Federal Register

Friday,
November 14, 2008

Part II

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 700, 724, 773, et al.
Abandoned Mine Land Program; Final Rule

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: Final rule.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are revising our regulations for the Abandoned Mine Reclamation Fund (Fund) and the Abandoned Mine Land (AML) program. This rule revises our regulations to be consistent with the Tax Relief and Health Care Act of 2006, Public Law 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 rule reflects the extension of our statutory authority to collect reclamation fees for an additional fourteen years and to reduce the fee rates. The rule 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 rule extends incentives reauthorized by the 2006 amendments pertaining to the remining of certain lands and water adversely affected by past mining.

DATES: *Effective Date:* January 13, 2009.

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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, Public Law 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, Public Law 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. However, funding for that program 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, 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). In addition, certified States and Indian tribes could 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, Public Law 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, Public Law 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 expense 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 funds into set-aside accounts for either future coal reclamation or acid mine drainage abatement and treatment programs or both. 30 U.S.C. 1232(g)(6) (as amended by the Omnibus Budget Reconciliation Act of 1990, Public Law 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, Public Law 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. Public Law 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 are no longer 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 are 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 receive mandatory distributions of Treasury funds in lieu of the State and Tribal share they are no longer 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 are 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 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 not less than $3 million annually. 30 U.S.C. 1232(g)(8)(A). This funding is a mandatory distribution from the Secretary's share of the Fund. However, like the rest of the distributions from the Fund, these distributions 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).

• Federal expenses from the Secretary's share must be appropriated by Congress. 30 U.S.C. 1231(d)(a). 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 an acid mine drainage (AMD) abatement and treatment program (AMD set-aside) 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 must 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, Public Law 102–486, section 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 and Guidance

Shortly after the enactment of the 2006 amendments, we 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 (NAAMLP) to notify the States and Indian tribes of the 2006 amendments' changes to SMCRA and to seek their input on the amendments. IMCC and NAAMLP subsequently submitted joint written comments on specific provisions of the amendments. We summarized their comments in the preamble to the proposed rule and we took all of the comments into consideration when developing the 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 restated and expanded upon the content of that guidance in the proposed and final rules. We have included the December 2007 written guidance in the docket for this rulemaking.

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 moneys to eligible States and Indian tribes under sections 411(h)(1) and (h)(2) of SMCRA;
- Uncertified States and Indian tribes may not use funds that they receive under section 411(h)(1) of SMCRA for noncoal reclamation or 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).

The comment period on the proposed rule was originally scheduled for 60 days, closing on August 19, 2008. We received requests from IMCC, NAAMLP, one State and one environmental group asking us to extend the comment period by an additional 60 days. In order to provide further opportunity to comment but to facilitate issuance of this final rule, we extended the comment period for ten days, through August 29, 2008. We believe that the number and quality of the comments we received, as discussed in the next section, indicate that we provided adequate time for comment.

III. Description of the Final Rule and Discussion of the Comments Received

This rulemaking revises our regulations to be consistent with all of the revisions to SMCRA contained in the 2006 amendments, except for those provisions relating to the remining incentives provisions leveraging amounts from the Fund and to tribal primacy. The remining incentives provisions that leverage amounts from the Fund are the subject of a separate rulemaking, primarily about incentives to reclaim refuse ''gob'' piles, proposed on May 1, 2008, at 73 FR 24120. Efforts by Indian tribes to develop programs to take over regulatory authority for coal mining under the 2006 amendments will be addressed separately for each Indian tribe applying for primacy.

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

We received approximately 51 comments on the proposed rule, including joint comments from IMCC and NAAMLP and ten comments from individual States and Indian tribes that currently have AML reclamation programs under Title IV of SMCRA. In addition, we received comments from five environmental groups, one township, and approximately 35 citizens, most of whom submitted identical letters. Many commenters specifically concurred in whole or in part with the IMCC/NAAMLP comments.

The comments that we received ranged from extremely specific to very general. We will first address the general comments. Any comment directed at a specific section of the proposed rules will be summarized and responded to in our section by section analysis. All comments timely submitted have been placed in the docket for this rule and are available for public review.

A. General Comments

Several commenters, including IMCC/NAAMLP, made general comments regarding the proposed rulemaking. Because these comments affect the rule as a whole, we will first address these comments.

IMCC/NAAMLP and one State commenter suggested that we withdraw the proposed rule because of the ''significant differences of opinion'' that exist between the States and OSM. The commenters alternatively recommended that if we chose not to withdraw the proposed rule that we seriously analyze their comments and consider significantly restructuring and modifying the final rule to be consistent with their suggestions.

Upon considering the commenters' request, we have decided that withdrawing the rule is not appropriate. Our overall general mission is to enforce and administer SMCRA, including all of its amendments. This final rule helps us to follow that mission because this rule is necessary to align our regulations with the 2006 amendments. Without this rulemaking, the existing regulations will not reflect the statutory changes and could create confusion. In addition, we believe this final rule will assist the States, Indian tribes, and the public by making our regulations easier to understand by using plain English and by providing the affected parties with more guidance and clarification when needed. Withdrawing the rule would delay the accomplishment of these purposes.

Several commenters expressed concern that OSM drafted proposed rules in a ''heavy handed'' or ''patriarchal'' manner that is a ''significant and detrimental departure from the cooperative spirit between OSM and the States and Tribes that has existed in the AML program for the last 25 years.'' As evidence of this point, the commenters mention that OSM is ''tak[ing] whatever approach is necessary [in interpreting the 2006 amendments] * * * to limit the flexibility of the States and Tribes to conduct AML reclamation on the sites most important to them within their respective borders. * * * We think OSM is merely seizing any justification it can to further limit the States and Tribes beyond what Congress intended.'' The commenters continued by pointing out that the preamble to the proposed rule frequently relies on our increased oversight responsibilities brought about by the 2006 amendments to justify the proposed rule. The commenters noted that by doing so, OSM is ''departing from the long

established reliance on oversight as the tool of choice to monitor and guide State and Tribal programs in favor of a command and control approach. Because of that, the proposed rule has the tone of a Title V rule meant to achieve compliance from regulated entities rather than a Title IV rule promoting reclamation with partners.'' Another commenter stated that the rule violates the intent of Congress because it is ''micro-managing the methods of AML funding to States and Tribes * * *.''

We appreciate hearing about these concerns from our State AML reclamation partners. In drafting both the proposed rule and this final rule, we did not attempt to be ''heavy handed'' in our approach or to increase oversight or OSM involvement except where mandated by the 2006 amendments. We value the collegial relationship we have had with the State and Tribal AML programs for many years and do not wish to see it erode. We recognize that the 2006 amendments significantly expanded all the programs' discretion to determine the most effective use of AML funds and have tried to reflect this in the proposed and final regulations. For instance, as discussed further in the section by section analysis, the regulations provide, consistent with the 2006 amendments, that uncertified programs can choose to direct more funding to water supply projects or AMD set-aside accounts with less OSM involvement or to address environmental problems adjacent to or in conjunction with high priority coal problems. This final rule does not extend our oversight role any further than is necessitated by the 2006 amendments.

With this rule, we have sought to reflect a balance that will promote and enhance the cooperative spirit that presently exists between State and Tribal AML programs and their Federal partners at OSM. To that end, we believe we have been working openly and closely with these State and Tribal programs and the organizations that represent them since the 2006 amendments were enacted. Even before the proposed rule was published, we met with the concerned States, Tribes, and their organizations, and even circulated draft proposed rule language to them on several occasions. Through these outreach efforts, we believe we have demonstrated that we have been open to comments and suggestions from the outset. This openness is further evidenced by the fact that we developed the proposed and final rules in order to incorporate changes suggested by the States and Indian tribes, including revising methods of calculating fund distributions, such as the calculation of the minimum program adjustments as described in the preamble to § 872.27, and changing several key definitions including ''adjacent'' and ''in conjunction'' as described in § 874.13.

In addition, the commenters criticize our reliance on advice from the Department of the Interior's Solicitor on three issues addressed in the rule—the use of grants instead of payments, the effect of the phase-in on minimum program funding, and the use of funds received under section 411(h)(1) of SMCRA for noncoal reclamation and AMD set-aside accounts. We acknowledge that many of our decisions are based upon the Solicitor's M-Opinion. When the 2006 amendments were first enacted, we began extensive analysis of the statute and outreach to the States and Indian tribes. At that time, we discovered that there were differences regarding the interpretation of several provisions contained in the 2006 amendments, and we sought legal guidance from the Solicitor's Office on three specific issues. The result of this guidance was the M-Opinion, which we used to help draft the proposed rule and to make the FY 2008 distributions. The M-Opinion is part of the docket for this rulemaking. OSM is bound by the interpretations of the 2006 amendments contained in the M-Opinion. *See* 209 Departmental Manual (DM) 3.2(A)(11) (''M-Opinions * * * shall be binding, when signed, on all other Departmental offices and officials and which may be overruled or modified only by the Solicitor, the Deputy Secretary, or the Secretary.''). Thus, our regulations must comply with the interpretations contained within the M-Opinion.

Similarly, a commenter complained about our reliance on section 402(g)(2) of SMCRA, which states that the Secretary of the Interior ''shall ensure strict compliance by the States and Indian Tribes with the priorities described in section 403(a) until a certification is made * * *.'' 30 U.S.C. 1232(g)(2). We agree that the proposed and final rule is consistent with this statutory provision, just as with other provision of the 2006 amendments.

The commenters have also criticized what they perceive to be an implied sense in the proposed rule that the States and Tribes should be satisfied and comfortable with OSM's interpretation of the 2006 amendments because of the significant increases in grant money provided to most States and Indian tribes under the new law. One commenter states:

> While the States and Tribes are very appreciative of Congressional action to return past unappropriated and current moneys to us, our focus has always been to use whatever moneys we receive to address public health and safety issues arising from the hazards of abandoned mines. For us, it is not just about the money—it's about programs and partnerships that work effectively and efficiently to accomplish the greatest amount of AML remediation possible. As a result, our comments regarding the proposed rule are intended to restore and structure the AML program in such a manner that it can make a difference for our citizens and the environment.

