 31, 2008. In addition, we have already distributed approximately \$274 million in FY 2008 mandatory grants to the States and Indian tribes.

Assessment of Potential Costs and Benefits

Executive Order 12866 requires OSM to conduct an assessment of the potential costs and benefits of any regulatory action deemed significant under Executive Order 12866. OMB Circular A–4 provides guidance to Federal agencies on the development of a regulatory analysis. It requires us to identify a baseline because benefits and costs are defined in comparison with a clearly stated alternative. OMB has

stated that “this normally will be a ‘no action’ baseline: what the world will be like if the proposed rule is not adopted.” OMB Circular A-4, Regulatory Analysis (Sept. 17, 2003). As previously stated, the new fee rates have gone into effect and are being paid and the grant distributions mandated by the 2006 amendments have been made for FY 2008. These statutory changes are already in effect regardless of whether this proposed rule is finalized. For comparison purposes, OSM will use as the “no action baseline” the fee rates paid by operators and grant distribution requirements for States and Indian tribes that would have been in effect if the 2006 amendments had not been signed into law. We will refer to this as the “old law” or the “no action alternative.” The second alternative we will analyze consists of the requirements pertaining to fee collections and grant distributions to States and Indian tribes established by the 2006 amendments. We will refer to this as the 2006 amendments alternative.

The basic difference between the two alternatives is the cost to the coal operators and the Treasury and the resulting benefits quantified in terms of the acres of environmental problems that can be reclaimed. Under the old law, the fee rates that would have been in effect on October 1, 2007, would have been the rates established using the formula specified in our existing regulations at 30 CFR 870.13(b). Those fee rates would be paid for

approximately 13–14 years. They would be established before the start of each fiscal year and would be based on estimates of coal production and the amount of the interest transferred to the CBF for that year. The fees for each year would have been structured to replace the amount of money transferred to the CBF at the beginning of the year (generally the amount of interest that the Fund earns that year, subject to a \$70 million cap, with corrections for adjustments to previous transfers and differences between estimated and actual coal production in prior years). The purpose of the fee was to reimburse the Fund for the interest transferred to the CBF. Under the old law alternative, the money in the Fund would have been exhausted in approximately 13–14 years—after which time, no more money would have been available for reclamation projects and no interest would have been transferred to the CBF.

Under the old law, grants would have been made based on the amount of money appropriated each year by Congress. Uncertified States and Indian tribes would be required to use the money for AML reclamation projects. Certified States and Indian tribes would be required to use the money for noncoal reclamation as specified in existing § 875.15. Pursuant to existing § 875.15, certified States and Indian tribes could use any money that they received for reclamation projects involving the restoration of lands and water adversely affected by past mineral mining, projects involving the

protection, repair, replacement, construction, or enhancement of utilities (such as those relating to water supply, roads, and other such facilities serving the public adversely affected by mineral mining and processing practices), and the construction of public facilities in communities impacted by coal or other mineral mining and processing practices.

As explained in the preamble, the 2006 amendments both extended the reclamation fee for 14 years and provided for a two-step reduction in the amount of the fee rate from the rate originally established in 1977. The statutory fee rates were reduced by 10 percent from the levels established in 1977, for the period from October 1, 2007, through September 30, 2012. The fee rates will again be reduced by another 10 percent from the levels established in 1977 for the period from October 1, 2012, through September 30, 2021. The fee rates under 2006 amendments are specified in the proposed rule at § 870.13. The fee rates for 2007–2012 will range from 31.5 cents per ton down to 9 cents per ton.

While the rates established by the 2006 amendments are lower than the 1977 rates, they are higher than the rates that would have been established under existing § 870.13(b), which would have gone into effect had the 2006 amendments not been enacted into law. Fee rates under existing § 870.13(b) for years 2007–2012 were estimated to range as follow:

Fiscal year	Fees for non-lignite coal produced by surface methods (cents per short ton)	Fees for non-lignite coal produced by underground methods (cents per short ton)	Fees for lignite coal (cents per short ton)
2007	8.5	3.7	2.4
2008	8.5	3.6	2.4
2009	7.8	3.4	2.2
2010	7.3	3.1	2.1
2011	2.6	1.1	0.7
2012	2.0	0.9	0.6

In addition to the fee rate extension, the 2006 amendments also require that:

1. Once fully phased in, the majority of the distributions to States and Indian tribes of moneys annually collected from the reclamation fee will be made outside of the appropriations process. 30 U.S.C. 1231(d).

2. All States and Indian tribes with approved reclamation programs will be paid amounts equal to their portion of the unappropriated prior balance of

State and Tribal share funds as of September 30, 2007. 30 U.S.C. 1240a(h)(1)(A). These payments are mandatory distributions from Treasury funds and will be made in seven equal annual installments that began in FY 2008. 30 U.S.C. 1232(i)(2) and 1240a(h)(1)(C). Uncertified States and Indian tribes must use these prior balance replacement funds for the purposes of section 403 of SMCRA. 30

U.S.C. 1240a(h)(1)(D)(ii). Certified States and Indian tribes must use these payments for purposes established by their State legislature or Tribal council, “with priority given for addressing the impacts of mineral development.” 30 U.S.C. 1240a(h)(1)(D)(i).

3. Subject to certain limitations, to the extent premium payments and other revenue sources do not meet the financial needs of the UMWA health care plans, all unappropriated past

interest earnings and all future interest earned by the Fund must be transferred to these plans, together with any remaining unappropriated balance in the RAMP allocation, which the 2006 amendments repealed. 30 U.S.C. 1232(h). In addition, the three UMWA health care plans are eligible to receive Treasury transfers to cover any remaining deficit, subject to certain limitations. 30 U.S.C. 1232(i).

In general, under the old law and the 2006 amendments, the type of coal reclamation problems that would be remediated, mainly by the uncertified States and Indian tribes, would be the most serious AML problems (Priority 1 and Priority 2 also referred to as "high priority" problems). High priority AML problems include:

- Clogged Streams;
- Clogged Stream Lands;
- Dangerous Piles or Embankments;
- Dangerous Highwalls;
- Dangerous Impoundments;
- Dangerous Slides;
- Hazardous or Explosive Gases;
- Hazardous Equipment or Facilities;
- Hazardous Recreational Water

Bodies;

- Industrial or Residential Waste;
- Portals;
- Polluted Water: Agricultural/

Industrial;

- Polluted Water: Human

Consumption;

- Subsidence-Prone Areas;

- Surface Burning;
- Underground Mine Fires; and
- Vertical Openings.

Under the old law, certified States and Indian tribes were required to use grant money for noncoal reclamation. Under the 2006 amendments, certified States and Indian tribes must use prior balance replacement funds for purposes established by the State legislature or Tribal council, with priority given for addressing the impacts of mineral development. Exactly what these purposes will be is undetermined at this time.

In the proposed rule, certified States and Indian tribes are allowed to use certified in lieu funds for any purpose they deem appropriate. In the preamble discussion for proposed § 872.34, we are seeking comment on an alternative which would require certified States and Indian tribes to use the money for noncoal reclamation. Under this alternative, we assume that the same types of activity would continue as are required by our existing regulations. Noncoal reclamation activities have included reclamation activities at abandoned mines affected by hard rock mining operations and sand and gravel operations. Also, in communities impacted by coal or other mineral mining, funds have been used for the construction of public facilities such as schools, hospitals, and water treatment plants. Under either alternative, we

assume that States and Indian tribes will use the money for the public good but the wide discretion given to the States and Indian tribes makes any meaningful discussion of the effects too speculative.

Summary of Costs and Benefits

The following two tables summarize the costs and benefits under the no action alternative and the 2006 amendments alternative.

Table 1 indicates the estimated costs associated with each alternative. Under the no action alternative, the cost to operators is approximately \$612 million. This sum consists of the fees that operators would pay under our current regulations at § 870.13(b). Under the 2006 amendments alternative, the estimated cost is approximately \$6.9 billion. This sum consists of: (1) The fees operators will pay under the rates established by the 2006 amendments; (2) money from the general fund of the Treasury that we are required to transfer to certified and uncertified States and Indian tribes for their share of the prior unappropriated balance; and (3) Treasury funds that will be transferred to certified States and Tribes as in lieu funds equal to 50% of fees collected on coal produced in their State or on Tribal lands. This sum does not include money that we will pay to the UMWA under the 2006 amendments because those payments are not addressed in this proposed rule. .

TABLE 1.—ESTIMATED COSTS ASSOCIATED WITH THE ALTERNATIVES FROM OCTOBER 1, 2007–SEPTEMBER 30, 2021

Alternatives	Estimated costs to operators for fees paid under the old law from October 1, 2007 thru September 30, 2021 (the 1977 fee rates at § 870.13(a) terminate on September 30, 2007; new fee rates at § 870.13(b) sufficient to replenish interest transferred to CBF take effect)	Estimated costs to operators for fees paid under the 2006 amendments from October 1, 2007 thru September 30, 2021	Estimated costs to the Federal Treasury (for prior balance replacement funds and certified in lieu funds)	Estimated total costs
	A	B	C	D
1. No Action or Old Law	\$612 million .....	.....	.....	\$612 million.
2. 2006 Amendments .....	.....	\$4.1 billion	\$2.8 billion	\$6.9 billion.

Table 2 indicates the estimated benefits expressed in acres of land reclaimed. Column A indicates the estimated total amount of money available for reclamation under each alternative. Column B indicates acres of high priority sites that need to be reclaimed under each alternative. Column C indicates the estimated acres of high priority sites that can be reclaimed with the funds available under each alternative. In Column D, D1

indicates the estimated acres of high priority coal sites that would not be reclaimed under the no action alternative because of insufficient funds. D2 indicates the estimated additional reclamation that could be achieved under the 2006 amendments. For uncertified States and Indian tribes, the additional reclamation would be at Priority 1 and 2 sites, Priority 3 sites, and noncoal reclamation. For certified States and Indian tribes, the reclamation

could be at newly discovered Priority 1, 2, and 3 coal sites, and noncoal reclamation. However, as previously discussed, under the 2006 amendments, certified States and Indian tribes may use prior balance replacement funds for purposes established by the State legislature or Tribal council, with priority given for addressing the impacts of mineral development; we are proposing in the rule that they may use certified in lieu funds for any purpose.

Therefore, the \$1.981 billion dollars that will come from Treasury funds may be used for coal and noncoal reclamation but it also may be used for other

undetermined purposes. We assume that certified States and Indian tribes will use the money for the public good, as they have in the past, but the wide

discretion given to the States and Indian tribes make any meaningful discussion of the actual benefits speculative.

TABLE 2.—ESTIMATED BENEFITS EXPRESSED IN ACRES OF LAND RECLAIMED

Alternatives	Amount of money estimated to be available for reclamation (\$ rounded in millions)	P1 and P2 sites acres identified with high priority environmental problems that need reclamation	Estimated number of acres of identified problems reclaimed with available funds	Estimated number of acres of land unreclaimed (D1) or additional reclamation possible after P1 and P2 sites completed (D2)
	A	B	C	D
1. No Action or Old Law; 1977 Fee Rates (§870.13(a)) terminate on September 30, 2007; new fee rates (§870.13(b)) sufficient to replenish interest transferred to CBF take effect.	\$2,110.4 (Source: collections prior to September 30, 2007 plus interest earned on prior collections).	210,379	157,937	(52,442).
2. 2006 Amendments Uncertified States and Indian tribes	\$6,027.6 \$4,045.7 (Source: prior balance replacement funds, 50% State share, 30% historic coal share and 3% estimated minimum program share).	210,379 208,131	210,379 208,131	210,257. 60,284.
Certified States and Indian tribes ...	\$1,981.9 (Source: prior balance replacement funds and certified in lieu funds).	2,248	2,248	149,973 (under 2006 amendments, funds are not committed to reclamation).

Note: For activity beyond FY 2023, an additional estimated amount available for reclamation of \$1.6 billion is projected to be used to reclaim an additional 106,000 acres.

As can be seen from the above tables, under the no action alternative the cost to industry would be approximately \$612 million, but there would be approximately 52,442 acres of Priority 1 and Priority 2 coal sites left unreclaimed. Under the 2006 amendments alternative, the cost to industry would be substantially greater, approximately \$4.1 billion, but that amount in combination with the \$2.8 billion in Treasury funds would be sufficient to reclaim all Priority 1 and Priority 2 sites. In addition, there would be additional funds remaining which could be used for reclamation at Priority 3 sites, for noncoal reclamation projects, construction of public facilities, and for other purposes deemed appropriate by the State or Indian tribe.

In addition to the quantifiable benefits expressed in acres reclaimed, unquantifiable benefits also result. These include:

- Reduction or elimination in health and safety problems, which would benefit nearby residents;
- Reduction or elimination of adverse environmental effects such as acid mine drainage and erosion and sedimentation;
- Improved habitat for fish and wildlife;

- Increased employment opportunities for those employed by the reclamation projects;
- An increase in the number of potential land uses at these sites and a reduction or elimination of hazardous features that are often attractive but dangerous to outdoor recreationists; and
- General increase in the quality of life in nearby communities and adjacent property values.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) requires that a Federal agency, when developing proposed and final regulations, consider the impact of its regulations on small entities. If a proposed rule is expected to have a significant economic impact on a substantial number of small entities, the agency must prepare an initial regulatory flexibility analysis. If a proposed rule is not expected to have a significant economic impact on a substantial number of small entities the agency is not required to perform an initial regulatory flexibility analysis and may certify in the rule that the rule would not have a significant economic impact on a substantial number of small entities under the RFA.

The Small Business Administration size standards for small businesses in

the coal mining industry are established by the North American Industry Classification System Codes (NAICS). NAICS classifies the “coal mining “industry under Code 2121; subsets of this sector include “Bituminous Coal and Lignite Surface Mining” code 212111; “Bituminous Coal Underground Mining” code 212112; and “Anthracite Mining” code 212113. The size standards established for each of these categories is 500 employees or less for each business concern and associated affiliates. Data available from the U.S. Census Bureau and from the Mine Safety and Health Administration indicates that over 90 percent of those engaged in coal mining operations are considered small entities.

As previously stated, it is the 2006 amendments which require coal operators to pay reclamation fees. Those subject to the fees received individual letters informing them of the fee and the extension of time during which the fee must be paid. Approximately \$135 million has already been collected. The proposed rule merely reflects the extension of our statutory authority to collect reclamation fees for an additional fourteen years. Based on these facts, the Department of the Interior certifies that the proposed rule would not have a significant economic

impact on a substantial number of small entities under the RFA.

