

## **Solicitation of Feedback regarding Remining Incentives**

The Office of Surface Mining and Reclamation is soliciting feedback on issues to consider in rulemaking development to implement new SMCRA Section 415 regarding possible remining incentives (enacted as part of the AML Reauthorization in December 2006; PL 109-432). Any promulgation of remining rules will be separate and independent from other OSM rulemaking related to AML reauthorization. I'd appreciate it if you could distribute the attached document about potential remining incentives to your leadership and provide us any comments from your organization by March 29, 2007. That deadline will allow us, if indicated, to subsequently determine the scope of any potential rulemaking and begin work on a proposed rule.

Please send comments by e-mail or regular mail directly to:

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The remainder of this document provides further details.

CHANGES TO SMCRA REGARDING REMINING  
IN THE TAX RELIEF AND HEALTH CARE ACT OF 2006

On December 20, 2006, President Bush signed Public Law Number 109-432, which provides, in relevant part, the authority to develop rules with remining incentives (emphasis added):

**Section 415-(a) IN GENERAL.**—Notwithstanding any other provision of this Act, **the Secretary may, after opportunity for public comment, promulgate regulations that describe conditions under which amounts in the fund may be used to provide incentives 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 with respect to the eligible land than would be achieved without the incentives.**

**(b) REQUIREMENTS.**—Any regulations promulgated under subsection (a) shall specify that **the incentives shall apply only if the Secretary determines, with the concurrence of the State regulatory authority referred to in title V, that, without the incentives, the eligible land would not be likely to be remined and reclaimed.**

**(c) INCENTIVES.**—

**(1) IN GENERAL.**—Incentives that may be considered for inclusion in the regulations promulgated under subsection (a) include, but are not limited to—

- (A) a rebate or waiver of the reclamation fees** required under section 402(a); and
- (B) the use of amounts in the fund to provide financial assurance for remining operations in lieu of all or a portion of the performance bonds** required under section 509.

**(2) LIMITATIONS.**—

**(A) USE.**—**A rebate or waiver** under paragraph (1)(A) **shall be used only for operations that—**

- (i) remove or reprocess abandoned coal mine waste; or**
- (ii) conduct remining activities that meet the priorities specified in paragraph (1) or (2) of section 403(a).**

**(B) AMOUNT.**—**The amount of a rebate or waiver** provided as an incentive under paragraph (1)(A) to remine or reclaim eligible land shall **not exceed the estimated cost of reclaiming the eligible land under this section.**

PL 109-432 authorizes OSM to promulgate rules with remining incentives, but we are not mandated to do rulemaking--particularly if rules could create problems with AML fund revenues and distribution, or might somehow have the unintended consequence of discouraging remining. Thus, we are seeking comment on whether incentives are needed in all cases, whether the types of incentives are appropriate, and what the impacts of these incentives (particularly fee waivers and rebates) would be on AML fund revenues and distributions.

This document was prepared to prompt dialogue on concepts and issues warranting consideration if proposed regulations to implement Section 415 remining incentives are developed. We are interested in feedback from the States, industry and other

stakeholders on these and other issues to help shape the scope of possible rulemaking proposals.

The new statutory language in Section 415 contains very narrow provisions that frame our rulemaking objectives:

- ✓ As background, it is important to note that past OSM rulemaking set practical performance standards that recognize the inherent difficulties in re-mining areas previously disturbed by coal mining. For instance, the degree of backfilling and grading possible when re-mining is controlled by “reasonably available spoil” in 30 CFR §§ 816/817.102, 816/817.106 and 819.19. 30 CFR §816/817.116 allows reduction of the liability period for revegetation success on re-mined land. 30 CFR §816/817.133 provides that post-mining land uses for re-mined sites should be the highest/best use achievable without affecting undisturbed areas.
- ✓ On its face, SMCRA section 415 appears to present little opportunity for changing other areas of SMCRA performance standards as incentives for re-mining. However, we are open to suggestions for other re-mining incentives that are consistent with the statute.
- ✓ Section 415 authorizes OSM to prepare re-mining incentives rules that *leverages “the use of amounts from the [AML Reclamation] fund”* to achieve more reclamation with respect to the eligible land than would be achieved without the incentives. Congress also indicated that the incentives will apply only if it is determined that, without the incentives, the eligible land would not be likely re-mined and reclaimed. How should the determination be made (i.e., what criteria used) by the Secretary and concurred with by the state regulatory authority that absent the incentives the site would not likely be re-mined and reclaimed?
- ✓ Should proposed rules to rebate or waive the reclamation fees be promulgated under 30 CFR Part 872 or some other Title V section of the rules?
- ✓ Is 30 CFR Part 872 or 30 CFR Part 800 the appropriate section for dealing with implementing Section 415 provisions dealing with use of the Abandoned Mine Reclamation Funds as a substitute for all or part of a performance bond?
- ✓ We would like to implement Section 415 in a general way that provides the most flexibility for state programs to consider unique conditions in their states to provide the re-mining incentives. However, the preamble to the rules could provide guidance on the range of possible appropriate options, circumstances, and conditions on the ground for fee waivers, rebates, and use of AML Funds for performance bonds. For instance:
  - Under what circumstances is a waiver of fees appropriate as opposed to a rebate? For example, a waiver may be most appropriate for reprocessing of abandoned coal mine waste sites as an incentive for permittees to

completely reprocess, remove, and reclaim a site of an embankment or impoundment. A rebate may be most appropriate for permittees who reprocess coal mine waste but must use the site as a disposal area for waste generated when reprocessing.

- Should rebates be returned on a sliding scale that rewards permittees for the ability to fulfill more performance standards? For example, returning a previously-mined site to approximate original contour following re-mining would result in a larger rebate than partial highwall elimination; meeting water quality standards would result in a larger rebate than merely improving water quality; improving ground cover over pre-remining conditions would return more fees than equaling pre-remining ground cover.
  - If a state guarantees all or part of re-mining reclamation with AML funding in lieu of requiring a bond, how will AML funds be tracked/transferred into the state bond fund accounts (and back again when reclamation is completed)?
- ✓ In the event of either re-mining site bond forfeiture or completed reclamation, how will the site be treated on the AML Inventory?
  - ✓ Congress revised Sections 402(g)(2), (7) and 403(a) of SMCRA regarding site priorities for AML funding. However, the revisions still reflect the priorities for funding projects that protect public health, safety and property. The re-mining incentives apply to operations that remove or reprocess abandoned coal mine waste without regard to site priorities. How should states ensure that use of AML fee rebates or waivers will not impact completion of higher priority AML reclamation priority projects under Sections 402 and 403?
  - ✓ How should the proposed rules assure that implementing a waiver or rebate of reclamation fees reaffirms the AML enhancement rule (64 FR 7470 and 68 FR 65622)?
  - ✓ Are there other incentives, not mentioned in Section 415, that the AML Funds could provide?
  - ✓ Should, or how should, any proposed OSM re-mining rule address the Corps of Engineer definition of re-mining? Proposed Nationwide Permit (NWP) 49 would define re-mining sites by a ratio of 60% re-mining acreage (includes any adjacent acreage disturbed necessary to reclaim the previously-mined area) to 40% (acreage for new mining disturbance).
  - ✓ Should, or how should, this rule address the Clean Water Act re-mining rules in Subpart G of 40 CFR §434?

NOTE: In addition to establishing Section 415 regarding remining, PL 109-432 restored the ability (which expired with the September 30, 2004 AML authorization provisions) for regulatory authorities to not penalize operators with Applicant Violator System permit blocking where unabated violations resulted from an unanticipated events or conditions at remining sites. An OSM interim final rulemaking (independent of any remining incentive rule proposal) will implement this provision through changes to 30 CFR §773.13, §785.25, and §816/817.116(c).