Congress decided to continue the important reclamation work that the States and Tribes are conducting by enacting the 2006 amendments. The 2006 amendments created many new opportunities for the States and Tribes, and we eagerly anticipate working with the States and Tribes—our reclamation partners—as this program moves forward. While the 2006 amendments created great opportunities, it is also quite specific in many areas. As we stated above, one of our goals for this rulemaking is to align our rules with the 2006 amendments. We believe this final rule does so.

Some commenters are concerned that we have no intention of considering their comments to the proposed rule and making revisions to the final rule because we have already distributed revised versions of some of the existing directives, guidelines, forms and manuals that accompany or are significantly related to our rules on the AML program, including the Federal Assistance Manual (FAM or GMT–10), and OSM Directive AML–1.

We would like to assure these commenters that no final decisions were made concerning the final rule until after we had read and analyzed all of the comments that we received. As mentioned above, we are bound by the interpretations in the Solicitor's M-Opinion since it was issued in December 2007. Pursuant to that M-Opinion as well as the decision documents issued with regard to the 2008 distributions, we updated the FAM in December 2007 and July 2008. The FAM is a series of OSM directives that relate to the management of grants provided to States and Tribes under SMCRA. The updates to the FAM allowed us to complete the FY 2008 grant distribution, to award and manage the FY 2008 grants, to provide streamlined grants procedures for certified States and Indian tribes, and to make other changes not related to the 2006 amendments. Because the FAM consists of internal OSM directives, we can easily make changes to these

directives to conform them to the current law and regulations. Thus, we are prepared to make additional changes that will be required to conform the contents of the FAM with the final rules that are enacted after consideration of the comments received on the proposed rule.

With respect to the AML–1, which is the directive that describes OSM's policies and procedures relating to the AML inventory (also known as Abandoned Mine Land Inventory System or AMLIS), we circulated a draft of this directive to States and Indian tribe to receive their input as we are currently in the process of migrating the AML inventory into a more usable database. The circulation of a draft of AML–1 has allowed us to receive many useful comments on the AML inventory and will greatly improve our new AML inventory system. We would like to emphasize that we have not yet finalized any changes to AML–1, and nothing we are doing to improve the AML inventory will prevent us from fully considering the comments received on the proposed rule.

We received several comments that included general support for the AML program and portions of the rule. For instance, one citizen commenter encouraged us to ''go through with the amendment to reauthorize the Abandoned Mine Land Program [because] our state, communities and people deserve to have the land reclaimed and brought back to something that can be used again rather than a dangerous eyesore that the land is now.'' We appreciate all of the comments we received in support of this rule.

Several environmental groups and one township submitted comments that generally support the 2006 amendments and the positive change that should result as programs address acid mine drainage in the coalfields. These commenters and others stressed the need to recognize that the States have diverse AML reclamation programs, and that there is no one-size-fits-all method to address AML reclamation. Flexibility was stressed by many commenters, including but not limited to the many commenters that expressed the sentiment that ''States should be given the latitude to use the funds for the construction or reconstruction of dams and waterways on public lands * * *.''

We recognize that conditions vary at AML sites across the country—from climate to the terrain— and that SMCRA was implemented to provide the States with primary governmental responsibility over surface mining and reclamation operations. 30 U.S.C. 1201(f). The 2006 amendments did not alter the relationship between public and private lands and did not change the funding authorities related to the construction of dams and waterways. Project selection is the responsibility of each State and Indian tribe according to its approved reclamation plan. Thus, where possible, we have attempted to provide as much flexibility to States and Indian tribes as allowed by SMCRA, as amended in 2006.

We also received several comments on remining as part of AML reclamation. One commenter strongly encouraged us to continue to pursue remining incentives, as they state that remining incentives are one of the most cost effective means of AML reclamation. In contrast, another commenter took a strong position against a broader interpretation of remining as an effective way to reclaim abandoned mine lands because reclamation in the name of remining has had some unfortunate environmental consequences in at least one State. In particular, this commenter stated that it is ''opposed [to] any changes that would broaden the interpretation of remining beyond the scope of reclaiming coal refuse.''

We would like to state unequivocally that this final rule does not address remining in any meaningful way. As discussed below in conjunction with Parts 700, 773, 785, 816 and 817, the only changes we are making to the regulations related to remining are those that must be made to conform the existing regulations with the changes made by the 2006 amendments. As mentioned above, we proposed a separate rulemaking on May 1, 2008, that addresses our discretionary authority under section 415 of SMCRA to enact remining incentives related to AML reclamation. 30 U.S.C. 1244. This final rule does not promulgate any of the provisions proposed in that rule.

A commenter also specially criticized the Programmatic Environmental Impact Statement (PEIS) for the Federal program for the State of Tennessee, and stated that it does ''not support any proposed revision of regulations that would further undermine preparation of environmental assessments (EA) or findings of no significant impact (FONSI) or environmental impact statements (EIS).'' We appreciate the concerns raised by this commenter and do not believe that this rulemaking changes the preparation of environmental documents under the National Environmental Policy Act (NEPA) for Tennessee. Other comments related to the Tennessee PEIS are outside of the scope of this rule.

As one of our goals of this rulemaking was to make the AML regulations easier to understand, we have attempted to address a few comments that stated the proposed rule was hard to follow and should be clarified. Although one State commended our efforts to make the regulations clear, it still found that in some places the proposed rule was somewhat difficult to fully understand. For example, that same State commented that the preamble to the proposed rule referred to a separate rulemaking related to the 2006 amendments that was published in the **Federal Register** on May 1, 2008. The State suggested that we clarify this reference to note that this May 2008 proposed rule was primarily about incentives to reclaim refuse ''gob'' piles. We made this change in the final rule and have made every effort to present and explain all of the complex issues as easily and simply as possible.

One environmental group commented that it strongly supports our Watershed Cooperative Agreement Program and urges us to use our discretion to recommend to Congress in our upcoming FY 2010 budget request at least $10 million for that program because restoration groups can leverage this funding several times over to provide an additional source of funding for AMD remediation. We appreciate the comment, but the Watershed Cooperative Agreement Program and future budget decisions are beyond the scope of this rule.

In their previous joint comments dated May 21, 2007, IMCC/NAAMLP commented that it will be very important for the States and Indian tribes to receive the training they will need to implement the provisions of the new rules once they are in place, and urged us to keep this in mind. Although it does not impact this rulemaking, we agree with the comment and plan to hold training and planning meetings with the States and Indian tribes after this rule takes effect.

B. Section by Section Analysis

Part 700—General

Definitions (§ 700.5)

We are adopting the changes to § 700.5 as proposed. These changes include the addition of two new definitions (''AML'' and ''AML inventory'') and relocation of 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'') from existing § 870.5 to § 700.5. Each of these terms apply to all

of the regulations in Chapter VII of Title 30 of the Code of Federal Regulations, and we are making limited substantive changes to the text of the definitions of the six relocated terms. We are revising the first sentence of the definition of eligible lands consistent with the preamble to Part 884 to make it clear that certification qualifies a State or Indian tribe for a State or Tribal reclamation plan. However, the rest of the definition is substantively unchanged as it applies to AML programs. We are also correcting a mistaken reference to § 874.14 in this definition. As explained in the preamble to the proposed rule, the correct reference is § 875.14—Eligible lands and water subsequent to certification. In addition, we are rewording two definitions (''eligible lands and water,'' and ''left or abandoned in either an unreclaimed or inadequately reclaimed condition'') using plain English.

We are also combining 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 is not changing. In addition, we are moving the definition of ''expended'' from § 870.5 to § 700.5 and removing the existing limitation that it only applies to costs for reclamation in order to make the definition consistent with the entire chapter.

Last, we are expanding the definition of ''Fund'' in § 700.5. Previously, this term was defined slightly differently in both §§ 700.5 and 870.5. Under this rule, the definition of this term in § 700.5 is being 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.

Responses to Comments

We received one comment on our proposed changes to § 700.5. This commenter explained that the proposed changes might ''still lead to misinterpretations and inadequate decision making regarding the best method to reclaim an AML site, i.e. reclamation or remining.'' We have considered this comment, and we appreciate the commenter's concern but do not believe that any changes to the definitions are necessary. The definition of ''reclamation activity'' in this section explains what is considered reclamation of lands and waters eligible under Title IV of SMCRA. This definition is not intended to provide guidance as to the best method for reclamation. Instead, each State or Indian tribal reclamation program has the choice and flexibility to determine what reclamation tools to use, including remining, as described in their reclamation plan and authorized by law.

Part 724—Requirements for Permits and Permit Processing

Payment of Penalty (§ 724.18)

We are revising § 724.18(d) to update the references in that section to reflect our division of existing § 870.15 into separate sections within Part 870 and to update information on how to find the interest rate for late payments. We received no comments on either this Part or Part 870, and we are adopting the changes as proposed.

Part 773—Requirements for Permits and Permit Processing

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

We proposed a technical amendment to § 773.13(a)(2) to conform this section with changes made to section 510(e) of SMCRA by the 2006 amendments. 30 U.S.C. 1260(e). As explained in the preamble to the proposed rule, section 510(e) was added to SMCRA in 1992 and created an exemption from the section 510(c) permit-block sanction for remining operations. This statutory provision originally contained a statutorily defined expiration date of September 30, 2004, which was removed by the 2006 amendments.

Responses to Comments

One environmental group commented that they oppose an open exemption from the section 510(c) permit-block sanction for remining operations. While we recognize the group's concern about remining and have considered their comment, we are only changing this regulation to conform to the 2006 amendments to SMCRA, which we believe are clear. Thus, we are adopting the revision to § 773.13(a)(2) as proposed to make our regulations consistent with SMCRA.