The administrative and procedural provisions in the rule are not expected to have an adverse economic impact on the regulated industry including small entities. The increased grant funding to States and Indian tribes required by the 2006 amendments is expected to provide increased contracting opportunities for firms, including small entities, to do reclamation-related work. Further, the proposed rule is not expected to produce 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

OSM does not consider the proposed rule to be a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act for the following reasons.

a. The provisions of the 2006 amendments pertaining to the new fee rates and grant requirements are self-implementing. Coal operators subject to the new rates received actual notice of the rates and of the extension of the time during which they must be paid. They have already begun to pay the fee at the new rate, and for the two quarters beginning October 1, 2007 and ending March 31, 2008, we already collected approximately \$135 million in reclamation fees. In addition, we have already distributed approximately \$274 million in FY 2008 mandatory grants to the States and Indian tribes. The proposed rule merely aligns our regulations with the self-implementing provisions of the 2006 amendments.

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

c. The proposed rule would 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 proposed rule is not a governmental action capable of interference with constitutionally protected property rights. A takings implication assessment is not required.

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

We have reviewed the proposed rule under the criteria specified in Executive Order 13132 and have determined that the rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The proposed rule does not preempt State law, it does not impose substantial direct compliance costs on State and local governments, it does 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.

As required by section 6 of the executive order, we consulted with representatives of States and Indian tribes early in the process of developing the proposed rule. In January, February, and May 2007, we met with representatives of States and Indian tribes with approved reclamation programs at meetings hosted by the Interstate Mining Compact Commission (IMCC) and the National Association of Abandoned Mine Land Programs (NAAML) to notify the States and Indian tribes of the 2006 amendments' changes to SMCRA and to seek their input on the amendments. The IMCC and NAAML subsequently submitted joint written comments on specific provisions of the amendments. We considered all the comments we received in developing the proposed rule. The consultations and concerns that were expressed are discussed above in "II. Outreach, Guidance, and Comments." Based on input the Department received after issuance of the Solicitor's Memorandum Opinion, one or more States may object to several provisions in these proposed rules, but we believe that the 2006 amendments

and other applicable statutes mandate adoption of these particular provisions. We do not have the option of adopting any other interpretation.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

Executive Order 13175 requires that Federal agencies consult with potentially affected Indian Tribal governments before taking any actions (including promulgation of regulations) that may have a substantial direct effect on one of 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. In addition, section 5 of that order requires the agency to prepare a Tribal summary impact statement for regulations that impose compliance costs on Tribal governments or that preempt Tribal law. The summary statement must be included in the preamble to the final rule.

We have determined that this proposed rule will have some effect on the three Indian tribes with AML programs, with changes in annual funding and increased discretion over the use of funds, but that this effect is not substantial. The rule does not impose compliance costs on Tribal governments or preempt Tribal law. Indian Tribal representatives were invited to informal meetings in January, February, and May of 2007, in which OSM met with State and Indian Tribal reclamation programs to get input on the 2006 amendments.

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

In accordance with 44 U.S.C. 3507(d), OSM has submitted the following request for information collection and recordkeeping authority for 30 CFR 785 to the Office of Management and Budget (OMB) for review and approval:

Title: 30 CFR 785—Requirements for permits for special categories of mining.
OMB Control Number: 1029-0040.

Summary: The information is being collected to meet the requirements of sections 507, 508, 510, 515, 701 and 711 of Pub. L. 95-87, which requires

applicants for special types of mining activities to provide descriptions, maps, plans and data of the proposed activity. This information will be used by the regulatory authority in determining if the applicant can meet the applicable

performance standards for the special type of mining activity. Response is required to obtain a benefit.

Bureau Form Number: None.

Frequency of Collection: Once.

Description of Respondents:

Applicants for coalmine permits and State Regulatory Authorities.

Total Annual Responses: 387.

Total Annual Burden Hours: 24,442.

Total Non-Wage Costs: 0.

INFORMATION COLLECTION SUMMARY FOR 30 CFR PART 785

Section	Number of applicant responses	Number of State responses	Hours per applicant	Hours per State	Total hours requested	Current ICB hours	Changes to ICB
785.13	6	6	110	40	900	900	0
785.14	4	4	250	420	2,680	2,680	0
785.15	50	50	150	40	9,500	9,500	0
785.16	5	5	10	40	250	250	0
785.17	6	6	60	10	420	420	0
785.18	7	6	10	10	130	130	0
785.19	1	1	300	7	307	307	0
785.20	35	34	25	30	1,895	1,895	0
785.22	1	1	40	24	64	64	0
785.25	80	79	80	79	8,296	0	8,296
Total	195	192	.....	.....	24,442	16,146	8,296

Under the Paperwork Reduction Act, OSM must obtain OMB approval of all information and recordkeeping requirements. No person is required to respond to an information collection request unless the form or regulation requesting the information has a currently valid OMB control (clearance) number. The control number appears in section 785.10. To obtain a copy of OSM's information collection clearance request contact John A. Trelease at (202) 208-2783 or by e-mail at jtrelease@osmre.gov.

Comments are invited on:

(a) Whether the proposed collection of information is necessary for SMCRA regulatory authorities to implement their responsibilities, including whether the information will have practical utility;

(b) The accuracy of OSM's estimate of the burden of the proposed collection of information;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(d) Ways to minimize the burden of collection on the respondents.

By law, OMB must respond to OSM within 60 days of publication of this proposed rule, but may respond as soon as 30 days after publication. Therefore, to ensure consideration by OMB, you must send comments regarding these burden estimates or any other aspect of these information collection and recordkeeping requirements by July 21, 2008 to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Interior Desk Officer, via e-mail to OIRA_DOCKET@omb.eop.gov, or via

facsimile to (202) 395-6566. Also, please send a copy of your comments to John A. Trelease, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave, NW., Room 202 SIB, Washington, DC 20240, or electronically to jtrelease@osmre.gov. Please include the OMB control number, 1029-0040, at the top of your correspondence.

National Environmental Policy Act

OSM has determined that these proposed regulations are categorically excluded from the National Environmental Policy Act (NEPA), 42 U.S.C. 4332(2)(C), pursuant to Department Manual 516 DM 2.3A(2), Section 1.10 of 516 DM 2, Appendix 1. In addition, we have determined that none of the "extraordinary circumstances" exceptions to the categorical exclusion applies.

Data Quality Act

In developing this rule we did not conduct or use a study, experiment, or survey requiring peer review under the Data Quality Act (Pub. L. 106-554).

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, § 700.5); (5) Is the description of the proposed rule in the SUPPLEMENTARY INFORMATION section of this preamble helpful in understanding the proposed rule? (6) 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.

List of Subjects

30 CFR Part 700

Administrative practice and procedure, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 724

Administrative practice and procedure, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 773

Administrative practice and procedure, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 785

Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 816

Environmental protection, Reporting and recordkeeping requirements, Surface mining.

30 CFR Part 817

Environmental protection, Reporting and recordkeeping requirements, Underground mining.

30 CFR Part 845

Administrative practice and procedure, Law enforcement, Penalties, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 846

Administrative practice and procedure, Penalties, Surface mining, Underground mining.

30 CFR Part 870

Abandoned Mine Reclamation Fund, Reclamation fees, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 872

Abandoned Mine Reclamation Fund, Indian lands, Reclamation fees, Surface mining, Underground mining.

30 CFR Part 873

Abandoned Mine Reclamation Fund, Indian lands, Reclamation fees, Surface mining, Underground mining.

30 CFR Part 874

Abandoned Mine Reclamation Fund, Indian lands, Reclamation fees, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 875

Abandoned Mine Reclamation Fund, Indian lands, Reclamation fees, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 876

Abandoned Mine Reclamation Fund, Indian lands, Reclamation fees, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 879

Abandoned Mine Reclamation Fund, Indian lands, Reclamation fees, Surface mining, Underground mining.

30 CFR Part 880

Abandoned Mine Reclamation Fund, Indian lands, Reclamation fees, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 882

Abandoned Mine Reclamation Fund, Indian lands, Reclamation fees, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 884

Abandoned Mine Reclamation Fund, Indian lands, Reclamation fees, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 885

Abandoned Mine Reclamation Fund, Indian lands, Reclamation fees, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 886

Abandoned Mine Reclamation Fund, Indian lands, Reclamation fees, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 887

Abandoned Mine Reclamation Fund, Indian lands, Reclamation fees, Reporting and recordkeeping requirements, Surface mining, Underground mining.

Dated: May 2, 2008.

C. Stephen Allred,

Assistant Secretary, Land and Minerals Management.

For the reasons given in the preamble, we are proposing to amend 30 Chapter VII as set forth below:

PART 700—GENERAL

1. The authority citation for part 700 continues to read as follows:

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

2. Amend § 700.5, by revising the definition for the term “Fund” and adding definitions for the terms “AML,” “AML inventory,” “Eligible lands and water,” “Emergency,” “Expended,” “Extreme danger,” “Left or abandoned in either an unreclaimed or inadequately reclaimed condition,” “Project,” “Reclamation activity,” and “Reclamation program” in alphabetical order to read as follows:

§ 700.5 Definitions.

* * * * *

AML means abandoned mine land(s).

AML inventory means OSM’s listing of abandoned mine land problems eligible to be reclaimed using moneys from the Abandoned Mine Reclamation Fund or the Treasury as appropriate.

* * * * *

Eligible lands and water means land and water eligible for reclamation or drainage abatement expenditures under the Abandoned Mine Land program. Eligible lands and water are those which were mined for coal or which were affected by such mining, wastebanks, coal processing, or other coal mining processes and left or abandoned in either an unreclaimed or inadequately reclaimed condition prior to August 3, 1977, and for which there is no continuing reclamation responsibility. However, lands and water damaged by coal mining operations after that date and on or before November 5, 1990, may also be eligible for reclamation if they meet the requirements specified in § 874.12(d) and (e) of this chapter. Following certification of the completion of all known coal problems, eligible lands and water for noncoal reclamation purposes are those sites that meet the eligibility requirements specified in § 875.14 of this chapter. For additional eligibility requirements for water projects, see § 874.14 of this chapter, and for lands affected by remaining operations, see section 404 of SMCRA.

Emergency means a sudden danger or impairment that presents a high probability of substantial physical harm to the health, safety, or general welfare of people before the danger can be abated under normal program operation procedures.

* * * * *

Expended means that moneys have been obligated, encumbered, or committed by contract by the State, Tribe, or us for work to be accomplished or services to be rendered.

Extreme danger means a condition that could reasonably be expected to cause substantial physical harm to persons, property, or the environment and to which persons or improvements on real property are currently exposed.

* * * * *

Fund means the Abandoned Mine Reclamation Fund established on the books of the U.S. Treasury for the purpose of accumulating revenues designated for reclamation of abandoned mine lands and other activities authorized by section 401 of SMCRA.

* * * * *

Left or abandoned in either an unreclaimed or inadequately reclaimed

condition means, for Abandoned Mine Land programs, lands and water:

(a) Which were mined or which were affected by such mining, wastebanks, processing or other mining processes prior to August 3, 1977, or between August 3, 1977, and November 5, 1990, as authorized pursuant to section 402(g)(4) of SMCRA, and on which all mining has ceased;

(b) Which continue, in their present condition, to degrade substantially the quality of the environment, prevent or damage the beneficial use of land or water resources, or endanger the health and safety of the public; and

(c) For which there is no continuing reclamation responsibility under State or Federal laws, except as provided in sections 402(g)(4) and 403(b)(2) of SMCRA.

* * * * *

Project means a delineated area containing one or more abandoned mine land problems. A project may be a group of related reclamation activities with a common objective within a political subdivision of a State or within a logical, geographically defined area, such as a watershed, conservation district, or county planning area.

* * * * *

Reclamation activity means the reclamation, abatement, control, or prevention of adverse effects of past mining by an Abandoned Mine Land program.

Reclamation program means a program established by a State or an Indian tribe in accordance with Title IV of SMCRA for reclamation of lands and water adversely affected by past mining, including the reclamation plan and annual applications for grants under the plan.

* * * * *

PART 724—INDIVIDUAL CIVIL PENALTIES

3. The authority citation for part 724 continues to read as follows:

Authority: 28 U.S.C. 2461, 30 U.S.C. 1201 et seq., and 31 U.S.C. 3701.

4. Amend § 724.18 by revising paragraph (d) to read as follows:

§ 724.18 Payment of penalty.

* * * * *

(d) *Delinquent payment.* Following the expiration of 30 days after the issuance of a final order assessing an individual civil penalty, any delinquent penalty shall be subject to interest at the rate established by the U.S. Department of the Treasury for late charges on late payments to the Federal Government. The Treasury current value of funds rate

is published by the Fiscal Service in the notices section of the **Federal Register** and on Treasury's Web site. Interest on unpaid penalties will run from the date payment first was due until the date of payment. Failure to pay overdue penalties may result in one or more of the actions specified in § 870.23(a) through (f) of this chapter. Delinquent penalties are subject to late payment penalties specified in § 870.21(c) of this chapter and processing and handling charges specified in § 870.21(d) of this chapter.

PART 773—REQUIREMENTS FOR PERMITS AND PERMIT PROCESSING

5. The authority citation for part 773 continues to read as follows:

Authority: 30 U.S.C. 1201 et seq., 16 U.S.C. 470 et seq., 16 U.S.C. 661 et seq., 16 U.S.C. 703 et seq., 16 U.S.C. 668a et seq., 16 U.S.C. 469 et seq., and 16 U.S.C. 1531 et seq.

6. Amend § 773.13 by revising paragraph (a)(2) to read as follows:

§ 773.13 Unanticipated events or conditions at remining sites.

(a) * * *

(2) Resulted from an unanticipated event or condition at a surface coal mining and reclamation operation on lands that are eligible for remining under a permit that was held by the person applying for the new permit.

* * * * *

PART 785—REQUIREMENTS FOR PERMITS FOR SPECIAL CATEGORIES OF MINING

7. The authority citation for part 785 continues to read as follows:

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

§ 785.25 [Amended]

8. In § 785.25, remove paragraph (c).

PART 816—PERMANENT PROGRAM PERFORMANCE STANDARDS—SURFACE MINING ACTIVITIES

9. The authority citation for part 816 continues to read as follows:

Authority: 30 U.S.C. 1201 et seq. and section 115 of Pub. L. 98-146.

10. In § 816.116, revise paragraphs (c)(2)(ii) and (c)(3)(ii) to read as follows:

§ 816.116 Revegetation: Standards for success.

* * * * *

(c) * * *

(2) * * *

(ii) Two full years for lands eligible for remining included in a permit for which a finding has been made under § 773.15(m) of this chapter. To the extent that the success standards are

established by paragraph (b)(5) of this section, the lands must equal or exceed the standards during the growing season of the last year of the responsibility period.

(3) * * *

(ii) Five full years for lands eligible for remining included in a permit for which a finding has been made under § 773.15(m) of this chapter. To the extent that the success standards are established by paragraph (b)(5) of this section, the lands must equal or exceed the standards during the growing seasons of the last two consecutive years of the responsibility period.

* * * * *

PART 817—PERMANENT PROGRAM PERFORMANCE STANDARDS—UNDERGROUND MINING ACTIVITIES

11. The authority citation for part 817 continues to read as follows:

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

12. In § 817.116, revise paragraphs (c)(2)(ii) and (c)(3)(ii) to read as follows:

§ 817.116 Revegetation: Standards for success.

* * * * *

(c) * * *

(2) * * *

(ii) Two full years for lands eligible for remining included in a permit for which a finding has been made under § 773.15(m) of this chapter. To the extent that the success standards are established by paragraph (b)(5) of this section, the lands must equal or exceed the standards during the growing season of the last year of the responsibility period.

(c) * * *

(3) * * *

(ii) Five full years for lands eligible for remining included in a permit for which a finding has been made under § 773.15(m) of this chapter. To the extent that the success standards are established by paragraph (b)(5) of this section, the lands must equal or exceed the standards during the growing seasons of the last two consecutive years of the responsibility period.

* * * * *

PART 845—CIVIL PENALTIES

13. The authority citation for part 845 continues to read as follows:

Authority: 28 U.S.C. 2461, 30 U.S.C. 1201 et seq., 31 U.S.C. 3701, Pub. L. 100-202, and Pub. L. 100-446.

14. In § 845.21, revise paragraph (b)(1) to read as follows:

§ 845.21 Use of civil penalties for reclamation.

* * * * *

(b) * * *

(1) Emergency projects as defined in § 700.5 of this chapter;

* * * * *

PART 846—INDIVIDUAL CIVIL PENALTIES

15. The authority citation for part 846 continues to read as follows:

Authority: 28 U.S.C. 2461, 30 U.S.C. 1201 *et seq.*, and 31 U.S.C. 3701.

16. Amend § 846.18 by revising paragraph (d) to read as follows:

§ 846.18 Payment of penalty.

* * * * *

(d) *Delinquent payment.* Following the expiration of 30 days after the issuance of a final order assessing an individual civil penalty, any delinquent penalty shall be subject to interest at the rate established by the U.S. Department of the Treasury for late charges on late payments to the Federal Government. The Treasury current value of funds rate is published by the Fiscal Service in the notices section of the **Federal Register** and on Treasury's Web site. Interest on unpaid penalties will run from the date payment first was due until the date of payment. Failure to pay overdue penalties may result in one or more of the actions specified in §§ 870.23(a) through (f) of this chapter. Delinquent penalties are subject to late payment penalties specified in § 870.21(c) of this chapter and processing and handling

charges specified in § 870.21(d) of this chapter.

PART 870—ABANDONED MINE RECLAMATION FUND—FEE COLLECTION AND COAL PRODUCTION REPORTING

17. The authority citation for part 870 continues to read as follows:

Authority: 28 U.S.C. 1746, 30 U.S.C. 1201 *et seq.*, and Pub. L. 105-277, sections 1701-1710

18. Revise § 870.1 to read as follows:

§ 870.1 Scope.

This Part sets out our procedures to collect fees for the Fund and to report coal production.

19. Amend § 870.5 as follows:

a. Revise the introductory text as set forth below; and

b. Remove the following definitions: "Abandoned Mine Reclamation Fund or Fund", "Agency", "Allocate", "Eligible lands and water", "Emergency", "Extreme danger", "Indian Abandoned Mine Reclamation Fund or Indian Fund", "Indian reclamation program", "Left or abandoned in either an unreclaimed or inadequately reclaimed condition", "OSM", "Permanent facility", "Project", "Qualified hydrologic unit", "Reclamation activity", "Reclamation plan", "State Abandoned Mine Reclamation Fund or State Fund", and "State reclamation program".

§ 870.5 Definitions.

As used in this Part—

* * * * *

20. Revise § 870.10 to read as follows:

§ 870.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.*, the Office of Management and Budget (OMB) has approved the information collection requirements of Part 870 and the OSM-1 Form and assigned control number 1029-0063. The information is used to maintain a record of coal produced nationwide each calendar quarter, the method of coal removal, the type of coal, and the basis for coal tonnage reporting. Persons must respond to meet the requirements of SMCRA. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

§ 870.11 [Amended]

21. Amend § 870.11 by removing paragraph (b) and redesignating paragraphs (c), (d), and (e) as paragraphs (b), (c), and (d), respectively.

22. In § 870.13, revise the heading of paragraph (a), revise paragraph (b) and add paragraph (c) to read as follows:

§ 870.13 Fee rates.

(a) *Fees for coal produced for sale, transfer, or use through September 30, 2007.*

* * * * *

(b) *Fees for coal produced for sale, transfer, or use from October 1, 2007, through September 30, 2012.* Fees for coal produced for sale, transfer, or use from October 1, 2007, through September 30, 2012, are shown in the following table:

Type of fee	Type of coal	Amount of fee
(1) Surface mining fee	Anthracite, bituminous, and sub-bituminous, including reclaimed.	(i) If value of coal is \$ 3.15 per ton or more, fee is 31.5 cents per ton. (ii) If value of coal is less than \$ 3.15 per ton, fee is 10 percent of the value.
(2) Underground mining fee	Anthracite, bituminous, and sub-bituminous.	(i) If value of coal is \$ 1.35 per ton or more, fee is 13.5 cents per ton. (ii) If value of coal is less than \$ 1.35 per ton, fee is 10 percent of the value.
(3) Surface and underground mining fee.	Lignite	(i) If value of coal is \$ 4.50 per ton or more, fee is 9 cents per ton. (ii) If value of coal is less than \$ 4.50 per ton, fee is 2 percent of the value.
(4) In situ coal mining fee	All types other than lignite	13.5 cents per ton based on Btu's per ton in place equated to the gas produced at the site as certified through analysis by an independent laboratory.
(5) In situ coal mining fee	Lignite	9 cents per ton based on the Btu's per ton of coal in place equated to the gas produced at the site as certified through analysis by an independent laboratory.

(c) *Fees for coal produced for sale, transfer, or use from October 1, 2012, through September 30, 2021.* The fees

for coal produced for sale, transfer, or use from October 1, 2012, through

September 30, 2021, are shown in the following table:

Type of fee	Type of coal	Amount of fee
(1) Surface mining fee	Anthracite, bituminous, and sub-bituminous, including reclaimed coal.	(i) If value of coal is \$ 2.80 per ton or more, fee is 28 cents per ton. (ii) If value of coal is less than \$ 2.80 per ton, fee is 10 percent of the value.
(2) Underground mining fee	Anthracite, bituminous, and sub-bituminous.	(i) If value of coal is \$ 1.20 per ton or more, fee is 12 cents per ton. (ii) If value of coal is less than \$ 1.20 per ton, fee is 10 percent of the value.
(3) Surface and underground mining fee.	Lignite	(i) If value of coal is \$ 4.00 per ton or more, fee is 8 cents per ton. (ii) If value of coal is less than \$ 4.00 per ton, fee is 2 percent of the value.
(4) In situ coal mining fee	All types other than lignite	12 cents per ton based on Btu's per ton in place equated to the gas produced at the site as certified through analysis by an independent laboratory.
(5) In situ coal mining fee	Lignite	8 cents per ton based on the Btu's per ton of coal in place equated to the gas produced at the site as certified through analysis by an independent laboratory.

23. Revise §§ 870.14 through 870.17 to read as follows:

§ 870.14 Determination of percentage-based fees.

(a) If you pay a fee based on a percentage of the value of coal, you must include documentation supporting the claimed coal value with your fee payment and production report. We may review this information and any additional documentation we may require, including examination of your books and records. We may accept the valuation you claim, or we may determine another value of the coal.

(b) If we determine that a higher fee must be paid, you must pay the additional fee together with interest computed under § 870.21.

§ 870.15 Reclamation fee payment.

(a) You must pay the reclamation fee based on calendar quarter tonnage no later than 30 days after the end of each calendar quarter.

(b) Along with any fee payment due, you must submit to us a completed Coal Sales and Reclamation Fee Report (OSM-1 Form). You can file the OSM-1 Form either in paper format or in electronic format as specified in § 870.17. On the OSM-1 Form, you must report:

(1) The tonnage of coal sold, used, or transferred;

(2) The name and address of any person or entity who is the owner of 10 percent or more of the mineral estate for a given permit; and

(3) The name and address of any person or entity who purchases 10 percent or more of the production from a given permit, during the applicable quarter.

(c) If no single mineral owner or purchaser meets the 10 percent criterion in paragraphs (b)(2) and (b)(3) of this section, then you must report the name and address of the largest single mineral owner and purchaser. If several persons

have successively transferred the mineral rights, you must include on the OSM-1 Form information on the last owner(s) in the chain before the permittee, i.e. the person or persons who have granted the permittee the right to extract the coal.

(d) At the time of reporting, you may designate the information required by paragraphs (b) and (c) of this section as confidential.

§ 870.16 Acceptable payment methods.

(a) If you owe total quarterly reclamation fees of \$25,000 or more for one or more mines, you must:

(1) Use an electronic fund transfer mechanism approved by the U.S. Department of the Treasury;

(2) Forward payments by electronic transfer;

(3) Include the applicable Master Entity No.(s) (Part 1—Block 4 on the OSM-1 Form), and OSM Document No.(s) (Part 1—upper right corner of the OSM-1 Form) on the wire message; and

(4) Use our approved form or approved electronic form to report coal tonnage sold, used, or for which ownership was transferred to the address indicated in the Instructions for Completing the OSM-1 Form.

(b) If you owe less than \$25,000 in quarterly reclamation fees for one or more mines, you may:

(1) Forward payments by electronic transfer in accordance with the procedures specified in paragraph (a) of this section; or

(2) Submit a check or money order payable to the Office of Surface Mining Reclamation and Enforcement in the same envelope with the OSM-1 Form to: Office of Surface Mining Reclamation and Enforcement, P.O. Box 360095M, Pittsburgh, Pennsylvania 15251.

(c) If you pay more than \$25,000 by a method other than an electronic fund transfer mechanism approved by the U.S. Department of the Treasury, you

will be in violation of the Surface Mining Control and Reclamation Act of 1977, as amended.

§ 870.17 Filing the OSM-1 Form.

(a) *Filing an OSM-1 Form electronically.* You may submit a quarterly electronic OSM-1 Form in place of a quarterly paper OSM-1 Form. Submitting the OSM-1 Form electronically is optional. If you submit your form electronically, you must use a methodology and medium approved by us and do one of the following:

(1) Maintain a properly notarized paper copy of the identical OSM-1 Form for review and approval by our Fee Compliance auditors (in order to comply with the notary requirement in SMCRA); or

(2) Submit an electronically signed and dated statement made under penalty of perjury that the information contained in the OSM-1 Form is true and correct.

(b) *Filing a paper OSM-1 Form.*

Alternatively, you may submit a quarterly paper OSM-1 Form. If you choose to submit your form on paper, you must do one of the following:

(1) Submit a properly notarized copy of the OSM-1 Form; or

(2) Submit the OSM-1 Form with a signed and dated statement made under penalty of perjury that the information contained in the form is true and correct. Under the unsworn statement option, you must sign the following statement: "I declare under penalty of perjury that the foregoing is true and correct. Executed on [date]."

24. In § 870.18, revise paragraph (b) to read as follows:

§ 870.18 General rules for calculating excess moisture.

* * * * *

(b) If OSM disallows any or all of an allowance for excess moisture, you must submit an additional fee plus interest computed according to § 870.21(a) and

penalties computed according to § 870.21(c).

* * * * *

25. Add new §§ 870.21 through 870.23 to read as follows:

§ 870.21 Late payments.

(a) Fee payments postmarked later than 30 days after the calendar quarter for which the fee was owed are subject to interest. Late reclamation fee payments are subject to interest at the rate established by the U.S. Department of the Treasury for late charges on payments to the Federal Government. The Treasury current value of funds rate is published annually in the **Federal Register** and on Treasury's Web site.

(b) We will charge interest on unpaid reclamation fees from the 31st day following the end of the calendar quarter for which the fee payment is owed to the date of payment. If you are delinquent, we will bill you monthly and initiate whatever action is necessary to collect full payment of all fees and interest.

(c) When a reclamation fee debt is more than 91 days overdue, a 6 percent annual penalty on the amount owed for fees will begin and will run until the date of payment. This penalty is in addition to the interest described in paragraph (a) of this section.

(d) For all delinquent fees, interest, and penalties, you must pay a processing and handling charge that we will set based upon the following components:

(1) For debts referred to a collection agency, the amount charged to us by the collection agency;

(2) For debts we processed and handled, a standard amount we set annually based upon similar charges by collection agencies for debt collection;

(3) For debts referred to the Office of the Solicitor within the U.S. Department of the Interior, but paid before litigation, the estimated average cost to prepare the case for litigation as of the time of payment;

(4) For debts referred to the Office of the Solicitor within the U.S. Department of the Interior, and litigated, the estimated cost to prepare and litigate a debt case as of the time of payment; and

(5) If not otherwise provided for, all other administrative expenses associated with collection, including, but not limited to, billing, recording payments, and follow-up actions.

(e) We will not charge prejudgment interest on any processing and handling charges.

§ 870.22 Maintaining required production records.

(a) If you engage in or conduct a surface coal mining operation, you must

maintain up-to-date records that contain at least the following information:

(1) The tons of coal you produced, bought, sold, or transferred, the amount of money you received per ton, the name of person to whom you sold or transferred the coal, and the date of each sale or transfer;

(2) The tons of coal you used and your date of your consumption;

(3) The tons of coal you stockpiled or inventoried that are not classified as sold for fee computation purposes under § 870.12; and

(4) For in situ coal mining operations, the total Btu value of gas you produced, the Btu value of a ton of coal in place certified at least semiannually by an independent laboratory, and the amount of money you received for gas sold, transferred, or used.