Part 785—Requirements for Permits for Special Categories of Mining

Information Collection (§ 785.10)

We revised this paragraph using plain language and the current format approved by the Office of Management and Budget (OMB). It describes OMB's approval of information collections in Part 785, our use of that information, and the estimated reporting burden associated with those collections. The change is editorial in nature and has no substantive effect.

Lands Eligible for Remining (§ 785.25(c))

As explained in more detail in the preamble to the proposed rule, we are removing § 785.25(c) to conform our regulations with the 2006 amendments. As discussed above in connection with § 773.13(a)(2), the 2008 amendments removed the statutorily defined expiration date of September 30, 2004, under section 510(e) of SMCRA. 30 U.S.C. 1260(e). We received no comments on this section and are adopting this section as proposed.

Part 816—Permanent Program Performance Standards—Surface Mining Activities

Revegetation: Standards for Success (§ 816.116)

We proposed a technical amendment to § 816.116(c)(2)(ii) and (c)(3)(ii) to conform this section with changes made to section 510(e) of SMCRA by the 2006 amendments. 30 U.S.C. 1260(e). As explained in the preamble to the proposed rule, sections 510(e) and 515(b)(20)(B) were added to SMCRA in 1992 and 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), but those remining incentives had a statutorily defined expiration date of September 30, 2004. See 30 U.S.C. 1260(e) and 1265(b)(20)(B) (1993). The 2006 amendments removed this expiration date, and we are updating our regulations in conformance with this change. We are also rewording this section using plain English.

Responses to Comments

One environmental group commented that they ''do not support the concept in 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). Any revision of this section should allow for conditional requirements that reflect changes in seasonal averages due to extreme wet or dry conditions within the two or five year time frame.'' As we state in our response to § 773.13(a)(2), we recognize the commenter's concern but are only changing this regulation to conform to the 2006 amendments to SMCRA, which we believe are clear. Thus, we adopt the revision to § 816.116(c)(2)(ii) and (c)(3)(ii) as proposed to make our regulations consistent with SMCRA.

Part 817—Permanent Program Performance Standards—Underground Mining Activities

Revegetation: Standards for Success (§ 817.116)

We also proposed a technical amendment to § 817.116(c)(2)(ii) and (c)(3)(ii) to conform this section with changes made to section 510(e) of SMCRA by the 2006 amendments. 30 U.S.C. 1260(e). The revisions to this section are identical to those adopted in § 816.116, except that this section relates to underground mining activities instead of surface mining activities. As explained in the preamble to the proposed rule, sections 510(e) and 515(b)(20)(B) were added to SMCRA in 1992 and 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), but those remining incentives had a statutorily defined expiration date of September 30, 2004. 30 U.S.C. 1260(e) and 1265(b)(20)(B). The 2006 amendments removed the expiration date, and we are updating our regulations in conformance with this change. We are also rewording this section using plain English.

Responses to Comments

One environmental group commented that they do not support the language proposed for this section for the same reasons they do not support the revision to § 816.116. Likewise, after consideration of this comment and for the same reasons stated in § 816.116, we are adopting the revisions to 817.116(c)(2)(ii) and (c)(3)(ii) as proposed.

Part 845—Civil Penalties

Use of Civil Penalties for Reclamation (§ 845.21)

We are revising § 845.21(b)(1) as proposed to reflect our move of the definition of ''emergency'' from § 870.5 to § 700.5 of this chapter. We received no comments on this Part.

Part 846—Individual Civil Penalties

Payment of Penalty (§ 846.18)

We are revising § 846.18(d) to update the references in that section to reflect our division of existing § 870.15 into separate sections within Part 870 and to update information on how to find the interest rate for late payments. We received no comments on either this Part or Part 870 and are adopting this section as proposed.

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. We did not receive any comments on our proposed revisions for Part 870, and we are adopting the proposed changes to this Part for the reasons described in the preamble to the proposed rule

Part 872—Moneys Available to Eligible States and Indian Tribes

We are revising Part 872 to address the changes to SMCRA that the 2006 amendments made. Generally, our revisions to Part 872 describe the moneys that make up the Fund and other sources of funding under SMCRA that are available to you, the eligible States and Indian Tribes with approved reclamation programs, including otherwise unappropriated funds in the U.S. Treasury. This Part also describes how we convey these funds to you and the purposes for which you may use them. In addition, we are dividing, removing, and renumbering parts of existing §§ 872.11(a) through 872.11(c) and § 872.12, changing headings, adding new sections and headings as appropriate, and more clearly describing the different types of funds available under this Part. We are making these additional changes to make the regulations easier to read and understand. Each change, a summary of the comments we received, if any, and our responses to these comments are described below in more detail.

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 § 700.5.

What does this Part do? (§ 872.1)

This section explains 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 received no comments on this section and, for the reasons set forth in the preamble to the proposed rule, we are adopting this section as proposed.

Definitions (§ 872.5)

This new section contains definitions pertinent to Part 872, including four definitions (''allocate,'' ''Indian Abandoned Mine Reclamation Fund or Indian Fund,'' ''reclamation plan,'' and ''State Abandoned Mine Reclamation Fund or State Fund'') that we are moving from existing § 870.5 and two new definitions (''award'' and ''distribute''). We received no comments on this section and are adopting § 872.5 generally as proposed and for the reasons discussed in the preamble to the proposed rule. For clarity, we are summarizing here our discussion of the terms ''allocate,'' ''distribute,'' and ''award'' because they are important in describing the process that we follow to make funds available to States and Indian tribes. Our accounting process first allocates funds to a particular share in the Fund when 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. After the funds are distributed, we award funds to States and Indian tribes in grants when they apply for such grants. Also, we did make a few minor edits to ''Indian Abandoned Mine Reclamation Fund or Indian Fund'' and ''State Abandoned Mine Reclamation Fund or State Fund'' for clarity.

Information Collection (§ 872.10)

In this section, we discuss the Paperwork Reduction Act requirements and the information collection aspects of Part 872. We are updating this section and rewording it using plain English. We did not receive any comments on this section and are adopting the section as proposed.

Where Do Moneys in the Fund Come From? (§ 872.11)

This section describes the funds we collect, recover, and otherwise receive that are the sources of revenue to the Fund. We proposed several changes to this section, including rephrasing the section heading, and renumbering existing §§ 872.11(a) through (a)(6) as §§ 872.11 through 872.11(f).

Substantively, we proposed removing language from existing § 872.11(a)(6) (now renumbered as § 872.11(f)) that made interest earned after September 30, 1992, available for possible future transfer to the UMWA CBF under section 402(h) of SMCRA because the 2006 amendments added new provisions related to our transfers to the UMWA health care plans. We also proposed to revise and reorganize the information in existing §§ 872.11(b), including paragraphs (b)(1) through (b)(8). For instance, existing § 872.11(b)(1) is now included in §§ 872.14 and 872.15 on State share funds and § 886.20 on unused funds. Similarly, existing § 872.11(b)(2) is now included in §§ 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 § 872.20, and existing § 872.11(b)(4) is included in §§ 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 §§ 872.26 and 872.27 on minimum program makeup funds. We are moving existing § 872.11(c) to § 872.12(c). We are revising all these provisions to be consistent with the 2006 amendments and to use plain English.

Responses to Comments

A State commented on proposed § 872.11(f), which provides that revenue to the Fund includes ''[i]nterest and other income earned from investment of the Fund. We will credit interest and other income only to the Secretary's share.'' The commenter reasoned that the interest earned on moneys in the Fund that have been allocated to States and Indian tribes as State or Tribal share funds ''should be credited to the respective state/tribe'' and that this interest would be used for the purposes of Title IV.

Although we agree with the commenter that sections 402(g)(1)(A) and (B) direct us to allocate moneys deposited in the fund to the State and Indian tribal shares, after consideration of this comment we must respectfully disagree with the commenter's conclusion that State and Indian tribes should also receive the interest on this allocation. Until the Abandoned Mine Reclamation Act of 1990 was enacted, there was no provision in SMCRA that allowed the Fund to contain any interest it earned. Compare the Omnibus Budget Reconciliation Act of 1990 (Pub. L. 101–508, 104 Stat. 1388–290, § 6002) with SMCRA (Pub. L. 95–87 (1977)). The 1990 amendments to SMCRA added sections 401(b)(5) and 401(e). 30 U.S.C. 1231(b)(5) and 1232(e). Section 401(e) directs the Secretary of the Treasury to ''invest such portion of the [Fund that is not required to meet current withdrawals] in public debt securities * * *.'' Under SMCRA, as amended in 2006, we must credit the interest earned on these investments to ''the fund for the purpose of the transfers'' to the UMWA health care plans referred to in section 402(h) of the Act. Thus, as noted in section 401(b)(5), the Fund will contain ''interest credited to the fund under subsection (e)'' but this interest can only be used for transfers to the UMWA health care plans. We do not have the statutory authority to credit the interest earned on State and Tribal shares to individual States and Tribes for their use under Title IV. Therefore, we adopted § 872.11(f) as proposed so that interest earned on the fund is properly credited to enable us to meet our obligations as prescribed by sections 401(e) and 402(h) of SMCRA.

Where Do Moneys Distributed From the Fund and Other Sources Go? (§ 872.12)

We did not receive any comments on this section and are adopting our proposed changes to § 872.12 for the reasons stated in the preamble to the proposed rule.

What Money Does OSM Distribute Each Year? (§ 872.13)

Section 872.13 is a new section that we proposed to add to describe how we distribute moneys each year to States and Indian tribes under SMCRA. Section 872.13(a) is intended as a tool that can be used to locate specific regulatory provisions relating to each type of funding that States and Tribes receive under sections 401, 402, and 411 of SMCRA. 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). Each type of funding is described in greater detail elsewhere in the rule.

Paragraph (b) explains that 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 you as early in the FY as possible. When we make adjustments to the fees collected in an earlier FY due to refunds or additional fee payments, we must make these changes to the FY in which we learn that the adjustments are necessary because we cannot go back and revise the prior year fee collection amounts and distributions that we have already made to you.

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 apply for grants using the procedures of Part 885 and uncertified States and Indian tribes use the procedures of Part 886.

Responses to Comments

A State commented on the mandatory annual distributions we described under § 872.13, and asked whether the distributions will occur in mid-December of each year as they have under our past practice for timing annual distributions.

Section 402(f)(2)(i) of SMCRA only requires us to distribute amounts deposited into the Fund for the preceding fiscal year. It does not specify when this distribution should occur. Because the fourth quarter of the fiscal year ends on September 30, with collections due 30 days after that, we expect to cut off collections as of November 30 of each year to capture most of the fourth quarter's collections. As we did for the FY 2008 distribution, we distribute these funds to States and Indian tribes as soon as practicable thereafter, generally in mid-December. However, after consideration of this comment, we decided not to address the timing of the distribution in this rulemaking in order to maintain flexibility to address unforeseen circumstances in future years, and we are adopting the rule as proposed.

What are State share funds? (§ 872.14)

To add clarity and establish a consistent structure for the types of funding in this Part, and as discussed in the preamble to the proposed rule, we proposed adding this section to explain 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. We did not receive any comments on this section, and we are adopting it as proposed.

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

We are adding § 872.15 to explain 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 provides that for you to be eligible to receive State share funds, you must have and maintain an approved reclamation plan. Section 872.15(a)(2) incorporates section 401(f)(3)(B) of SMCRA and provides that States certified under section 411(a) 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). In accordance with section 401(f)(3)(B), we did not distribute State share funds to certified States in FY 2008.

In § 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 of State share funds, which are required to be phased in under 401(d)(3) and (f) of SMCRA. 30 U.S.C. 1231(d)(3) and (f). 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. However, 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 are distributing to you, the uncertified State, only 50 percent of the State share allocated to you. Because the State share is 50 percent of the reclamation fees collected on production in your State, for FY 2008 and FY 2009, you received only 25 percent of the reclamation fees collected on coal produced in your 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 your 50 percent share, which is 37.5 percent of the reclamation fees collected on coal produced in your State. We will distribute to you your 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 you all moneys remaining in your State share of the fund.

Consistent with section 402(g)(1)(C) of SMCRA, § 872.15(b)(2) explains that we are continuing to award funds under this paragraph in grants in accordance with Part 886. 30 U.S.C. 1232(g)(1)(C).

Responses to Comments

IMCC/NAAMLP and two States commented on various aspects of this section as proposed. First, as part of a broader comment that affects historic coal funds (§ 872.22), minimum program make-up funds (§ 872.27), prior balance replacement funds (§ 872.30), and certified in lieu funds (§ 872.33), as well as State and Tribal share funds (this section and § 872.18), IMCC/NAAMLP suggested that we change our proposed regulations to allow States and Indian tribes a choice to receive these funds either in grants or by direct payments. The commenters prefer allowing each State and Indian tribe to choose whether to use a grant or direct payment because it maximizes flexibility. In support of this position, the commenter asserts that Congress did not dictate in the 2006 amendments that we must use grants to award funds under SMCRA.

After consideration of SMCRA and this comment, we have determined to finalize § 872.15(b)(2) as proposed with minor edits made for clarity. Thus, under this regulation State share funds will be awarded as grants to uncertified States and Indian tribes. Section 402(g)(1)(C) of SMCRA requires that funds the Secretary allocates to State and Indian tribal shares under paragraph (g)(1) of section 402 ''shall only be used for annual reclamation project construction and program administration *grants*.'' 30 U.S.C. 1232(g)(1)(C) (emphasis added). This provision clearly requires us to award State share funds in grants.

Second, IMCC/NAAMLP and two separate State commenters suggested that we modify the proposed rule to specify what will happen to the State share funds that are not distributed during FY 2008 through FY 2011 under section 401(f)(5)(B) of SMCRA and proposed § 872.15(b)(1). IMCC/NAAMLP mentioned several possible ways in which these withheld funds could be treated, including returning them to the States as part of the prior balance replacement funds, holding them in the Fund until the end of the AML program in FY 2023, or placing them in the historic coal fund. However, IMCC/NAAMLP and one State commenter settled on requesting that we add paragraph (c) to this section that states: ''We will distribute to you the amounts we withhold under subparagraph (b) of this section in two equal installments. We will do this in Federal fiscal years 2018 and 2019.''

IMCC/NAAMLP expressed concerns about whether the States can spend these withheld funds on noncoal reclamation and the AMD set-aside once they are returned. Similarly, another State commenter requested that we allow the amounts that are withheld under the phase-in provision to be used as part of the AMD set-aside when they are distributed to the States. Specifically, this State commenter was unsatisfied with our apparent decision in the proposed rule to ''plac[e] these withheld funds into the unappropriated balance category for distribution along with the Prior Balance Replacement Payments in subsequent years.'' This commenter asserted that we should treat these withheld funds differently ''because Prior Balance Replacement Payments carry the October 1, 2007 cutoff date.''

We appreciate the questions and concerns that we received regarding what happens to State share funds withheld according to the phase-in provision of section 401(f)(5). After careful consideration of the alternative approaches presented in the comments, we have decided not to modify the proposed rule and are adopting it as proposed with minor editorial modifications for clarity.

In coming to this conclusion, we first reviewed the language provided by IMCC/NAAMLP and one State that would have us distributing the withheld amounts over two years. As the commenters pointed out, such a provision would make the return of these withheld moneys consistent with the return of the phased-in certified in lieu funds that certified States and Indian tribes receive under section 411(h)(3)(C). Although this approach has an appeal because it promotes consistency as to how to treat the separate phase-in provisions contained in the 2006 amendments, after a thorough analysis of this issue we have determined that we do not have statutory authority to make such a distribution. SMCRA unambiguously states that certified States will receive ''[a]mounts withheld from the first 3 annual installments [of certified in lieu funds] in 2 equal annual installments beginning with fiscal year 2018.'' There is no such comparable provision for State share moneys that uncertified States receive, and we cannot read such a provision into the statute where it does not exist. Therefore, we reject the suggested addition of § 872.15(c).

In addition, after reviewing the proposed language of § 875.15, we determined that the language of § 872.15(b)(1)(iv) is clear that in FY 2023 and thereafter, uncertified States will begin to receive moneys ''remaining in their State share of the Fund.'' *See also* 30 U.S.C. 1231(f)(2)(B). We believe this language is clear because the only State share funds remaining in the Fund in FY 2023 and thereafter are those amounts withheld from the phase-in provision of section 401(f)(5)(B) of SMCRA.

There are two reasons why the only State share money remaining in the Fund in FY 2023 and thereafter is the withheld money from the phase-in provision. First, the prior balance replacement fund provisions of section 411(h)(1) provide that an amount equivalent to all of the State share moneys allocated, but not appropriated, to States for reclamation fee collections received on coal produced before

October 1, 2007, will be returned to the States through Treasury funds. 30 U.S.C. 1240a(h)(1). As explained in the preamble to § 872.30(c), the actual State share moneys that remain in the Fund will then become historic coal funds that will also be distributed in FY 2023 and thereafter. 30 U.S.C. 1240a(h)(4)(A). In other words, after the prior balance replacement funds are paid, there will be no State share moneys in the Fund for moneys collected on coal produced prior to October 1, 2007. Second, because State share funds are now permanently appropriated at their full allocation amount, subject to the section 401(f)(5)(B) phase-in for four fiscal years, the only State share funds that will remain in the Fund that can be paid out in FY 2023 are those that are withheld by the phase-in. These funds can be used for any of the purposes enumerated in § 872.16, including noncoal reclamation and inclusion in an AMD set-aside account. Thus, § 872.15(b)(1)(iv), as proposed, adequately addresses this issue.

We would also like to mention that we agree with one State's analysis that section 411(h)(1)(B) of SMCRA defines the amount that will be distributed for prior balance replacement funds as ''the unappropriated amount allocated to a State or Indian tribe before October 1, 2007 under subparagraph (A) or (B) of section 401(g)(1).'' 30 U.S.C. 1240a(h)(1)(B). Thus, we are not authorized to use prior balance replacement funds to return the withheld amounts of the State share for collections received on coal produced after October 1, 2007. Section 872.31 explains the purposes for which prior balance replacement funds can be used.

We recognize, however, that only States that remain uncertified in FY 2023 and thereafter will receive funds under § 872.15(b)(1)(iv). Given the tenor of the comments, we anticipate that some States that are currently uncertified may have phased-in State share amounts withheld but may certify before they would be eligible to receive these funds back in FY 2023 and thereafter. Therefore, as authorized by section 411(h)(2)(A) and described further in the preamble to § 872.33, we are adding language to § 872.33 to clarify that if a certified State has unpaid State share funds withheld in the phase-ins, we will distribute certified in lieu funds to it at the next annual distribution after it certifies. This certified in lieu payment will then cover both the State share funds withheld during the phase-in and State share allocations from fee collections in the previous FY. Thus, States that are currently uncertified and subject to the phase-in of State share funds will receive an amount equivalent to the withheld amount from Treasury funds as part of their certified in lieu payments if they become certified before they have this withheld amount returned as State share funds in 2023 and thereafter. As such, these funds can be used without restriction as described in § 872.34.

Are there any restrictions on how States may use State share funds? (§ 872.16)

For the reasons described in the preamble to the proposed rule, we are adopting § 872.16(a) through (e) generally as proposed, although we have changed the title and added a word to the introductory language for clarity. Moreover, as described below, we are also adding paragraph (f) in response to comments received. These paragraphs now provide that you, the uncertified State, may use your State share grant funds only 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 AMD set-aside fund under Part 876; (5) to acquire land under § 879.11; and (6) to maintain the AML inventory under section 403(c) of SMCRA.

Responses to Comments

One State and IMCC/NAAMLP commented that States should be allowed to use their State share funds to maintain the AML inventory. They observed that, by not specifically saying States may use funds other than prior balance replacement funds to maintain the AML inventory, the regulations could be interpreted to mean the only types of funds that States could use to maintain the AML inventory would be prior balance replacement funds.