(b) We must have access to your records of any surface coal mining operation for review. Your records must be available to us at reasonable times.

(c) We may inspect and copy any of your books or records that are necessary to substantiate the accuracy of your OSM-1 Form and payments. If the fee is paid at the maximum rate, we will not copy information relative to price. We will protect all copied information as authorized or required by the Privacy Act (5 U.S.C. 552a) and the Freedom of Information Act (5 U.S.C. 552).

(d) You must maintain your books and records for 6 years from the end of the calendar quarter in which the fee was due or paid, whichever is later.

(e) If you do not maintain or make available your books and records as required in this section, we will estimate the fee due under this Part through use of average production figures based upon the nature and acreage of your coal mining operation.

(1) We will assess the fee at the amount we estimate plus an additional 20 percent to account for possible error in our fee liability estimate.

(2) After you receive our fee liability estimate, you may request that we revise that estimate based upon your information. However, you must demonstrate that our fee liability estimate is incorrect. You may do this by providing adequate documentation that we find to be acceptable and comparable to the information required in § 870.19(a).

§ 870.23 Consequences of noncompliance.

If you do not maintain adequate records, provide us with access to records of a surface coal mining operation, or pay overdue reclamation fees, including interest on late payments or underpayments, we may take one or more of the following actions:

(a) Start a legal action against you;

(b) Report you to the Internal Revenue Service;

(c) Report you to State agencies responsible for taxation;

(d) Report you to credit bureaus;

(e) Refer you to collection agencies; or

(f) Take some other appropriate action against you.

26. Revise part 872 to read as follows:

PART 872—MONEYS AVAILABLE TO ELIGIBLE STATES AND INDIAN TRIBES

Sec.

872.1 What does this Part do?

872.5 Definitions.

872.10 Information collection.

872.11 Where do moneys in the Fund come from?

872.12 Where do moneys distributed from the Fund and other sources go?

872.13 What moneys does OSM distribute each year?

872.14 What are State share funds?

872.15 How does OSM distribute and award State share funds?

872.16 What may States use State share funds for?

872.17 What are Tribal share Funds?

872.18 How does OSM distribute and award Tribal share funds?

872.19 What may Indian tribes use Tribal share funds for?

872.20 What will OSM do with unappropriated AML funds currently allocated to the Rural Abandoned Mine Program?

872.21 What are historic coal funds?

872.22 How does OSM distribute and award historic coal funds?

872.23 What may you use historic coal funds for?

872.24 What are Federal expense funds?

872.25 What may OSM use Federal expense funds for?

872.26 What are minimum program make up funds?

872.27 How does OSM distribute and award minimum program make up funds?

872.28 What may you use minimum program make up funds for?

872.29 What are prior balance replacement funds?

872.30 How does OSM distribute and award prior balance replacement funds?

872.31 What may you use prior balance replacement funds for?

872.32 What are certified in lieu funds?

872.33 How does OSM distribute and award certified in lieu funds?

872.34 What may you use certified in lieu funds for?

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

§ 872.1 What does this Part do?

This Part sets forth procedures and general responsibilities for managing funds received under Title IV of the Surface Mining Control and Reclamation Act of 1977, as amended.

§ 872.5 Definitions.

As used in this Part—

Allocate means to identify moneys in our records at the time they are received by the Fund. The allocation process identifies moneys in the Fund by the type of funds collected, including the specific State or Indian tribal share.

Award means to approve our grant agreement authorizing you to draw down and expend program funds.

Distribute means to annually assign funds to a specific State or Indian tribe. After distribution, funds are available for award in a grant to that specific State or Indian tribe.

Indian Abandoned Mine Reclamation Fund or *Indian Fund* means a separate fund that an Indian tribe established to account for moneys we award under Parts 885 or 886 of this chapter or other moneys these regulations authorize to be deposited in the Indian Fund.

Reclamation plan or *State reclamation plan* means a plan that a State or Indian tribe submitted and that we approved under section 405 of SMCRA and Part 884 of this chapter.

State Abandoned Mine Reclamation Fund or *State Fund* means a separate fund that a State established to account for moneys we award under Parts 885 or 886 of this chapter or other moneys these regulations authorize to be deposited in the State Fund.

§ 872.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.*, the Office of Management and Budget (OMB) has approved the information collection requirements of Part 872 and assigned it control number 1029-0054. The information is used to determine whether States and Indian tribes will be granted funds for reclamation activities. States and Indian tribes must respond to obtain a benefit in accordance with SMCRA. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

§ 872.11 Where do moneys in the Fund come from?

Revenue to the Fund includes—

(a) Reclamation fees we collect under section 402 of SMCRA and Part 870 of this chapter;

(b) Amounts we collect from charges for use of land acquired or reclaimed with moneys from the Fund under Part 879 of this chapter;

(c) Moneys we recover through satisfaction of liens filed against privately owned lands reclaimed with

moneys from the Fund under Part 882 of this chapter;

(d) Moneys we recover from the sale of lands acquired with moneys from the Fund or by donation;

(e) Moneys donated to us for the purpose of abandoned mine land reclamation; and

(f) Interest and any other income earned from investment of the Fund. We will credit interest and other income only to the Secretary's share.

§ 872.12 Where do moneys distributed from the Fund and other sources go?

(a) Each State or Indian tribe with an approved reclamation plan must establish an account to be known as a State or Indian Abandoned Mine Reclamation Fund. These funds will be managed in accordance with the OMB Circular A-102.

(b) Revenue for the State and Indian Abandoned Mine Reclamation Funds will include—(1) Amounts we granted for purposes of conducting the approved reclamation plan;

(2) Moneys collected from charges for uses of land acquired or reclaimed with moneys from the State or Indian Abandoned Mine Reclamation Fund under Part 879 of this chapter;

(3) Moneys recovered through the satisfaction of liens filed against privately owned lands;

(4) Moneys the State or Indian tribe recovered from the sale of lands acquired under Title IV of SMCRA; and

(5) Such other moneys as the State or Indian tribe decides should be deposited in the State or Indian Abandoned Mine Reclamation Fund for use in carrying out the approved reclamation program.

(c) Moneys deposited in State or Indian Abandoned Mine Reclamation Funds must be used to carry out the reclamation plan approved under Part 884 of this chapter and projects approved under § 886.27 of this chapter.

§ 872.13 What moneys does OSM distribute each year?

(a) Under Title IV of SMCRA, each Federal fiscal year we must distribute to you, the States and Indian tribes with approved reclamation plans, the moneys listed in this section. We will distribute all Fund moneys and other moneys from the Treasury that have been designated for mandatory distribution. We will provide information to you showing how we calculated your distribution. We will distribute the following moneys:

(1) State share funds to uncertified States as described in § 872.14;

(2) Tribal share funds to uncertified Indian tribes as described in § 872.17;

(3) Historic coal funds to uncertified States and Indian tribes as described in § 872.21;

(4) Minimum program make up funds to eligible uncertified States and Indian tribes as described in § 872.26;

(5) Prior balance replacement funds to certified and uncertified States and Indian tribes as described in § 872.29; and

(6) Certified in lieu funds to certified States and Indian tribes as described in § 872.32.

(b) We will calculate annual fee collections for coal produced in the previous Federal fiscal year on a net cash basis. This means that we will use collections that are paid for the current Federal fiscal year to adjust fees that were overpaid or underpaid in prior fiscal years.

(c) We will distribute any Congressionally-appropriated funds for grants to you out of the Federal expenses funds when the appropriation becomes available.

(d) You may apply for any or all distributed funds at any time after the distribution using the procedures in Part 885 of this chapter for certified States and Indian tribes or Part 886 for uncertified States and Indian tribes.

§ 872.14 What are State share funds?

“State share funds” are moneys we distribute to you from your State share of the Fund each Federal fiscal year under section 402(g)(1)(A) of SMCRA. Your State share of the Fund is 50 percent of the reclamation fees we collected from within your State (excluding fees collected on Indian lands) and allocated to you, the State, in the Fund for coal produced in the previous fiscal year.

§ 872.15 How does OSM distribute and award State share funds?

(a) To be eligible to receive State share funds, you must meet the following criteria:

(1) You must have and maintain an approved reclamation plan under Part 884 of this chapter; and

(2) You cannot be certified under section 411(a) of SMCRA.

(b) If you meet the eligibility requirements in paragraph (a) of this section, we will distribute and award these State share funds to you as follows:

(1) We will annually distribute State share funds to you as shown in the following table:

For the Federal fiscal year(s) beginning . . .	the amount of State share funds we annually distribute to you will be . . .
(i) October 1, 2007, and October 1, 2008	50 percent of your 50 percent share of reclamation fees collected on prior fiscal year coal production.
(ii) October 1, 2009, and October 1, 2010	75 percent of your 50 percent share of reclamation fees collected on prior fiscal year coal production.
(iii) October 1, 2011, and continuing through September 30, 2022	100 percent of your 50 percent share of reclamation fees collected on prior fiscal year coal production.
(iv) October 1, 2022 (fiscal year 2023)	the amount remaining in your State share of the Fund.

(2) We will award these funds to you in grants according to the provisions of Part 886 of this chapter.

§ 872.16 What may States use State share funds for?

- You may only use State share funds for:
- (a) Coal reclamation under § 874.12 of this chapter;
 - (b) Water supply restoration under § 874.14 of this chapter;
 - (c) Noncoal reclamation under § 875.12 of this chapter that is requested under section 409(c) of SMCRA;
 - (d) Deposit into an acid mine drainage abatement and treatment fund under Part 876 of this chapter; and

(e) Land acquisition under § 879.11 of this chapter.

§ 872.17 What are Tribal share funds?

“Tribal share funds” are moneys we distribute to you from your Tribal share of the Fund each Federal fiscal year under section 402(g)(1)(B) of SMCRA. Your Tribal share of the Fund is 50 percent of the reclamation fees we collected and allocated to you, the Indian tribe(s), in the Fund for coal produced in the previous fiscal year from the Indian lands in which you have an interest.

§ 872.18 How will OSM distribute and award Tribal share funds?

- (a) To be eligible to receive Tribal share funds, you must meet the following criteria:
- (1) You must have and maintain an approved reclamation plan under Part 884 of this chapter; and
 - (2) You cannot be certified under section 411(a) of SMCRA.
- (b) If you meet the eligibility requirements in paragraph (a) of this section, we will distribute and award these Tribal share funds to you as follows:
- (1) We will annually distribute Tribal share funds to you as shown in the following table:

For the Federal fiscal year(s) beginning . . .	the amount of Tribal share funds we annually distribute to you will be . . .
(i) October 1, 2007, and October 1, 2008	50 percent of your 50 percent share of reclamation fees collected on prior fiscal year coal production.
(ii) October 1, 2009, and October 1, 2010	75 percent of your 50 percent share of reclamation fees collected on prior fiscal year coal production.
(iii) October 1, 2011, and continuing through September 30, 2022	100 percent of your 50 percent share of reclamation fees collected on prior fiscal year coal production.
(iv) October 1, 2022 (fiscal year 2023)	the amount remaining in your Tribal share of the Fund.

(2) We will award these funds to you in grants according to the provisions of Part 886 of this chapter.

§ 872.19 What may Indian tribes use Tribal share funds for?

- You may only use Tribal share funds for:
- (a) Coal reclamation under § 874.12 of this chapter;
 - (b) Water supply restoration under § 874.14 of this chapter;
 - (c) Noncoal reclamation under § 875.12 of this chapter that is requested under section 409(c) of SMCRA;
 - (d) Deposit into an acid mine drainage abatement and treatment fund under Part 876 of this chapter; and
 - (e) Land acquisition under § 879.11 of this chapter.

not appropriated or moved to other allocations before December 20, 2006, for possible transfer to the three United Mine Workers of America (UMWA) health care plans described in section 402(h)(2) of SMCRA.

§ 872.21 What are historic coal funds?

- (a) “Historic coal funds” are moneys provided under section 402(g)(5) of SMCRA based on the amount of coal produced before August 3, 1977, in your State or on Indian lands in which you have an interest. Under the 2006 amendments, each year we allocate and distribute 30 percent of annual AML fee collections for coal produced in the previous fiscal year plus 60 percent of any other revenue to the Fund as historic coal funds to supplement grants to States and Indian tribes.
- (b) Historic coal funds also will include moneys we reallocate under sections 401(f)(3)(A)(i), 411(h)(1)(A)(ii), and 411(h)(4) of SMCRA, including:
- (1) The moneys we reallocate based on prior balance replacement funds

distributed under § 872.29, which will be available to supplement grants beginning with Federal fiscal year 2023; and

(2) The moneys we reallocate based on certified in lieu funds distributed under § 872.32, which will be available to supplement grants in Federal fiscal years 2009 through 2022.

§ 872.22 How does OSM distribute and award historic coal funds?

- (a) To be eligible to receive historic coal funds, you must meet the following criteria:
- (1) You must have and maintain an approved reclamation plan under Part 884 of this chapter;
 - (2) You cannot be certified under section 411(a) of SMCRA; and
 - (3) You must have unfunded Priority 1 and 2 coal problems remaining under sections 403(a)(1) and (2) of SMCRA.
- (b) If you meet the eligibility requirements in paragraph (a) of this section, we distribute these moneys to you using a formula based on the

§ 872.20 What will OSM do with unappropriated AML funds currently allocated to the Rural Abandoned Mine Program?

Under section 402(h)(4)(B) of SMCRA, we will make available any moneys that remain allocated to RAMP and that were

amount of coal historically produced before August 3, 1977, in your State or from the Indian lands concerned.

(c) We annually distribute historic coal funds to you as shown in the following table:

For the Federal fiscal year(s) beginning . . .	the amount of historic coal funds we annually distribute to you will be . . .
(1) October 1, 2007, and October 1, 2008	50 percent of the amount we calculated using the formula described in paragraph (b) of this section.
(2) October 1, 2009, and October 1, 2010	75 percent of the amount we calculated using the formula described in paragraph (b) of this section.
(3) October 1, 2011, and continuing through September 30, 2022	100 percent of the amount we calculated using the formula described in paragraph (b) of this section.
(4) October 1, 2022 (fiscal year 2023), and thereafter	to the extent funds are available, the amount needed to reclaim your remaining Priority 1 and 2 coal problems.