After reviewing this comment, we have revised § 872.16 to include paragraph (f), which specifies that uncertified States can use State share funds ''to maintain the AML inventory under section 403(c) of SMCRA.'' This addition recognizes that maintaining the AML inventory will help uncertified States measure progress toward addressing all known coal problems.

What are Tribal share funds? (§ 872.17)

To add clarity and establish a consistent structure for the types of funding in this Part, and as discussed in the preamble to the proposed rule, we proposed adding this section to explain that Tribal share funds are 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. We did not receive any comments on this section, and we are adopting it as proposed.

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

This section largely is a duplicate of § 872.15 except that it applies to Indian tribes and the Tribal share funds instead of States and State 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. In the preamble to the proposed rule, we did note a few distinctions involving the distribution of Tribal share funds to Indian tribes, including why § 872.18 excludes all certified Indian tribes from receiving Tribal share funds after October 1, 2007, and the reason why the Crow Indian tribe received a Tribal share distribution for FY 2008. We received no comments on these points. We are retaining the relevant provisions in the final rule and are adopting them as proposed with minor modifications to the wording for clarity.

Responses to Comments

All of the comments we received on § 872.18 were the part of the comments made by IMCC/NAAMLP and the two States that commented on § 872.15. Essentially, one State and IMCC/NAAMLP commented that we should give Indian tribes the option of receiving their Tribal share funds in grants or by direct payments. For the same reasons we give in our response to that comment under § 872.15 relating to State share funds, we adopt § 872.18(b)(2) as proposed, with a minor modification for clarity. Thus, we would continue to award Tribal share funds to any uncertified Indian tribes in grants.

In addition, also as part of a broader comment, IMCC/NAAMLP and one State commented that we should distribute Tribal share funds held back for the phase-ins in two equal payments in FY 2018 and 2019. Another State commenter was unsatisfied with our apparent decision to make withheld funds part of the prior balance replacement funds, thereby effectively restricting their use in noncoal reclamation and AMD set-aside accounts. For the same reasons we give in our response to that comment under § 872.15 relating to State share funds, we adopt § 872.18 as proposed, with minor modifications made for clarity.

Thus, we will distribute any Tribal share moneys withheld under the phase-in provision for reclamation fee collections for coal produced after October 1, 2007, in FY 2023 and thereafter when it will be returned to any remaining uncertified Tribes.

Are there any restrictions on how Indian tribes may use Tribal share funds? (§ 872.19)

For the reasons described in the preamble to the proposed rule, we are adopting § 872.19(a) through (e) generally as proposed, although we have changed the title and added a word to the introductory language for clarity. Moreover, as described below, we are also adding paragraph (f) in response to comments received. These paragraphs now provide that you, the uncertified Indian tribe, may use your Tribal share grant funds only 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 AMD set-aside fund under Part 876; (5) to acquire land under § 879.11; and (6) to maintain the AML inventory under section 403(c) of SMCRA.

Responses to Comments

As part of a comment related to the almost identical provision related to the use of State share funds, IMCC/NAAMLP commented that we should allow use of funds other than prior balance replacement funds to maintain the AML inventory. Similarly, one State specified that we should add paragraph (f) to § 872.16, related to State share funds, that provides that State share funds be allowed to maintain the AML inventory. To promote consistent uses of State share and Tribal share funds and for the same reasons we decided to include that paragraph (f) in § 872.16, we have also decided to include it here. So, § 872.19(f) now clearly allows uncertified Indian tribes to use their Tribal share funds to maintain the AML inventory under section 403(c) of SMCRA.

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

We received no comments on this section. For the reasons discussed in the preamble to the proposed rule, we are adopting § 872.20 as proposed.

What are historic coal funds? (§ 872.21)

Section 872.21 describes historic coal funds, which are 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. 30 U.S.C. 1232(g)(5). Under § 872.21(a), we determine the amount of the historic coal funds by allocating 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). We distribute these 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). Under § 872.21(b), we describe other moneys included in historic coal funds as a result of the reallocations we must make during our annual fund distribution. We received no comments on this section. For the reasons discussed in the preamble to the proposed rule, we are adopting § 872.21 as proposed.

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

We are adding § 872.22 to describe how we distribute and award historic coal funds. We distribute these 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 are removing existing § 872.11(b)(4)(i) and (ii) and including 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.

Section 872.22(b) provides that once the eligibility criteria listed in § 872.22(a)(1) and (2) are met, we calculate the amount of historic coal funds that 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. We will continue to use the formula described in paragraph (b) of this section to distribute historic coal funds to you even after reclamation fee collections end.

The table in § 872.22(c) describes how we distribute historic coal funds, and how these distributions are affected by the four year phase-in contained in section 401(f)(5)(B) of SMCRA.

Section 872.22(d) states that we only distribute the historic coal funds you need to reclaim your unfunded Priority 1 or 2 coal problems and includes the provisions that we are moving from existing § 872.11(b)(4)(i) and (ii). Specifically, this paragraph addresses the situation where the cost to reclaim all your, the uncertified State's or Indian tribe's, remaining Priority 1 and 2 coal problems is more than the amount you receive for your State or Tribal share alone, but is less than the amount that you receive for your State or Tribal share, unused funds from prior allocations, and historic coal funds combined. If this event occurs, we will reduce the amount of historic coal funds that you receive to the amount needed for you to fund reclamation of your remaining Priority 1 or 2 coal problems.

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

Responses to Comments

We received six comments regarding paragraphs (b), (c), and (e) of § 872.22. However, after careful consideration of these comments and for the reasons stated below, we are adopting all paragraphs of this section as proposed with only minor revisions to clarify some of the references in the regulation.

As explained in detail above and in the preamble to the proposed rule, § 872.22(b) provides that we distribute historic coal funds to eligible States and Indian tribes according to an existing formula based on the amount of historic coal production before SMCRA was enacted. We received comments on this paragraph from IMCC/NAAMLP and two States.

To begin, IMCC/NAAMLP asked whether we would ''recalculate the percentages used in the formula each

year * * *?'' The answer to this question is that we recalculate the percentages in the formula every year. The formula is based on the tons of coal produced in your State or on your Indian lands prior to August 3, 1977, and these historic coal production numbers do not change. We calculate the distribution percentages by determining the percentage your State or Indian tribe has of the total coal tonnage produced in the States and Indian tribes eligible for historic coal funding that year. The percentages will only change only in two instances: (1) When a State or Indian tribe that was not previously eligible for historic coal funding becomes eligible by establishing an approved reclamation program or by entering sufficient Priority 1 or 2 coal problems in the AML inventory; or (2) when a previously eligible State or Indian tribe loses eligibility by certifying coal completion or falling below the requirement for inventoried Priority 1 or 2 coal problems. Thus, we expect the formula to remain the same in many years. Because the formula does change, but we expect that it can only change in the limited instances described above, we have decided not to place the formula into the regulations. The formula and calculations to make the annual historic coal fund distribution are published on OSM's Web site each year as part of the fund distribution package.

In addition, two States suggested that we revise the historic coal formula. One State suggested that we revise the formula to take into account ''the hazards left to be abated.'' Similarly, the other State commenter proposed that we revise the formula to take into ''consideration the inability of a State to complete its [high priority reclamation] by September 30, 2022 and beyond.'' As these States point out, such revisions would help to ensure minimum program States could complete their high priority reclamation projects before the AML programs end.

We appreciate these suggested revisions to the formula and recognize that some States with large inventories of high priority coal problems receive small distributions of historic coal funds. We also recognize that increasing the amount of historic coal funds distributed to these States would help them reclaim their coal problems more quickly. However, section 402(g)(5)(A) of SMCRA requires us to allocate historic coal funds ''through a formula based on the amount of coal historically produced in the State or from the Indian lands concerned prior to August 3, 1977.'' 30 U.S.C. 1232(g)(5)(A). Because SMCRA does not give us the discretion to consider the amount of high priority coal problems for each State as listed in the AML inventory when we allocate and distribute historic coal funds, we did not make any substantive changes to § 872.22(b).

As with the State share funds under § 872.15 and the Tribal share funds under § 872.18, we received several comments inquiring into and proposing suggestions for the distribution of historic coal funds withheld under the phase-in provision of section 401(f)(5)(B). For instance, IMCC/NAAMLP noted that our proposed rule was unclear about what happens to these withheld funds, and IMCC/NAAMLP and one State recommended that we distribute the amounts of historic coal funds withheld because of the phase-in provision in two equal distributions in FY 2018 and 2019. These commenters also expressed concerns regarding the purposes that the withheld historic coal funds may be used for once returned.

In the discussion in the preamble to §§ 872.15 and 872.18, we explained that SMCRA does not authorize us to distribute State and Tribal share moneys withheld under the section 401(f)(5)(B). Likewise, SMCRA does not authorize us to distribute withheld historic coal moneys through two payments in FY 2018 and 2019, as we do for the certified in lieu moneys withheld from certified States and Indian tribes under the phase-in provision of section 411(h)(3). We think that § 872.22 explains what happens to these withheld historic coal moneys. We slightly expanded § 872.22(c)(4) to clarify that in FY 2023 and thereafter, States that remain uncertified will receive the amount calculated using the historic coal formula each year ''until funds are no longer available or you have reclaimed your remaining Priority 1 and 2 coal problems.'' So, the amount of historic coal funds withheld during the phase-in period will remain in the Fund along with other undistributed historic coal funds, which will primarily consist of the large amounts transferred from unappropriated State and Tribal share balances upon payment of prior balance replacement funds under section 411(h)(1) of SMCRA. In FY 2023 and thereafter, we expect these historic coal funds to provide the bulk of funding to States that still have high priority coal reclamation. States that receive historic coal funds in FY 2023 and thereafter can use them for any of the purposes described in § 872.23, including noncoal reclamation and inclusion in the AMD set-aside account. Certified States and Indian tribes, however, cannot receive certified in lieu funds to make up for any withheld historic coal funds. Section 411(h)(2)(A) of SMCRA, which governs the use of certified in lieu funds, refers only to State and Tribal share funds that were allocated after October 1, 2007, and not to historic coal funds. So we could not add a paragraph to § 872.33 that would allow an amount equal to any withheld historic coal funds to be distributed from certified in lieu funds if a State is certified before FY 2023.