(d) In any given year, we will only distribute to you the historic coal funds that you need to reclaim your unfunded Priority 1 or 2 coal problems. Your distribution of State or Tribal share funds under §§ 872.14 or 872.17 plus your distribution of historic coal funds along with unused funds from prior allocations could be more than you need to reclaim your remaining high priority problems. If that occurs, we will reduce the historic coal funds we distribute to you to the amount that you need to fully fund reclamation of all your remaining Priority 1 or 2 coal problems.

(e) We will award these funds to you in grants according to the provisions of Part 886 of this chapter.

§ 872.23 What may you use historic coal funds for?

You may only use historic coal funds for:

- (a) Coal reclamation under § 874.12 of this chapter;
- (b) Water supply restoration under § 874.14 of this chapter;
- (c) Noncoal reclamation under § 875.12 of this chapter that is requested under section 409(c) of SMCRA;
- (d) Deposit into an acid mine drainage abatement and treatment fund under Part 876 of this chapter; and
- (e) Land acquisition under § 879.11 of this chapter.

§ 872.24 What are Federal expense funds?

“Federal expense funds” are moneys available in the Fund that are not allocated or distributed as State share funds (§ 872.14), Tribal share funds (§ 872.17), historic coal funds (§ 872.21), or minimum program make up funds (§ 872.26). Congress must appropriate Federal expense funds before we may expend them.

§ 872.25 What may OSM use Federal expense funds for?

(a) We may use Federal expense funds only for the purposes in section 402(g)(3) of SMCRA, which include the following:

(1) The Small Operator Assistance Program under section 507(c) of SMCRA (not more than \$10 million annually);

(2) Emergency projects under State, Tribal, and Federal programs under section 410 of SMCRA;

(3) Nonemergency projects in States and on lands within the jurisdiction of Indian tribes that do not have an approved abandoned mine reclamation program under section 405 of SMCRA;

(4) The Secretary’s administration of Title IV of SMCRA and this subchapter; and

(5) Projects authorized under section 402(g)(4) in States and on lands within the jurisdiction of Indian tribes that do not have an approved abandoned mine reclamation program under section 405 of SMCRA.

(b) We will not deduct moneys that we have annually allocated or distributed as Federal expense funds under sections 402(g)(3) or (4) of SMCRA for any State or Indian tribe from moneys we will annually allocate or distribute to a State or Indian tribe under the authority of sections 402(g)(1) or (5) of SMCRA.

(c) We will expend moneys under the authority in section 402(g)(3)(C) of SMCRA only in States or on Indian lands where the State or Indian tribe does not have an abandoned mine reclamation program approved under section 405 of SMCRA.

§ 872.26 What are minimum program make up funds?

(a) “Minimum program make up funds” are additional moneys we will distribute each Federal fiscal year to eligible States and Indian tribes to make up the difference between their total distribution of other funds and \$3 million. The source of these moneys is the non-appropriated Federal expense funds.

(b) To be eligible to receive funds under this section, you must meet the following criteria:

(1) You must have and maintain an approved reclamation plan under Part 884 of this chapter;

(2) You cannot have certified under section 411(a) of SMCRA;

(3) The total amount you receive annually from State share funds (§ 872.14) or Tribal share funds (§ 872.17), historic coal funds (§ 872.21), and prior balance replacement funds (§ 872.29) must be less than \$3 million; and

(4) You must need more than the total of funds you will receive from State or Tribal share, historic coal, and prior balance replacement funds to reclaim Priority 1 and 2 coal problems under sections 403(a)(1) and (2) of SMCRA in your State or on Indian lands within your jurisdiction.

(c) We will make funds available to the States of Missouri and Tennessee under this section to reclaim Priority 1 and 2 coal problems included in the AML inventory, provided each State has a reclamation plan approved under Part 884 of this chapter.

§ 872.27 How does OSM distribute and award minimum program make up funds?

(a) If you meet the eligibility requirements in § 872.26(b), we will distribute these minimum program make up funds to you as follows:

(1) We calculate your total distribution under this Part by first adding, in order, your prior balance replacement funds distribution (§ 872.29), your applicable State or Tribal share funds distribution (§§ 872.14 or 872.17), and your historic coal funds distribution (§ 872.21). If the sum of these funds is less than \$3 million, we will calculate the amount of minimum program make up funds to add to your distribution under this section to increase it to that level.

(2) For each of the Federal fiscal years 2007 through 2022, we add minimum program make up funds to your combined distribution of prior balance replacement, State or Tribal share, and

historic coal funds as shown in the following table:

For each of the Federal fiscal year(s) beginning . . .	The amount of minimum program make up funds we add to your distribution will be . . .
(i) October 1, 2007, and October 1, 2008	50 percent of the amount that we calculated should be added under paragraph (a)(1) of this section.
(ii) October 1, 2009, and October 1, 2010	75 percent of the amount that we calculated should be added under paragraph (a)(1) of this section.
(iii) October 1, 2011, and continuing through September 30, 2022	100 percent of the amount that we calculated should be added under paragraph (a)(1) of this section as long as you have at least \$3 million of Priority 1 and 2 coal problems remaining.
(iv) October 1, 2022, and thereafter	to the extent funds are available, 100 percent of the amount that we calculated should be added under paragraph (a)(1) until you have less than \$3 million of Priority 1 and 2 coal problems remaining.

(b) We award these funds to you in grants according to the provisions of Part 886 of this chapter.

§ 872.28 What may you use minimum program make up funds for?

You may only use minimum program make up funds to reclaim Priority 1 and 2 coal problems under sections 403(a)(1) and (2) of SMCRA.

§ 872.29 What are prior balance replacement funds?

“Prior balance replacement funds” are moneys we must distribute to you instead of the moneys we allocated to your State or Tribal share of the Fund before October 1, 2007, but did not distribute to you because Congress did not appropriate them. They come from general funds of the United States Treasury that are otherwise unappropriated. Under section 411(h)(1) of SMCRA, we distribute prior balance replacement funds to you, the State or Indian tribe, for seven years starting in the Federal fiscal year beginning October 1, 2008.

§ 872.30 How does OSM distribute and award prior balance replacement funds?

(a) We distribute prior balance replacement funds to you as follows:

- (1) In an amount equal to the aggregate, unappropriated amount allocated to you before October 1, 2007, under sections 402(g)(1)(A) or (B) of SMCRA;
- (2) If you are, or are not, certified under section 411(a) of SMCRA; and
- (3) In seven equal annual installments beginning with the 2008 Federal fiscal year which starts on October 1, 2007.

(b) We award these funds to you in grants according to the provisions of Part 885 of this chapter for certified States and Indian tribes or Part 886 of this chapter for uncertified States and Indian tribes.

(c) At the same time we distribute prior balance replacement funds to you under this section, we transfer the same amount to historic coal funds from moneys in your State or Tribal share of the Fund that were allocated to you before October 1, 2007. The transferred funds will be available for annual grants under § 872.21 for the Federal fiscal year beginning October 1, 2022, and annually thereafter. We will allocate, distribute, and award the transferred funds according to the provisions of §§ 872.21, 872.22, and 872.23.

§ 872.31 What may you use prior balance replacement funds for?

(a) If you are certified under section 411(a) of SMCRA, you may only use prior balance replacement funds for those purposes your State legislature or Tribal council establishes, giving priority to addressing the impacts of mineral development.

(b) If you are not certified under section 411(a) of SMCRA, you may only use prior balance replacement funds for the purposes in section 403 of SMCRA, which include:

- (1) Reclamation of coal problems under § 874.12 of this chapter;
- (2) Water supply restoration under § 874.14 of this chapter; and
- (3) Maintenance of the AML inventory.

§ 872.32 What are certified in lieu funds?

“Certified in lieu funds” are moneys that we must distribute to you, the certified State or Indian tribe, in lieu of moneys allocated to your State or Tribal share of the Fund after October 1, 2007. Certified in lieu funds come from general funds of the United States Treasury that are otherwise unappropriated. Beginning with the 2009 Federal fiscal year which starts on October 1, 2008, we will distribute certified in lieu funds to you under section 411(h)(2) of SMCRA.

§ 872.33 How does OSM distribute and award certified in lieu funds?

(a) You must be certified under section 411(a) of SMCRA to receive certified in lieu funds.

(b) If you meet the eligibility requirement in paragraph (a) of this section, we will distribute these certified in lieu funds to you as follows:

- (1) Starting in the Federal fiscal year that begins on October 1, 2008, we annually distribute funds to you based on 50 percent of reclamation fees received for coal produced during the previous Federal fiscal year in your State or on Indian lands within your jurisdiction;
- (2) The funds we annually distribute to you are in lieu of moneys we otherwise would distribute to you from State share funds under § 872.14 or Tribal share funds under § 872.17 had you not been excluded from receiving those funds under section 401(f)(3)(B) of SMCRA; and
- (3) We annually distribute certified in lieu funds to you as shown in the following table:

In the Federal fiscal year(s) beginning on . . .	The amount of certified in lieu funds we annually distribute to you will be equal to . . .
(i) October 1, 2008	25 percent of your 50 percent share of annual reclamation fee collections.
(ii) October 1, 2009	50 percent of your 50 percent share of annual reclamation fee collections.

In the Federal fiscal year(s) beginning on . . .	The amount of certified in lieu funds we annually distribute to you will be equal to . . .
(iii) October 1, 2010	75 percent of your 50 percent share of annual reclamation fee collections.
(iv) October 1, 2011, and thereafter	100 percent of your 50 percent share of annual reclamation fee collections.

(c) We award these funds to you in grants according to the provisions of Part 885 of this chapter.

(d) At the same time we distribute certified in lieu funds to you under this section, we will transfer the same amount to historic coal funds and make those funds available for annual grants under § 872.21 that same Federal fiscal year. We will allocate, distribute, and award the transferred funds according to the provisions of §§ 872.21, 872.22, and 872.23.

(e) We will distribute to you the amounts we withhold under paragraph (b) of this section in two equal annual installments. We will do this in Federal fiscal years 2018 and 2019.

§ 872.34 What may you use certified in lieu funds for?

You may use certified in lieu funds for any purpose.

PART 873—FUTURE RECLAMATION SET-ASIDE PROGRAM

27. The authority citation for part 873 is revised to read as follows:

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

28. Revise §§ 873.11 and 873.12 to read as follows:

§ 873.11 Applicability.

The provisions of this Part apply to funds awarded, as defined in § 872.5 of this chapter, under section 402(g)(6)(A) of SMCRA before its amendment on December 20, 2006, and their use by the States or Indian tribes for coal reclamation purposes after September 30, 1995.

§ 873.12 Future set-aside program criteria.

(a) Any State or Indian tribe may receive and retain, without regard to the limitation referred to in section 402(g)(1)(D) of SMCRA, up to 10 percent of the total of the funds distributed annually to such State or Indian tribe under sections 402(g) (1) and (5) of SMCRA for a future set-aside fund if such amounts were awarded before December 20, 2006. The State or Indian tribe must deposit all set-aside funds awarded into a special fund established under State or Indian tribal law. The State or Indian tribe must expend amounts awarded (together with all interest earned on such amounts) solely

to achieve the priorities stated in section 403(a) of SMCRA.

(b) Moneys the State or Indian tribe deposited in the special fund account, together with any interest earned, are considered State or Indian tribal moneys.

PART 874—GENERAL RECLAMATION REQUIREMENTS

29. The authority citation for part 874 continues to read as follows:

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

30. Add § 874.5 to read as follows:

§ 874.5 Definitions.

As used in this Part—
Reclamation plan or State reclamation plan means a plan that a State or Indian tribe submitted and that we approved under section 405 of SMCRA and Part 884 of this chapter.

31. Revise §§ 874.10 and 874.11 to read as follows:

§ 874.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.*, the Office of Management and Budget (OMB) has approved the information collection requirements of Part 874 and assigned it control number 1029–0113. This information is used to ensure that appropriate reclamation projects involving the incidental extraction of coal are conducted under the authority of section 528(2) of SMCRA and that selected projects contain sufficient environmental safeguards. Persons must respond to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

§ 874.11 Applicability.

You must comply with the requirements in this Part if—

(a) You conduct reclamation projects using moneys from the Fund;

(b) You conduct reclamation projects using prior balance replacement funds provided to uncertified States and Indian tribes under § 872.29 of this chapter;

(c) You choose to use certified in lieu funds provided under § 872.32 of this chapter to address coal problems subsequent to certification; or

(d) You, a certified State or Indian tribe, at the direction of your State legislature or Tribal council, choose to use prior balance replacement funds received under § 872.29 of this chapter to address coal problems subsequent to certification.

32. Amend § 874.12 by revising paragraphs (c), (e), and (f) to read as follows:

§ 874.12 Eligible coal lands and water.

* * * * *

(c) There is no continuing responsibility for reclamation by the operator, permittee, or agent of the permittee under statutes of the State or Federal government, or as a result of bond forfeiture. Bond forfeiture will render lands or water ineligible only if the amount forfeited is sufficient to pay the total cost of the necessary reclamation. In cases where the forfeited bond is insufficient to pay the total cost of reclamation, additional moneys from the Fund or any prior balance replacement funds provided under § 872.29 of this chapter may be used.

* * * * *

(e) An uncertified State or Indian tribe may expend funds made available under paragraphs 402(g)(1) and (5) of SMCRA and prior balance replacement funds under section 411(h)(1) of SMCRA for the reclamation and abatement of any site eligible under paragraph (d) of this section, if the State or Indian tribe, with the concurrence of the Secretary, makes the findings required in paragraph (d) of this section and the State or Indian tribe determines that the reclamation priority of the site is the same or more urgent than the reclamation priority for the lands and water eligible under paragraphs (a), (b), or (c) of this section that qualify as a Priority 1 or 2 site under section 403(a) of SMCRA.

(f) With respect to lands eligible under paragraph (d) or (e) of this section, moneys available from sources outside the Fund or that are ultimately recovered from responsible parties must either be used to offset the cost of the reclamation or transferred to the Fund if not required for further reclamation activities at the permitted site.

* * * * *

33. Revise § 874.13 to read as follows:

§ 874.13 Reclamation objectives and priorities.

(a) When you conduct reclamation projects under this Part, you should follow OSM's "Final Guidelines for Reclamation Programs and Projects" (66 FR 31250, June 11, 2001) and the expenditures must reflect the following priorities in the order stated:

(1) *Priority 1:* The protection of public health, safety, and property from extreme danger of adverse effects of coal mining practices, including the restoration of land and water resources and the environment that:

(i) Have been degraded by the adverse effects of coal mining practices; and

(ii) Are adjacent to a site that has been or will be addressed to protect the public health, safety, and property from extreme danger of adverse effects of coal mining practices.

(2) *Priority 2:* The protection of public health and safety from adverse effects of coal mining practices, including the restoration of land and water resources and the environment that:

(i) Have been degraded by the adverse effects of coal mining practices; and

(ii) Are adjacent to a site that has been or will be addressed to protect the public health and safety from adverse effects of coal mining practices.

(3) *Priority 3:* The restoration of land and water resources and the environment previously degraded by adverse effects of coal mining practices, including measures for the conservation and development of soil, water (excluding channelization), woodland, fish and wildlife, recreation resources, and agricultural productivity. Priority 3 land and water resources that are geographically contiguous with existing or remediated Priority 1 or 2 problems will be considered adjacent under paragraphs (a)(1)(ii) or (a)(2)(ii) of this section.

(b) This paragraph applies to State or Tribal share funds available under §§ 872.14 and 872.17 of this chapter and historic coal funds available under § 872.21 of this chapter. You may expend these funds to reclaim Priority 3 lands and waters, if either of the following conditions applies:

(1) You have completed all of the Priority 1 and Priority 2 reclamation in the jurisdiction of your State or Indian tribe; or

(2) The expenditure for Priority 3 reclamation is made in conjunction with the expenditure of funds for Priority 1 or Priority 2 reclamation projects, including Priority 1 or Priority 2 reclamation projects conducted before December 20, 2006. Expenditures under this paragraph must either:

(i) Facilitate the Priority 1 or Priority 2 reclamation; or

(ii) Provide reasonable savings towards the objective of reclaiming all Priority 3 land and water problems within the jurisdiction of your State or Indian tribe.

34. Amend § 874.14 by revising the section heading and paragraph (a) to read as follows:

§ 874.14 Water supply restoration.

(a) Any State or Indian tribe that has not certified completion of all coal-related reclamation under section 411(a) of SMCRA may expend funds under §§ 872.16, 872.19, 872.23, and 872.31 of this chapter for water supply restoration projects. For purposes of this section, "water supply restoration projects" are those that protect, repair, replace, construct, or enhance facilities related to water supplies, including water distribution facilities and treatment plants that have been adversely affected by coal mining practices. For funds awarded before December 20, 2006, any uncertified State or Indian tribe may expend up to 30 percent of the funds distributed to it for water supply restoration projects.

* * * * *

35. Revise § 874.16 to read as follows:

§ 874.16 Contractor eligibility.

To receive moneys from the Fund or Treasury funds provided to uncertified States and Indian tribes under § 872.29 of this chapter, every successful bidder for an AML contract must be eligible under §§ 773.12, 773.13, and 773.14 of this chapter at the time of contract award to receive a permit or be provisionally issued a permit to conduct surface coal mining operations.

PART 875—CERTIFICATION AND NONCOAL RECLAMATION

36. The authority citation for part 875 continues to read as follows:

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

37. Revise the heading for part 875 to read as set forth above.

38. Add § 875.5 to read as follows:

§ 875.5 Definitions.

As used in this Part—
Reclamation plan or *State reclamation plan* means a plan that a State or Indian tribe submitted and that we approved under section 405 of SMCRA and Part 884 of this chapter.

39. Revise §§ 875.10 and 875.11 to read as follows:

§ 875.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.*, the Office of Management and

Budget (OMB) has approved the information collection requirements of Part 875 and assigned it control number 1029-0103. This information establishes procedures and requirements for State and Indian tribes to conduct noncoal reclamation under abandoned mine land funding. The information is needed to assure compliance with SMCRA and the Omnibus Budget Reconciliation Act of 1990. Persons must respond to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

§ 875.11 Applicability.

(a) If you are a State or Indian tribe that has not certified under section 411(a) of SMCRA, you must follow these noncoal reclamation requirements when you use State share funds under § 870.16, Tribal share funds under § 870.19, or historic coal funds under § 870.23 to conduct reclamation projects on lands or water affected by mining of minerals and materials other than coal.

(b) If you are a State or Indian tribe that has certified under section 411(a) of SMCRA, you may use prior balance replacement funds under § 872.31 of this chapter, certified in lieu funds under § 872.34 of this chapter, or both to:

(1) Maintain certification as required by §§ 875.13 and 875.14 by addressing eligible coal problems; and

(2) To implement the other requirements of this Part as provided for under an approved reclamation plan according to Part 884 of this chapter.

40. Amend § 875.12 by revising paragraph (c) to read as follows:

§ 875.12 Eligible lands and water before certification.

* * * * *

(c) There is no continuing responsibility for reclamation by the operator, permittee, or agent of the permittee under statutes of the State or Federal Government or by the State as a result of bond forfeiture. Bond forfeiture will render lands or water ineligible only if the amount forfeited is sufficient to pay the total cost of the necessary reclamation. In cases where the forfeited bond is insufficient to pay the total cost of reclamation, moneys sufficient to complete the reclamation may be sought under Part 886 of this chapter;

* * * * *

41. Amend § 875.13 by revising paragraph (a) introductory text and paragraph (a)(1) and by adding paragraph (d) to read as follows:

§ 875.13 Certification of completion of coal sites.

(a) The Governor of a State, or the equivalent head of an Indian tribe, may submit to the Secretary a certification of completion of coal sites. The certification must express the finding that the State or Indian tribe has achieved all existing known coal-related reclamation objectives for eligible lands and waters under section 404 of SMCRA or has instituted the necessary processes to reclaim any remaining coal related problems. In addition to the above finding, the certification of completion must contain:

(1) A description of both the rationale and the process used to arrive at the above finding for the completion of all coal-related reclamation under section 403(a)(1) through (3).

* * * * *

(d) The Director may, on his or her own initiative, make the certification referred to in paragraph (a) of this section on behalf of your State or Indian tribe if:

(1) Based upon information contained in the AML inventory, the Director determines that all coal reclamation projects meeting the priorities described in § 874.13(a) of this chapter in the jurisdiction of your State or Indian tribe have been completed; and

(2) Before making any determination, the Director provides the public an opportunity to comment through a notice in the **Federal Register**.

42. Revise § 875.14 to read as follows:

§ 875.14 Eligible lands and water after certification.

(a) Following certification, eligible noncoal lands, waters, and facilities are those—(1) Which were mined or processed for minerals or which were affected by such mining or processing, and abandoned or left in an inadequate reclamation status before August 3, 1977. However, for Federal lands, waters, and facilities under the jurisdiction of the Forest Service, the eligibility date is August 28, 1974. For Federal lands, waters and facilities under the jurisdiction of the Bureau of Land Management, the eligibility date is November 26, 1980; and

(2) For which there is no continuing reclamation responsibility under State or other Federal laws.

(b) If eligible coal problems are found or occur after certification, you must submit to us a plan that describes the approach and funds that will be used to address those problems in a timely manner. You may address any eligible coal problems with the certified in lieu funds that you have already received or will receive from § 872.32 of this

chapter. You may, at the direction of the State legislature or Tribal council, also use the prior balance replacement funds received from § 872.29 of this chapter to address coal problems subsequent to certification. Any coal reclamation projects that you do must conform to sections 401 through 410 of SMCRA.

43. Revise § 875.16 to read as follows:

§ 875.16 Exclusion of certain noncoal reclamation sites.

You, the uncertified State or Indian tribe, may not use moneys from the Fund or from prior balance replacement funds provided under § 872.29 of this chapter of this chapter for the reclamation of sites and areas designated for remedial action under the Uranium Mill Tailings Radiation Control Act of 1978 (42 U.S.C. 7901 *et seq.*) or that have been listed for remedial action under the Comprehensive Environmental Response Compensation and Liability Act of 1980 (42 U.S.C. 9601 *et seq.*).

44. Revise § 875.20 to read as follows:

§ 875.20 Contractor eligibility.

Every successful bidder for any contract by an uncertified State or Indian tribe under this Part, or for a contract by a certified State or Indian tribe to undertake coal AML reclamation as required to maintain certification under this Part, must be eligible under §§ 773.12, 773.13, and 773.14 of this chapter at the time of contract award to receive a permit or be provisionally issued a permit to conduct surface coal mining operations. This section does not apply to any contract by a certified State or Indian tribe that is not for coal reclamation.

PART 876—ACID MINE DRAINAGE TREATMENT AND ABATEMENT PROGRAM

45. The authority citation for part 876 is revised to read as follows:

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

46. Revise § 876.10 to read as follows:

§ 876.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.*, the Office of Management and Budget (OMB) has approved the information collection requirements of Part 876 and assigned it control number 1029–0104. OSM will use the information to determine if the State's or Indian tribe's Acid Mine Drainage Abatement and Treatment Programs is in compliance with legislative mandate. States and Indian tribes are required to respond to obtain a benefit in accordance with SMCRA. A Federal agency may not conduct or sponsor, and

you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

47. Revise § 876.12 to read as follows:

§ 876.12 Eligibility.

(a) Beginning December 20, 2006, any uncertified State or Indian tribe having an approved reclamation program may receive and retain, without regard to the limitation in section 402(g)(1)(D) of SMCRA, up to 30 percent of the total of the funds distributed annually to that State or Indian tribe under section 402(g)(1) of SMCRA (State or Tribal share) and section 402(g)(5) of SMCRA (historic coal funds). For funds awarded before December 20, 2006, any uncertified State or Indian tribe may retain up to 10 percent of the funds distributed to it for an acid mine drainage fund. All amounts set aside under this section must be deposited into an acid mine drainage abatement and treatment fund established under State or Indian tribal law.

(b) Before depositing funds under this Part, an uncertified State or Indian tribe must:

(1) Establish a special fund account providing for the earning of interest on fund balances; and

(2) Specify that moneys in the account may only be used for the comprehensive abatement of the causes and treatment of the effects of acid mine drainage within qualified hydrologic units (as defined in paragraph (c) of this section) affected by coal mining practices.

(c) As used in paragraph (b) of this section, “qualified hydrologic unit” means a hydrologic unit:

(1) In which the water quality has been significantly affected by acid mine drainage from coal mining practices in a manner that adversely impacts biological resources; and

(2) That contains lands and waters that are:

(i) Eligible under section 404 of SMCRA and include any of the priorities described in section 403(a) of SMCRA; and

(ii) The subject of the expenditure from the forfeiture of a bond required under section 509 of SMCRA or from other State sources to abate and treat acid mine drainage.

(d) After the conditions specified in paragraphs (a) and (b) of this section are met, OSM may approve a grant and the State or Indian tribe may deposit moneys into the special fund account. The moneys so deposited, together with any interest earned, must be considered State or Indian tribal moneys.

§§ 876.13 and 876.14 [Removed]

48. Remove §§ 876.13 and 876.14.

PART 879—ACQUISITION, MANAGEMENT, AND DISPOSITION OF LANDS AND WATER

49. The authority citation for part 879 is revised to read as follows:

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

50. Add § 879.5 to read as follows:

§ 879.5 Definitions.

As used in this Part—
Reclamation plan or State reclamation plan means a plan that a State or Indian tribe submitted and that we approved under section 405 of SMCRA and Part 884 of this chapter.

§ 879.10 [Removed]

51. Remove § 879.10.

52. Amend § 879.11 by revising paragraph (a) introductory text, paragraph (a)(2), paragraph (b), and paragraph (c) to read as follows:

§ 879.11 Land eligible for acquisition.

(a) We may acquire land adversely affected by past coal mining practices with moneys from the Fund. If approved in advance by us, you, an uncertified State or Indian tribe, may also acquire land adversely affected by past coal mining practices with moneys from the Fund or with prior balance replacement funds provided under § 872.29 of this chapter. Our approval must be in writing, and we must make a finding that the land acquisition is necessary for successful reclamation and that—

* * * * *

(2) Permanent facilities will be constructed on the land for the restoration, reclamation, abatement, control, or prevention of the adverse effects of past coal mining practices. For the purposes of this paragraph, “permanent facility” means any structure that is built, installed or established to serve a particular purpose or any manipulation or modification of the site that is designed to remain after the reclamation activity is completed, such as a relocated stream channel or diversion ditch.

(b) You, an uncertified State or Indian tribe, if approved in advance by us, may acquire coal refuse disposal sites, including the coal refuse, with moneys from the Fund and with prior balance replacement funds provided under § 872.29 of this chapter. We, OSM, also may use moneys from the Fund to acquire coal refuse disposal sites, including the coal refuse.

(1) Before the approval of the acquisition, the reclamation program seeking to acquire the site will make a finding in writing that the acquisition is necessary for successful reclamation

and will serve the purposes of their reclamation program.

(2) Where an emergency situation exists and a written finding as set out in § 877.14 of this chapter has been made, we may acquire lands where public ownership is necessary and will prevent recurrence of the adverse effects of past coal mining practices.

(c) Land adversely affected by past coal mining practices may be acquired by us if the acquisition is an integral and necessary element of an economically feasible plan or project to construct or rehabilitate housing which meets the specific requirements in section 407(h) of SMCRA.

* * * * *

53. Amend § 879.15 by revising paragraph (h) to read as follows:

§ 879.15 Disposition of reclaimed land.

* * * * *

(h) All moneys received from disposal of land under this Part must be returned to us. We will handle all moneys received under this paragraph as unused funds in accordance with §§ 885.19 and 886.20 of this chapter.

PART 880—MINE FIRE CONTROL

54. The authority citation for part 880 is revised to read as follows:

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

55. Amend § 880.5 by adding paragraph (h) to read as follows:

§ 880.5 Definitions.

* * * * *

(h) *Reclamation plan or State reclamation plan* means a plan that a State or Indian tribe submitted and that we approved under section 405 of SMCRA and Part 884 of this chapter.