As part of its larger comment discussed in more detail in the preamble to § 872.15, IMCC/NAAMLP also requested that we change our proposed regulations to allow you to have the option of receiving historic coal funds in grants or by direct payments. Although we considered this comment, we cannot adopt this suggestion for the same reason we cannot allow State and Tribal share funds to be paid as direct payments in §§ 872.15 and 872.18. SMCRA specifies that historic coal funds are awarded as ''annual *grants* to States and Indian tribes which are not certified under section 411(a) to supplement [State and Tribal share] *grants* received by such States and Indian tribes * * * until the priorities stated in paragraphs (1) and (2) of section 403(a) have been achieved * * *.'' 30 U.S.C. 1232(g)(5)(A) (emphasis added). Thus, we must distribute historic coal funds as grants.

Are there any restrictions on how you may use historic coal funds? (§ 872.23)

For the reasons described in the preamble to the proposed rule, we are adopting § 872.23(a) through (e) generally as proposed, although we have changed the title and added a word to the introductory language for clarity. Moreover, as described below, we are also adding paragraph (f) in response to comments received. These paragraphs now provide that you, the uncertified State or Indian tribe, may use your historic coal funds only 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 or the governing body of an Indian tribe under section 409(c) of SMCRA; (4) to deposit into an AMD set-aside fund under Part 876; (5) to acquire land under § 879.11; and (6) to maintain the AML inventory under section 403(c) of SMCRA.

Responses to Comments

IMCC/NAAMLP and one State commented that States and Indian tribes should be allowed to use their historic coal funds to maintain the AML

inventory. As with their similar comments directed at §§ 872.16 and 872.19, they observed that, by not specifically saying States and Indian tribes may use funds other than prior balance replacement funds to maintain the AML inventory, the regulations could be interpreted to mean that the only type of funds that States could use to maintain the AML inventory would be prior balance replacement funds.

After reviewing this comment, we have revised § 872.23 to include paragraph (f), which specifies that uncertified States and Indian tribes are allowed to use historic coal funds to maintain the AML inventory. This addition recognizes that maintaining the AML inventory will help uncertified States and Indian tribes measure progress toward addressing all known coal problems.

In the preamble to the proposed rule, we specifically requested comments on whether or not the requirement in section 402(g)(2) of SMCRA for ''strict compliance'' by uncertified States and Indian tribes with the priorities for reclamation of coal problems also impacts the authorization in section 409(b) that allows historic coal funds to be expended on noncoal reclamation. IMCC/NAAMLP commented that they do not believe the requirement of section 402(g)(2) applies to the use of historic coal funds or prior balance replacement funds.

We agree with the comment to the extent it describes the purposes for which historic coal funds can be used. Amended section 402(g)(2) of SMCRA, which requires ''strict compliance'' by uncertified States and Indian tribes with the priorities for reclamation of coal problems, does not impact the authorization in section 409(b) that allows you to spend historic coal funds on noncoal reclamation. Once requests are made under section 409(c) of SMCRA, uncertified States and Indian tribes may use historic coal funds provided under section 402(g)(5) ''for those reclamation projects which meet the priorities stated in section 403(a)(1)''. 30 U.S.C. 1239(c)(1). Thus, we are adopting § 872.23(c), as proposed, to explicitly allow uncertified States and Indian tribes to continue using historic coal funds for noncoal reclamation consistent with section 409(b) of SMCRA. Although we agree that historical coal share funds can be used for noncoal reclamation, the same is not true for the use of prior balance replacement funds. We will discuss this comment as it relates to why a different analysis applies to prior balance replacement funds, in conjunction with § 872.31.

What are Federal expense funds? (§ 872.24)

As proposed, we are dividing existing § 872.11(b)(5) into two sections and renumbering 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. With the exception of minimum program make up funds, which the 2006 amendments added to section 402(g)(3) in paragraph (E), we called them ''Federal expense'' funds in the proposed rule and this final rule. The new sections address the 2006 amendments and use plain English.

Section 872.24 replaces the introductory paragraph at existing § 872.11(b)(5) and identifies Federal expense funds as 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.

Responses to Comments

Comments we received from IMCC/NAAMLP and one State revealed that our description of Federal expense funds under proposed § 872.24 and our explanation for removing a reference to minimum program make up funds in proposed § 872.25(b) were inconsistent. Specifically, the comments noted that, under proposed § 872.24, Federal expense funds are considered moneys in the Fund that are not allocated or distributed as State and Tribal share funds, historic coal funds, and minimum program make up funds. Yet, we stated in proposed § 872.25(b) that we may not deduct the amount of funds we allocate or distribute as Federal expense funds from your State or Tribal share funds and historic coal funds, and we proposed to remove a reference to minimum program make up funds in proposed § 872.25(b) 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.'' 73 FR 35225. The commenters wanted us to clarify whether or not minimum program make up funds are Federal expense funds.

We agree with the commenters that this language in proposed §§ 872.24 and 872.25 could be confusing, and as explained below, we are revising § 875.25 to remove any potential inconsistency. Thus, for the reasons stated in the preamble to the proposed rule, we are adopting § 872.24 as proposed. As such, Federal expense funds are considered to be moneys in the Fund that we do not allocate or distribute as State and Tribal share funds, historic coal funds, or minimum program make up funds. Section 402(g)(3) of SMCRA addresses uses of the Secretary's 20 percent share of the Fund, which we divide into two subsets: ''Federal expense funds'' that Congress must appropriate, which include funding for expenses under sections 402(g)(3)(A) through (D); and minimum program make up funds under section 402(g)(3)(E) that are provided under section 402(g)(8) of SMCRA and are not subject to Congressional appropriation. Though minimum program make up funds come out of the Secretary's 20 percent share (sometimes called the ''Federal share''), we do not consider them ''Federal expense funds'' because Congress does not specifically appropriate them (other than the appropriation contained within the 2006 amendments).

Are there any restrictions on how OSM may use Federal expense funds? (§ 872.25)

Section 872.25 describes how we may use Federal expense funds. For clarity, we have changed the title of this section from that proposed. However, with the exceptions described below, we are generally adopting this section as proposed. 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.

Paragraphs (a) through (a)(5) detail that we may, for instance, 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. These paragraphs are based on section 402(g)(3)(A)–(D) and 402(g)(4) of SMCRA.

We are renumbering existing § 872.11(b)(7) as § 872.25(b) and rewording this provision using 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 expense funds, described at § 872.25, from your State or Tribal share funds and historic

coal funds. Section 872.25(b) also removes a reference in former § 872.11(b)(7) to minimum program make up funds provided under section 402(g)(8) of SMCRA. After considering the comments described with regard to § 872.24 and this section, we are removing the reference to minimum program make up funds that we had included in the proposed rule. We do not consider minimum program make up funds to be Federal expense funds because, unlike the funds listed in sections 402(g)(3)(A) through (D) and 402(g)(4) of SMCRA, minimum program make up funds have already been appropriated by Congress in the 2006 amendments and do not require any further annual appropriation before distribution can occur. 30 U.S.C. 1232(g)(3)(E).

In addition, we are renumbering existing § 872.11(b)(8) as § 872.25(c) and rewording 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).

Responses to Comments

As discussed above in connection with § 872.24, comments from IMCC/NAAMLP and one State pointed out an inconsistency in our description of Federal expense funds under § 872.24 and our explanation for removing a reference to minimum program make up funds in § 872.25(b). More specifically, the comments noted that our proposed rule in § 872.24 essentially said minimum program make up funds are not Federal expense funds, yet proposed § 872.25(b) said they are.

As we explained in the discussion of § 872.24 in this final rule, we agree with the comments and are making changes in the text of § 872.25(a) and (b) in the final rule to clarify that minimum program make up funds are not Federal expense funds, although both minimum program make up funds and Federal expense funds are subsets of the Secretary's 20 percent share of collections to the Fund. We believe these changes we made to this section are consistent with sections 401(d)(1) and 402(g)(5)(A) of SMCRA. Section 401(d)(1) of SMCRA specifically provides that ''[m]oneys from the fund for expenditures under subparagraphs (A) through (D) of section 402(g)(3) shall be available only when appropriated for those subparagraphs.'' 30 U.S.C. 1231(d)(1). In contrast, minimum program make up funds are covered by section 401(d)(3) which says ''[m]oneys from the fund shall be available for all other purposes of this title without prior appropriation * * *.'' 30 U.S.C. 1231(d)(3). This section would include minimum program make up funds as set out in sections 402(g)(3)(E) and 402(g)(8)(A). It is because of this distinction that for the final rule we removed the reference to section 402(g)(8) of SMCRA from § 872.25(b). It also is why we addressed minimum program make up funds separately in §§ 872.26 through 872.28 instead of including them with Federal expenses in § 872.24.

We also received comments from IMCC/NAAMLP that said we should include minimum program make up funding in the list of authorized uses of Federal expense funds in § 872.25(a). The comments asserted that we ''can use any number of funds to make these [minimum program] payments, including the federal expense fund.''

After consideration of this comment, we decided not to make any additional changes to § 872.25. As we stated previously, we consider minimum program make up funds to be distinct from Federal expense funds even though both minimum program make up funds and Federal expense funds come out of the Secretary's 20 percent share of annual fee collections, as authorized under section 402(g)(3). The primary distinction is that Congress must appropriate Federal expense funds while minimum program make up funds do not need a Congressional appropriation other than that contained in the 2006 amendments. Section 401(f)(5)(A) of SMCRA allows us in any fiscal year to request, and Congress to appropriate, Federal expense funds from the Fund in addition to the mandatory appropriations made for grants to States and Indian tribes in the 2006 amendments. We believe, however, that it is not necessary to list in this regulation all the possible budget choices future administrations and Congress may make.