PART 882—RECLAMATION ON PRIVATE LAND

56. The authority citation for part 882 is revised to read as follows:

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

57. Revise § 882.10 to read as follows:

§ 882.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.*, the Office of Management and Budget (OMB) has approved the information collection requirements of Part 882 and assigned it control number 1029-0057. This information is being collected to meet the mandate of section 408 of SMCRA, which allows the State or Indian tribe to file liens on private property that has been reclaimed under certain conditions. This information will be used by the regulatory authority to ensure that the State or Indian tribe has sufficient programmatic capability

to file liens to recover costs for reclaiming private lands. States and Indian tribes are required to respond to obtain a benefit in accordance with SMCRA. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

58. Amend § 882.13 by revising paragraph (a)(1) to read as follows:

§ 882.13 Liens.

* * * * *

(a) * * *

(1) A lien must not be placed against the property of a surface owner who did not consent to, participate in or exercise control over the mining operation which necessitated the reclamation work.

* * * * *

PART 884—STATE RECLAMATION PLANS

59. The authority citation for part 884 is revised to read as follows:

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

60. Add § 884.5 to read as follows:

§ 884.5 Definitions.

As used in this Part—
Reclamation plan or State reclamation plan means a plan that a State or Indian tribe submitted and that we approved under section 405 of SMCRA and Part 884 of this chapter.

61. Revise § 884.11 to read as follows:

§ 884.11 State eligibility.

You, a State or Indian tribe, are eligible to submit a reclamation plan if you have eligible lands or water as defined in § 700.5 of this chapter within your jurisdiction. We may approve your proposed reclamation plan if you have an approved State regulatory program under section 503 of SMCRA, and you meet the other requirements of this chapter and SMCRA. The States of Tennessee and Missouri are exempt from the requirement for an approved State regulatory program by section 402(g)(8)(B) of SMCRA. The Navajo, Hopi, and Crow Indian tribes are exempt from the requirement for an approved regulatory program by section 405(k) of SMCRA.

62. Amend § 884.17 by revising the section heading and paragraph (b) to read as follows:

§ 884.17 Other uses by certified States and Indian tribes.

* * * * *

(b) Grant applications for uses other than coal reclamation by certified States and Indian tribes may be submitted in accordance with § 885.15 of this chapter.

63. Add part 885 as follows:

PART 885—GRANTS FOR CERTIFIED STATES AND INDIAN TRIBES

Sec.

- 885.1 What does this Part do?
- 885.5 Definitions.
- 885.10 Information collection.
- 885.11 Who is eligible for a grant?
- 885.12 What can I use grant funds for?
- 885.13 What are the maximum grant amounts?
- 885.14 How long is my grant?
- 885.15 How do I apply for a grant?
- 885.16 After OSM approves my grant, what responsibilities do I have?
- 885.17 How can my grant be amended?
- 885.18 What audit, accounting, and administrative requirements must I meet?
- 885.19 What happens to unused funds from my grant?
- 885.20 What must I report?
- 885.21 What happens if I do not comply with applicable Federal law or the terms of my grant?
- 885.22 When and how can my grant be terminated for convenience?

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

§ 885.1 What does this Part do?

This Part sets forth procedures for grants to you, a State or Indian tribe that has certified under § 875.13 of this chapter that all known coal reclamation problems in your State or on Indian lands within your jurisdiction have been addressed. OSM's "Final Guidelines for Reclamation Programs and Projects" (66 FR 31250, June 11, 2001) may be used if applicable.

§ 885.5 Definitions.

As used in this Part—

Award means to approve our grant agreement authorizing you to draw down and expend program funds.

Distribute means to annually assign funds to a specific State or Indian tribe. After distribution, funds are available for award in a grant to that specific State or Indian tribe.

Reclamation plan or State reclamation plan means a plan that a State or Indian tribe submitted and that we approved under section 405 of SMCRA and Part 884 of this chapter.

§ 885.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.*, the Office of Management and Budget (OMB) has approved the information collection requirements for all Title IV grants and assigned clearance number 1029–0059. This information is being collected to obtain an estimate from you, the certified State or Indian tribe, of the funds you believe necessary to implement your program and to provide OSM with a means to measure performance results under the

Government Performance and Results Act through your obligations of funds. Certified States and Indian tribes are required to respond to obtain a benefit in accordance with SMCRA. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

§ 885.11 Who is eligible for a grant?

You are eligible for grants under this Part if:

- (a) You are a State or Indian tribe with a reclamation plan approved under Part 884 of this chapter; and
- (b) You have certified under § 875.13 of this chapter that all known coal problems in your State or on Indian lands in your jurisdiction have been addressed.

§ 885.12 What can I use grant funds for?

(a) For all awards under this Part, you must use moneys for activities authorized in SMCRA and included in your approved reclamation plan or described in the grant application. In addition, you may use moneys granted under this Part to administer your approved reclamation program.

(b) You may use grant funds as established for each type of funds you receive. You may use prior balance replacement funds as provided under § 872.31 of this chapter. You may use certified in lieu funds as provided under § 872.34 of this chapter. You may use any moneys which may be available to you from the Fund for noncoal reclamation as authorized under section 411 of SMCRA and Part 875 of this chapter.

(c) You may use grant funds for any allowable cost as determined by the OMB cost principles in Circular A–87.

§ 885.13 What are the maximum grant amounts?

(a) You may apply at any time for a grant of any or all of the Title IV funds that are available to you.

(b) We will not award an amount greater than the total funds distributed to your State or Indian tribe in the current annual fund distribution less any previous awards of current year funds, plus any funds distributed to you in previous years but not awarded, plus any unexpended funds recovered from previous grants and made available to you under § 885.19 of this chapter.

(c) Funds for the current fiscal year will be available for award after the annual fund distribution described in § 872.13 of this chapter.

(d) Whenever you request it, we will give you information on the amounts

and types of funds that are currently available to you.

§ 885.14 How long is my grant?

The performance period for your grant will be the time period you request in your grant application.

§ 885.15 How do I apply for a grant?

(a) You must use application forms and procedures specified by OSM.

(b) We will award your grant as soon as practicable but no more than 30 days after we receive your complete application.

(c) If your application is not complete, we will inform you as soon as practicable of the additional information we need to receive from you before we can process the award.

(d) You must agree to expend the funds of the grant in accordance with SMCRA, applicable Federal laws and regulations, and applicable OMB and Treasury Circulars.

§ 885.16 After OSM approves my grant, what responsibilities do I have?

(a) When we award your grant, we will send you a written grant agreement stating the terms of the grant.

(b) After you are awarded a grant, you may assign functions and funds to other Federal, State, or local organizations. However, we will hold you responsible for the overall administration of that grant, including the proper use of funds and reporting.

(c) The grant award constitutes an obligation of Federal funds. You accept the grant and its conditions once you initiate work under the agreement or draw down awarded funds.

(d) Although we have approved the grant agreement, you must ensure that any applicable laws, clearances, permits, or requirements are met before you expend funds for projects other than coal reclamation under Part 874.

(e) If you conduct a coal reclamation project under Part 874 of this chapter, you must not expend any funds until we have ensured that all necessary actions have been taken by you and us to ensure compliance with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and any other applicable laws, clearances, permits or requirements.

(f) To the extent technologically and economically feasible, you must use fuel other than petroleum or natural gas for all public facilities that are planned, constructed, or modified in whole or in part with Title IV grant funds.

(g) You must not expend more funds than we have awarded. Our award of any grant does not commit or obligate the United States to award any

continuation grant or to enter into any grant revision, including grant increases to cover cost overruns.

§ 885.17 How can my grant be amended?

(a) A grant amendment is a change of terms or conditions of the grant agreement. An amendment may be initiated by you or by us.

(b) You must promptly notify us in writing, or we must promptly notify you in writing, of events or proposed changes that may require a grant amendment.

(c) All requirements and procedures for grant amendments will follow 43 CFR part 12.

(d) We must award your amended grant agreement within 20 days of receiving your request.

§ 885.18 What audit, accounting, and administrative requirements must I meet?

(a) You must comply with the audit requirements of the OMB Circular A-133.

(b) You must follow procedures governing grant accounting, payment, records, property, and management contained in 43 CFR part 12.

§ 885.19 What happens to unused funds from my grant?

All program grant funds are available until expended. If there are any unexpended funds after your grant is completed, we will deobligate the funds when we close your grant. We will make these unused funds available for re-award to the same certified State or Indian tribe to which they were originally distributed. You may apply for unused funds whenever you choose to request them either in a new grant award or as an amendment to an existing open grant.

§ 885.20 What must I report?

(a) For each grant, you must annually report to us the performance and financial information that we request.

(b) Upon completion of each grant, you must report to us final performance and financial information that we request.

(c) You must use the AML inventory to maintain a current list of AML problems and to report annual reclamation accomplishments with grant funds.

(1) If you conduct reclamation projects, you must update the AML inventory for each reclamation project you complete as you complete it.

(2) We must approve any amendments to the AML inventory after December 20, 2006. We define "amendment" as any coal problems added to the AML inventory in a new or existing problem area.

§ 885.21 What happens if I do not comply with applicable Federal law or the terms of my grant?

If you or your subgrantee materially fails to comply with an award, a reclamation plan, or a Federal statute or regulation, including statutes relating to nondiscrimination, we may take appropriate remedial actions. Enforcement actions and procedures must follow 43 CFR part 12.

§ 885.22 When and how can my grant be terminated for convenience?

Either you or we may terminate the grant for convenience following the procedures in 43 CFR part 12.

64. Revise part 886 to read as follows:

PART 886—RECLAMATION GRANTS FOR UNCERTIFIED STATES AND INDIAN TRIBES

Sec.

886.1 What does this Part do?

886.5 Definitions.

886.10 Information collection.

886.11 Who is eligible for a grant?

886.12 What can I use grant funds for?

886.13 What are the maximum grant amounts?

886.14 How long will my grant be?

886.15 How do I apply for a grant?

886.16 After OSM approves my grant, what responsibilities do I have?

886.17 How can my grant be amended?

886.18 What audit and administrative requirements must I meet?

886.19 How must I account for grant funds?

886.20 What happens to unused funds from my grant?

886.21 What must I report?

886.22 What records must I maintain?

886.23 What actions can OSM take if I do not comply with the terms of my grant?

886.24 What procedures will OSM follow to reduce, suspend, or terminate my grant?

886.25 How can I appeal a decision to reduce, suspend, or terminate my grant?

886.26 When and how can my grant be terminated for convenience?

886.27 What special procedures apply to Indian lands not subject to an approved Tribal reclamation program?

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

§ 886.1 What does this Part do?

This Part sets forth procedures for grants to you, an uncertified State or Indian tribe, to reclaim eligible lands and water and conduct other activities necessary to carry out your approved reclamation plan. OSM's "Final Guidelines for Reclamation Programs and Projects" (66 FR 31250, June 11, 2001) should be used as applicable.

§ 886.5 Definitions.

As used in this Part—

Award means to approve our grant agreement authorizing you to draw down and expend program funds.

Distribute means to annually assign funds to a specific State or Indian tribe. After distribution, funds are available for award in a grant to that specific State or Indian tribe.

Reclamation plan or *State reclamation plan* means a plan that a State or Indian tribe submitted and that we approved under section 405 of SMCRA and Part 884 of this chapter.

§ 886.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.*, the Office of Management and Budget (OMB) has approved the information collection requirements of Part 886, and Forms OSM-47, OSM-49, and OSM-51, and assigned clearance number 1029-0059. This information is being collected to obtain an estimate from you the uncertified State or Indian tribe of the funds you believe necessary to implement your reclamation program and to provide OSM with a means to measure performance results under the Government Performance and Results Act through State and Tribal obligations of funds. Uncertified States and Indian tribes are required to respond to obtain a benefit in accordance with SMCRA. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

§ 886.11 Who is eligible for a grant?

You are eligible for grants under this Part if:

(a) You are a State or Indian tribe with a reclamation plan approved under Part 884 of this chapter; and

(b) You have not certified that all known coal problems in your State or on Indian lands in your jurisdiction have been addressed.

§ 886.12 What can I use grant funds for?

(a) You must use moneys granted under this Part to administer your approved reclamation program and to carry out the specific reclamation and other activities authorized in SMCRA as included in your reclamation plan or your grant application.

(b) We award grants for reclamation of eligible lands and water in accordance with sections 404 and 409 of SMCRA and §§ 874.12 and 875.12 of this chapter, and in accordance with the priorities stated in section 403 of SMCRA and § 874.13 of this chapter.

(c) You may use grant funds as established in this chapter for each type of funds you receive in your AML grant. You may use State share funds as provided in § 872.16 of this chapter; Tribal share funds as in § 872.19 of this chapter; historic coal funds as in

§ 872.23 of this chapter; minimum program make up funds as in § 872.28 of this chapter; prior balance replacement funds as in § 872.31 of this chapter; and federal expense funds as in § 872.25 of this chapter and in the appropriation.

(d) You may use grant funds for acquisition of land or interests in land, and any mineral or water rights associated with the land, for up to 90 percent of the costs.

(e) You may use grant funds only for costs which are allowable as determined by OMB cost principles in Circular A-87.

§ 886.13 What are the maximum grant amounts?

(a) You may apply at any time for a grant of any or all of the program funds that are distributed to you.

(b) We will not award an amount greater than the total funds distributed to your State or Indian tribe in the current annual fund distribution, less any previous awards of current year funds, plus any funds distributed to you in previous years but not awarded, plus any unexpended funds recovered from previous grants and made available to you under § 886.20 of this chapter.

(c) Funds for the current fiscal year will be available for award after the annual fund distribution described in § 872.13 of this chapter.

(d) Whenever you request it, we will give you information on the amounts and types of funds that are currently available to you.

§ 886.14 How long will my grant be?

(a) We will approve a grant period on the basis of the information contained in the grant application showing that projects to be funded will fulfill the objectives of SMCRA and the approved reclamation plan.

(b) The grant period will normally be for 3 years.

(c) We may extend the grant period at your request. We will normally approve one extension for up to one additional year.

(d) The grant period for funding your administrative costs will not normally exceed the first year of the grant.

(e) At your request, we may award or extend grants containing State or Tribal share funds distributed to you in Fiscal Years 2008, 2009, or 2010 for a budget period of up to five years.

§ 886.15 How do I apply for a grant?

(a) You must use application forms and procedures specified by OSM.

(b) We will approve or disapprove your grant application within 60 days of receipt.

(c) If we do not approve your application, we will inform you in writing of the reasons for disapproval. We may propose modifications if appropriate. You may resubmit the application or appropriate revised portions of the application. We will process the revised application as an original application.

(d) You must agree to carry out activities funded by the grant in accordance with SMCRA, applicable Federal laws and regulations, and applicable OMB and Treasury Circulars.