IMCC/NAAMLP and two States commented that we should revise § 872.25(a)(2) to state more affirmatively our responsibility to administer emergency powers under section 410 of SMCRA either through our Federal Reclamation Program in States and for Indian tribes without approved emergency programs or through approved State and Indian tribal emergency programs. The comments maintained that section 410(a) of SMCRA makes OSM, and not States and Indian tribes, responsible for funding emergency projects. In support, the commenters assert that we have not given States with approved emergency programs full autonomy to operate them, and that recently some States' proposed emergency projects have not been approved. The commenters expressed their concern that we intend to reduce or eliminate emergency program funding.

After considering these comments, we have decided not to change proposed § 875.25(a)(2). While we appreciate these comments, they address issues that are beyond the scope of this rulemaking. For example, the 2006 amendments did not amend section 410 of SMCRA or otherwise address the scope of OSM's emergency powers. Thus, whether, and to what extent, OSM expends money on AML emergencies is unaffected by the 2006 amendments and this rulemaking. While we are adding § 875.25, this section does not expand or constrict the scope of OSM's emergency powers. We certainly recognize that AML emergencies can pose extreme hazards to public health and safety and property, and we do not in any way suggest that it is acceptable for such emergencies to go unabated. As always, we will work in a cooperative manner with our State co-regulators to assure that AML emergencies will be abated.

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

As proposed, part of our changes to existing § 872.11(b)(6) included moving that section to §§ 872.26 and 872.27. 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. First, § 872.26(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. After consideration of the comments received, we have amended § 872.26(a) to identify the source of these funds as moneys in the Secretary's 20 percent share of the Fund that are authorized for mandatory distribution and are not included in the Federal expense share under §§ 872.24 and 872.25. Section 402(g)(3)(E) of SMCRA requires us to use the Secretary's 20 percent share of the Fund provided under section 402(g)(3) for this mandatory distribution. 30 U.S.C.

1232(g)(3)(E). However, unlike the Federal expense funds provided under paragraphs (A) through (D) of section 402(g)(3) and §§ 872.24 and 872.25 of the regulations, these funds do not need additional Congressional appropriation. 30 U.S.C. 1231(d)(1).

Second, § 872.26(b) describes four criteria that 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. Other than minor modifications for clarity, we did not change these requirements from the proposal.

Last, consistent with section 402(g)(8)(B) of SMCRA, § 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. This paragraph was adopted as proposed.

Responses to Comments

The calculation and use of minimum program make up funds was a subject of several comments. These commenters were primarily concerned with the amount of money minimum program States will be receiving under the 2006 amendments and these regulations. In particular, the general comments reflected two primary concerns: first, that if minimum program States receive only the minimum level of funding annually they will not complete the reclamation of the coal problems listed in the AML inventory during the life of the AML program; and, second, whether the phase-in provision of SMCRA section 401(f)(5)(B) should apply to minimum program make up funds. We will discuss the first concern below, but because § 872.27 contains language implementing the phase-in provision, we will discuss the second under that section.

Two States expressed concern that OSM is interpreting the 2006 amendments in such a manner as to guarantee that minimum program States will not receive enough funds to reclaim the sites listed in the AML inventory during the life of the program. One of these commenters notes that it has ''an AML inventory which exceeds $200 million [and it] would never be able to complete reclamation on all the Priority 1 and 2 hazards in the State by the end of fee collection in 2022 at $3 million per year minimum,'' which would leave the citizens of that State ''in great danger of being injured or even killed through some type of contact with one of these [unreclaimed] hazards.'' Another State asserted the same concerns: ''At an annual $3 million funding distribution [this State] will not get the Priority 1 and Priority 2 AML problems reclaimed by September 30, 2022.'' Three environmental groups generally commented that minimum program States deserve and are due $3 million annually.

A specific suggestion that these two State commenters and IMCC/NAAMLP made was to add the words ''or greater'' at the end of the first sentence of § 872.26(a) and at the end of § 872.27(a)(1). These commenters indicate that these changes will allow the Secretary to give a State or Indian tribe more than the minimum program mandatory funding of $3 million per year, if he so chose. This language could be used, as two States note and IMCC/NAAMLP appears to agree, to allow the Secretary to give more funds to minimum program States, particularly in the later years of the program after more States and Indian tribes certify coal completion and more historic coal funds are available to distribute among uncertified States and Indian tribes with large AML inventories remaining. One State asked that throughout the rule we make it clear that ''minimum program funding is not less than $3 million annually and can be greater than $3 million on an annual funding basis.'' In regard to a similar suggested change to § 872.27, IMCC/NAAMLP stated that they did not care how OSM was able to get the minimum program States more funds, but that ''it simply needs to be done in order to meet the minimum $3 million [annual] award beginning immediately.''

We appreciate the concerns that commenters raise on this point, but after careful consideration we have determined that we cannot change paragraph (a) of this section (or of § 872.27 as explained below) as suggested. We agree with the commenters' point that a static funding level of $3 million a year will not enable some States to complete their high priority coal reclamation by the time the fee collections end. We regret this situation because, as IMCC/NAAMLP and one State pointed out, '' 'minimum program' does not refer to [a] lack of AML hazards that a State has to address,'' and dangerous AML sites will likely continue to exist after FY 2022 in minimum program States and could pose grave danger to those States' citizens and visitors.

Unfortunately, the 2006 amendments do not provide us with the statutory authorization to augment the $3 million floor to ensure that the minimum program States can complete high priority coal reclamation using any funds appropriated for mandatory distribution under section 401 of SMCRA, although we may increase funding above this floor for appropriated Federal expenses such as State emergency program funding.

Section 402(g)(8) of SMCRA requires us to ''ensure that the grant awards total not less than $3,000,000 annually to each State and each Indian tribe having an approved abandoned mine reclamation program * * *.'' 30 U.S.C. 1232(g)(8)(A). All this section does is establish the threshold amount that minimum program States will receive; it does not alter the underlying calculation that determines how much every uncertified State will receive. To calculate whether any uncertified State will meet this minimum threshold, you must look at section 401(f)(3), which states:

> [F]or each fiscal year, * * * the Secretary shall distribute—
>
> (i) The amounts allocated under [the State and Tribal share provisions], the amounts allocated under [the historic coal funds provision], and any amount reallocated [because of equivalent amount is paid out of Treasury as certified in lieu funds], for grants to States and Indian tribes [as historic coal funds]; and
>
> (ii) The amounts allocated [for the minimum program make-up] under section 1232(g)(8).

30 U.S.C. 1231(f)(3). For uncertified States with a total amount to be distributed less than $3 million, section 401(f)(3)(ii) authorizes us to distribute minimum program make up funds in order to get them up to the threshold amount in section 402(g)(8)(A). It is the provisions of section 401 that authorize and appropriate these moneys from the Fund to uncertified States in mandatory distributions, and nothing in section 402(g)(8) changes the formula allocation set forth in section 401(f)(3). Thus, we are only authorized by SMCRA to provide minimum program make up funds, if needed, to bring the funding for each uncertified State up to $3 million. We are not authorized to use minimum program make up funds to give mandatory distributions in excess of these amounts to minimum program States.

To use Federal expense funds to provide the States with amounts greater

than $3 million, we would need a specific Congressional appropriation. Section 401(f)(5)(A) says that ''the amount distributed under this section shall be in addition to the amount appropriated from the fund during the fiscal year.'' 30 U.S.C. 1231(f)(5)(A). Although section 401(f)(5)(A) of SMCRA authorizes us to provide additional grants from Federal expense funds, it does not require us to provide such grants. Instead, the language of individual appropriations acts and our budgetary discretion, which are outside the scope of this rulemaking, govern how we expend the Federal expense funds.

We agree that more historic coal funds will be available to the remaining uncertified States as other States finish their coal problems and become certified. This occurs because the historic coal distribution percentages are increased for the remaining States, and also because amounts in the Fund equal to the certified in lieu funds the newly certified States will now receive are reallocated to historic coal funds under section 411(h)(4) and used to increase total historic coal distributions. We expect that as States certify, minimum program States will receive more historic coal funds and eventually will no longer require minimum program make up funds because the increase in historic coal funds will raise their funding over the $3 million threshold.

We also note that the comments we received in conjunction with §§ 872.24 and 872.25 about an inconsistency between the description of Federal expense funds and minimum program make up funds in the proposed rule also apply to this section. As we previously clarified in this final rule, we do not consider minimum program make up funds to be Federal expense funds, and, to be consistent with the changes we made in §§ 872.25(a) and (b), we are also changing § 872.26(a) to clarify that the source of minimum program make up funds is the moneys in the Secretary's 20 percent share of the Fund that are authorized for mandatory distribution.

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

Section 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 Secretary's share 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 do not receive any minimum program funding under this section. If your distribution of these funds is less than $3 million annually, we add Secretary's share funds to increase your total distribution to $3 million.

Although we use Secretary's share funds to ensure that you receive at least $3 million in your 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). 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.

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. We are calculating the phased-in distribution using 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 have added 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 have been $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.

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 unfunded reclamation costs of your Priority 1 and 2 coal problems.

Last, § 872.27(b) says we are awarding 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. After careful consideration of the comments received and explained below, we decided to adopt § 872.27 as proposed.

Responses to Comments

As mentioned in the comments to § 872.26, the comments we received on minimum program make up funding generally related to two primary concerns—the need to complete high priority reclamation before the end of the AML program and the application of the phase-in provision to minimum program make up funds. With regard to the first concern, the commenters who suggested that we add ''or greater'' to § 872.26 also suggested we add that phrase to § 872.27(a)(1). For the reasons described in § 872.26, we have decided not to add the suggested language to this section.