(e) We will not require complete copies of plans and specifications for projects either before the grant is approved or at the start of the project. However, after the start of the project, we may review your plans and specifications at your office, the project site, or any other appropriate site.

§ 886.16 After OSM approves my grant, what responsibilities do I have?

(a) When we award your grant, we will send you a written grant agreement stating the terms of the grant.

(b) After you are awarded a grant, you may assign functions and funds to other Federal, State, or local agencies. However, we will hold you responsible for the overall administration of that grant, including the proper use of funds and reporting.

(c) The grant award constitutes an obligation of Federal funds. You accept the grant and its conditions once you initiate work under the agreement or draw down awarded funds.

(d) Although we have approved the grant agreement, you must not expend any construction funds until you receive a written authorization to proceed with reclamation on the individual project. Our Authorization to Proceed ensures that both you and we have taken all actions necessary to ensure compliance with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and any other applicable laws, clearances, permits, or requirements.

(e) You must enter coal problems in the AML inventory before you expend funds on design or construction activities for a site. We must approve any amendments to the AML inventory made after December 20, 2006. For purposes of this section, we define "amendment" as any coal problem added to the AML inventory in a new or existing problem area and any Priority 3 coal problem in the AML inventory that is elevated to either Priority 1 or Priority 2 status.

(1) For emergency projects conducted under section 410 of SMCRA, our finding that an emergency condition exists constitutes our approval for the

abandoned mine lands problem to be entered into the AML inventory.

(2) We must approve amendments to the AML inventory for non-emergency coal problems before you, the State or Indian tribe, begin project development or design or use funds for construction activities. In projects where development and design is minimal, this approval may occur during the Authorization to Proceed process.

(f) To the extent technologically and economically feasible, you must use fuel other than petroleum or natural gas for all public facilities that are planned, constructed, or modified in whole or in part with abandoned mine land grant funds.

(g) You must not expend more funds than we have awarded. Our award of any grant does not commit or obligate the United States to award any continuation grant or to enter into any grant revision, including grant increases to cover cost overruns.

§ 886.17 How can my grant be amended?

(a) A grant amendment is a change of the terms or conditions of the grant agreement. An amendment may be initiated by you or by us.

(b) You must promptly notify us in writing, or we must promptly notify you in writing, of events or proposed changes that may require a grant amendment.

(c) All procedures for grant amendments will follow 43 CFR part 12.

(d) We must approve or disapprove the amendment within 30 days of receiving your request.

§ 886.18 What audit and administrative requirements must I meet?

(a) You must comply with the audit requirements of the OMB Circular A-133.

(b) You must follow administrative procedures governing grant payments, property, and related requirements contained in 43 CFR part 12.

§ 886.19 How must I account for grant funds?

You must do all of the following in accordance with the requirements of 43 CFR part 12:

(a) Accurately and timely account for grant funds;

(b) Adequately safeguard all funds, property, and other assets and assure that they are used solely for authorized purposes;

(c) Provide a comparison of actual amounts spent with budgeted amounts for each grant;

(d) Request any cash advances as closely as possible to the actual time of the disbursement; and

(e) Design a systematic method to assure timely and appropriate resolution of audit findings and recommendations.

§ 886.20 What happens to unused funds from my grant?

(a) If there are any unexpended funds after your grant is completed, we will deobligate the funds when we close your grant. We will treat unused funds as follows:

(1) We will transfer any State share funds under § 872.14 of this chapter or Tribal share funds under § 872.17 that were not expended within three years of the date they were awarded in a grant, except five years for funds awarded in Fiscal Years 2008, 2009, and 2010, to historic coal funds, § 872.21 of this chapter. We will distribute any funds transferred to historic coal in the next annual distribution in the same way as historic coal funds from fee collections during that fiscal year.

(2) We will hold any unused Federal expense funds under § 872.24 of this chapter for distribution to any State or Indian tribe as needed for the activity for which the funds were appropriated.

(3) We will make unused funds of all other types available for re-award to the same State or Indian tribe to which they were originally distributed. This includes historic coal funds under § 872.21 of this chapter, minimum program make up funds under § 872.26 of this chapter, and prior balance replacement funds under § 872.29 of this chapter.

(b) If you have any State share funds or Tribal share funds that were distributed to you in an annual distribution under §§ 872.15 or 872.18 of this chapter but that were not awarded to you in grant within 3 years of the date they were distributed, or 5 years for funds distributed in Fiscal Years 2008, 2009, and 2010, we will transfer the unawarded funds to the historic coal fund under § 872.21 of this chapter and distribute them in the next annual distribution.

§ 886.21 What must I report?

(a) For each grant, you must annually report to us the performance and financial information that we specify.

(b) Upon completion of each grant, you must submit to us final performance, financial, and property reports, and any other information that we specify.

(c) When you complete each reclamation project, you must update the AML inventory.

§ 886.22 What records must I maintain?

You must maintain complete records in accordance with 43 CFR Part 12.

Your records must support the information you reported to us. This includes, but is not limited to, books, documents, maps, and other evidence. Accounting records must document procedures and practices sufficient to verify:

(a) The amount and use of all Title IV funds received; and

(b) The total direct and indirect costs of the reclamation program for which you received the grant.

§ 886.23 What actions can OSM take if I do not comply with the terms of my grant?

(a) If you, or your subgrantee, fail to comply with the terms of your grant, we may take one or more of the following remedial actions, as appropriate in the circumstances:

(1) Temporarily withhold cash payments pending your correction of the deficiency;

(2) Disallow (that is, deny both use of Federal funds and matching credit for non-Federal funds) all or part of the cost of the activity or action not in compliance;

(3) Wholly or partly reduce, suspend or terminate the current award for your program;

(4) Withhold further grant awards for the program; or

(5) Take other remedies that may be legally available.

(b) If we terminate your State regulatory administration and enforcement grant, provided under Part 735 of this chapter, for failure to implement, enforce, or maintain an approved State regulatory program or any part thereof, we will terminate the grant awarded under this Part. This paragraph does not apply to the States of Missouri or Tennessee under section 402(g)(8)(B) of SMCRA, or to the Navajo, Hopi and Crow Indian tribes under section 405(k) of SMCRA.

(c) If you fail to enforce the financial interest provisions of Part 705 of this chapter, we will terminate the grant.

(d) If you fail to submit reports required by this Part or Part 705 of this chapter, we will take appropriate remedial actions. We may terminate the grant.

(e) If you fail to submit a reclamation plan amendment as required by § 884.15 of this chapter, we may reduce, suspend, or terminate all existing AML grants in whole or in part or may refuse to process all future grant applications.

(f) If you are not in compliance with all Federal statutes relating to nondiscrimination, including but not limited to the following, we will terminate the grant:

(1) Title VI of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 252 (42

U.S.C. 2000d *et seq.*).

“Nondiscrimination in Federally Assisted Programs,” which provides that no person in the United States shall on the grounds of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance, and the implementing regulations in 43 CFR part 17.

(2) Executive Order 11246, as amended by Executive Order 11375, “Equal Employment Opportunity,” requiring that employees or applicants for employment not be discriminated against because of race, creed, color, sex, or national origin, and the implementing regulations in 40 CFR part 60.

(3) Section 504 of the Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 355 (29 U.S.C. 794), as amended by Executive Order 11914, “Nondiscrimination with Respect to the Handicapped in Federally Assisted Programs.”

§ 886.24 What procedures will OSM follow to reduce, suspend, or terminate my grant?

We will use the following procedures to reduce, suspend, or terminate your grant:

(a) We must give you at least 30 days written notice of intent to reduce, suspend, or terminate a grant. An OSM official authorized to approve your grant must sign our notice of intent. We must send this notice by certified mail, return receipt requested. Our notice must include the reasons for the proposed action and the proposed effective date of the action.

(b) We must give you opportunity for consultation and remedial action before we reduce or terminate a grant.

(c) We must notify you in writing of the termination, suspension, or reduction of the grant. The notice must be signed by the authorized approving official and sent by certified mail, return receipt requested.

(d) Upon termination, you must refund to us that remaining portion of the grant money not encumbered. However, you may retain any portion of the grant that is required to meet contractual commitments made before the effective date of termination.

(e) You must not make any new commitments of grant funds after receiving notification of our intent to terminate the grant without our approval.

(f) We may allow termination costs as determined by applicable Federal cost principles listed in OMB Circular A-87.

§ 886.25 How can I appeal a decision to reduce, suspend, or terminate my grant?

(a) Within 30 days of our decision to reduce, suspend, or terminate a grant, you may appeal the decision to the Director.

(1) You must include in your appeal a statement of the decision being appealed and the facts that you believe justify a reversal or modification of the decision.

(2) The Director must decide the appeal within 30 days of receipt.

(b) Within 30 days of a decision by the Director to reduce, suspend, or terminate a grant, you may appeal the decision to the Department of the Interior's Office of Hearings and Appeals. You must include in the appeal a statement of the decision being appealed and the facts that you believe justify a reversal or modification of the decision.

§ 886.26 When and how can my grant be terminated for convenience?

Either you or we may terminate or reduce a grant if both parties agree that continuing the program would not produce benefits worth the additional costs. We will handle a termination for convenience as an amendment to the grant to be approved by the OSM official authorized to approve your grant.

§ 886.27 What special procedures apply to Indian lands not subject to an approved Tribal reclamation program?

(a) This section applies to Indian lands not subject to an approved Tribal reclamation program. The Director is authorized to mitigate emergency situations or extreme danger situations arising from past mining practices and begin reclamation of other areas determined to have high priority on such lands.

(b) The Director is authorized to receive proposals from Indian tribes for projects that should be carried out on Indian lands subject to this section and to carry out these projects under Parts 872 through 882 of this chapter.

(c) For reclamation activities carried out under this section on Indian lands, the Director shall consult with the Indian tribe and the Bureau of Indian Affairs office having jurisdiction over the Indian lands.

(d) If a proposal is made by an Indian tribe and approved by the Director, the Tribal governing body shall approve the project plans. The costs of the project may be charged against Federal expense funds under § 872.25 of this chapter.

(e) Approved projects may be carried out directly by the Director or through such arrangements as the Director may make with the Bureau of Indian Affairs or other agencies.

PART 887—SUBSIDENCE INSURANCE PROGRAM GRANTS

65. The authority citation for part 887 continues to read as follows:

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

66. Revise § 887.1 to read as follows:

§ 887.1 Scope.

This Part sets forth the procedures for grants to you, a State or Indian tribe with an approved reclamation plan to establish, administer, and operate a self-sustaining individual State or Indian tribe administered program to insure private property against damages caused by land subsidence resulting from underground coal mining.

§ 887.3 [Removed]

67. Remove § 887.3.

68. Amend § 887.5 by revising the definition of "Self-sustaining," removing the definition of "State Administered" and adding the definitions of "reclamation plan or State reclamation plan" and "State or Indian tribe administered" to read as follows:

§ 887.5 Definitions.

* * * * *

Reclamation plan or State reclamation plan means a plan that a State or Indian tribe submitted and that we approved under section 405 of SMCRA and Part 884 of this chapter.

Self-sustaining means maintaining an insurance rate structure which is designed to be actuarially sound. Self-sustaining requires that State or Indian tribal subsidence insurance programs provide for recovery of payments made in settlement for damages from any party responsible for the damages under the law of the State or Indian tribe. Actuarial soundness implies that funds are sufficient to cover expected losses and expenses including a reasonable allowance for underwriting services and contingencies. Self-sustaining must not preclude the use of funds from other non-Federal sources.

State or Indian tribe administered means administered either directly by a State or Indian tribe or for a State or Indian tribe through a State or Indian tribal authorized commission, board, contractor such as an insurance company, or other entity subject to State or Indian tribal direction.

69. Revise §§ 887.10 through 887.13 to read as follows:

§ 887.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.*, the OMB has approved the information collection requirements of Part 887 and assigned it control number 1029-0107. This information is being

collected to support State and Indian tribal grant requests for moneys for the establishment, administration, and operation of self-sustaining State or Indian tribal administered subsidence insurance programs. States and Indian tribes are required to respond to obtain a benefit in accordance with SMCRA. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

§ 887.11 Eligibility for grants.

You are eligible for grants under this Part if you are a State or Indian tribe with a reclamation plan approved under Part 884 of this chapter. If you are uncertified, you must have State share funds available under § 872.14 of this chapter or Tribal share funds available under § 872.17 of this chapter. If you have certified completion of coal reclamation under section 411(a) of SMCRA, you must have certified in lieu funds available under § 872.32 of this chapter, or prior balance replacement funds available under § 872.29 of this chapter if the State legislature or Tribal council has established this purpose.

§ 887.12 Coverage and amount of grants.

(a) You may use moneys granted under this Part to develop, administer, and operate a subsidence insurance program to insure private property against damages caused by subsidence resulting from underground coal mining. The moneys may be used to cover your costs for services and materials according to OMB cost principles, Circular A-87. You may use eligible grant moneys to cover capitalization requirements and initial reserve requirements mandated by applicable State or Tribal law provided use of such moneys is consistent with the 43 CFR part 12.

(b) You must submit a grant application under the procedures of Part 885 of this chapter for certified States and Indian tribes or Part 886 of this chapter for uncertified States or Indian tribes. Your application must include the following:

(1) A narrative statement describing how the subsidence insurance program is "State or Indian tribe administered"; and

(2) A narrative statement describing how the funds requested will achieve a self-sustaining individual State or Indian tribe administered program to insure private property against subsidence resulting from underground coal mining.

(c) Grants awarded to you under this Part cannot exceed a cumulative total

over the lifetime of the program of \$3 million.

(d) You may not use grant moneys from the Fund for lands that are ineligible for reclamation funding under Title IV of SMCRA.

(e) Insurance premiums must be considered program income and must be used to further eligible subsidence insurance program objectives in accordance with 43 CFR part 12.

§ 887.13 Grant period.

The grant funding period must not exceed 8 years from the time we approve the grant. You must return any unexpended funds remaining at the end of any grant period to us according to 43 CFR part 12.

70. Revise § 887.15 to read as follows:

§ 887.15 Grant administration requirements and procedures.

The requirements and procedures for grant administration set forth in Part

885 of this chapter for reclamation grants to certified States and Indian tribes or in Part 886 of this chapter for reclamation grants to uncertified States and Indian tribes must be used for subsidence insurance funds in grants.

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