The rest of the comments on this section, from IMCC/NAAMLP, four States, and three environmental groups, generally related to § 872.27(a)(2), which incorporates SMCRA's phase-in provision of Fund moneys. The commenters asserted that SMCRA requires that minimum program States receive at least the full $3 million as soon as possible, and some of them presented specific reasons why. In particular, IMCC/NAAMLP and State commenters specified that we should not phase in distributions of minimum program make up funds. To justify this position, IMCC/NAAMLP provided an extensive discussion of section 401(f) and 402(g)(8). Particularly they quoted section 401(f)(5)(B), which states

''notwithstanding paragraph (3), the amounts distributed under this subsection'' will be phased in for the first four years beginning with FY 2008. 30 U.S.C. 1231(f)(5)(B). The commenter relies on this provision and states that OSM ignores this provision, and ''by its own terms (i.e. the 'notwithstanding' phrase), [the phase-in provision] only overrides the requirements of section 401(f)(3).'' The commenter finds independent justification in sections 401(f)(1), 401(f)(2), and 402(g)(8) to support a conclusion that ''section 401(f)(5) only applies to such additional funds as might otherwise be provided to OSM to the minimum program States and Tribes above the guaranteed distributions required elsewhere in the statute. This means that OSM cannot contribute more than $1.5 million in additional funding to each minimum program States and Tribes in fiscal years 2008 and 2009, and not over $2.3 million in additional funding in each of fiscal years 2010 and 2011, and not over $3.0 million in additional funding in each subsequent year through fiscal year 2024.''

IMCC/NAAMLP and one State described the history of minimum program make up funding and how it has neither been fully appropriated nor met the needs of eligible States and Indian tribes for several years. IMCC/NAAMLP and one State detailed portions of the legislative history of SMCRA and some of its amendments as it related to historical guarantees made to the States and Indian tribes for funding of at least $2 million. The legislative history included ''Congressional letters from committee chairmen [confirming] that Congress did not intend for funding to minimum program states to be phased-in.''

The commenters pointed out that despite these guarantees, Congress has generally only appropriated the minimum funding level at $1.5 million. Moreover, IMCC/NAAMLP provided a chart of the funding increases for States and Indian tribes in FY 2008 showing that every State and Indian tribe, except minimum program States, received an increase in funding ranging from 29 to 269 percent. IMCC/NAAMLP also asserted that minimum program States would not expect an increase until FY 2012. It continued by pointing out that large numbers of serious coal problems remain in some eligible States despite Congressional and State intent and efforts to strengthen provisions for abating them, and stresses that the purpose of Title IV is to help States and Indian tribes abate abandoned mine problems. Thus, IMCC/NAAMLP encouraged us to '' 'look outside the box' and consider the real reason that Title IV was enacted almost 30 years ago'' to justify amending the rule as proposed to fund the full $3 million in minimum program make up funds immediately. As one State commented, to provide less than the full $3 million would be a breach of faith between OSM and the States and Indian tribes.

As we stated in response to the comments under § 872.26, we agree that minimum program States and Indian tribes face widespread and significant abandoned coal mine problems that have yet to be addressed despite the Fund's 30-year existence. We acknowledge that eligible States and Indian tribes historically have not received the full $2 million that the previous version of section 402(g)(8) of SMCRA indicated they were authorized to receive. With the 2006 amendments, Congress addressed this underfunding by increasing the minimum level of distributions under this paragraph and making them mandatory. *See* 30 U.S.C. 1231(d)(3) and 1232(g)(8)(A). But it also enacted the phase-in provision of section 401(f)(5)(B), which effectively makes the minimum program States wait until FY 2010 to receive any significant increase in funding. 30 U.S.C. 1231(f)(5)(B).

We must, moreover, disagree with the conclusions that the commenters drew from the chronic underfunding of minimum program States and the changes to SMCRA made by the 2006 amendments. To begin, we must correct a misperception made by some of the commenters. As we described in the preamble to the proposed rule and repeated here, the formula that the regulations establish to determine the amount of funds that minimum program States receive give them an increase, however slight, over the $1.5 million annually that they previously received. In our calculation example above, we increased State A's funding from $1.5 million to $1.7 million, a 13% increase. Our records show that all of the 10 States that received minimum program funding in FY 2007 received more total funding in FY 2008 than they did in the FY 2007 distribution, with increases ranging from 4% to 168%.

Most importantly, the commenters have not provided any statutory authority under the language of SMCRA as written that supports our not applying the phase-in provision of section 401(f)(5)(B) to minimum program make up funds. When the 2006 amendments were enacted, we recognized the complicated interconnectedness of sections 401 and 402 of SMCRA. As described above, at our request, the Solicitor issued an M-Opinion that provides the Department's interpretation of SMCRA on the issue of whether the section 401(f)(5)(B) phase-in provision applies to minimum program make up funds. The Solicitor determined that section 401(f)(3) plainly requires us to reduce the total amount of annual grants in FY 2008 through FY 2011, including State or Tribal share, historic coal, and minimum program make up funds, to eligible States and Indian tribes by applying the phase-in provision of section 401(f)(5)(B). The M-Opinion recognizes that Congress's reason for imposing the phase-in is not readily apparent. At the same time, however, it concludes that the language of SMCRA that makes the State or Tribal share, historic coal, and minimum program make up funds subject to the phase-in is clear.

After extensively reviewing the rationales presented by the commenters, we still believe that the analysis contained in the M-Opinion is correct. As described, IMCC/NAAMLP asserts that SMCRA only applies the phase-in provision in section 401(f)(5)(B) to funds that the Secretary may provide to the minimum program States after the other guaranteed distributions are made, including the minimum program fund distribution that would bring them up to the $3 million floor. We believe that such an interpretation of SMCRA is incorrect and ignores the statutory scheme of section 401. Section 401(f) of SMCRA clearly requires the Secretary to distribute to States and Indian tribes the amounts determined under section 401(f)(2). Section 401(f)(2), in turn, provides a calculation of funds that are then distributed under section 401(f)(3). The phase-in provision of section 401(f)(5)(B) unambiguously applies to all amounts distributed under section 401(f)(3). Nothing in section 401(f)(3) indicates that it only refers to funds distributed in addition to other funds distributed under Title IV. Indeed, it clearly states it applies to ''the amount to be distributed to States and Indian tribes pursuant to'' section 401(f)(2). Thus, we disagree with the analysis presented by the commenters.

Even though it may be unfortunate that some States do not receive as much critical funding as they need to reclaim their high priority coal projects, we are only authorized to provide as much funding as SMCRA allows. As much as we appreciate the desire of these States to reclaim the high priority coal problems as quickly as practicable, we cannot interpret SMCRA in such a way as to go against its plain meaning. Therefore, we are not changing § 872.27 in response to these comments.

Because we recognize the importance of reclaiming high priority coal problems in all uncertified States and Indian tribes, including minimum program States, in the proposed rule we specifically invited comments on ''other ways to calculate minimum program make up funding that meet SMCRA's requirements.'' 73 FR 35226. IMCC/NAAMLP responded that they do not prefer a specific approach as long as it provides a minimum grant award of $3 million beginning in FY 2008. But as we explained, SMCRA's requirements do not allow us provide the full $3 million.

Another comment from IMCC/NAAMLP addressed the last line of the table in § 872.27(a)(2)(iv). On that line we stated 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. IMCC/NAAMLP commented that we should revise this section to state that, if a State or Indian tribe has more than $3 million in Priority 1 or 2 problems remaining after that date and funds still are available, we can and will distribute more than $3 million, not just a minimum of $3 million.

We understand the commenter's position, but we included § 872.27(a)(2)(iv) to make clear that we will add minimum program make up funds to your distribution amount until you have less than $3 million in Priority 1 and 2 coal problems remaining. This is consistent with section 402(g)(8)(A), which authorizes us to set $3 million as the floor amount of your total annual mandatory distribution, including minimum program make up funds if you qualify for them under this section. This is also consistent with section 401(f)(2)(B) of SMCRA, which requires that, for FY 2023 and each fiscal year after that, to the extent funds are available, we must distribute an amount equal to the amount we distributed under 401(f)(2)(A) during fiscal year 2022. Further, we use the word ''and'' to include Priority 1 and 2 coal problems consistent with the wording of section 402(g)(8) of SMCRA.

As with State and Tribal share funds and historic coal funds, IMCC/NAAMLP and two States requested that we change our regulations in §§ 872.26 and 872.27 to allow States and Indian tribes a choice to receive minimum program make up funds either in grants or by direct payments. Section 402(g)(8), however, refers to the Secretary's ensuring that ''the *grant* awards'' are made to each minimum program State and Indian tribe. Thus, as discussed further in the preamble in regard to §§ 872.15, 872.18, and 872.22 and because section 402(g)(8)(A) clearly contemplates that minimum program make up funds will be distributed as grants, we are not making the suggested change to these sections.

As with the State share funds under § 872.15, Tribal share funds under § 872.18, and historic coal funds under § 872.22, we received comments about historic coal funds withheld pursuant to the phase-in provision of section 401(f)(5)(B). For instance, IMCC/NAAMLP recommended that we distribute the amounts of minimum program make up funds withheld because of the phase-in provision in two equal distributions in FY 2018 and 2019. As we explained in §§ 872.15, 872.18, and 872.22, SMCRA does not authorize us to distribute moneys withheld because of the phase-in of State share, Tribal share, historic coal and minimum program make up funds in two payments in FY 2018 and 2019. Minimum program make up funding withheld during the phase-in period will remain in the Fund as part of the Secretary's share until it is either distributed as minimum program make up funding in FY 2023 and thereafter under § 872.27(a)(2)(iv), or otherwise appropriated by Congress and expended by OSM for Federal expenses under § 872.25. As we explained for historic coal funds in § 872.22, certified in lieu funds can only be used to pay for withheld State share or Tribal share funds, so when a State certifies we cannot distribute certified in lieu funds equal to withheld minimum program funds.

Are there any restrictions on how you may use minimum program make up funds? (§ 872.28)

Section 872.28 lists what you may use minimum program make up funds for. We first revised the title and introductory text for clarity. Furthermore, after considering the comments, we have revised this section so that it now allows you to use minimum program make up funds for: (a) Priority 1 and 2 coal reclamation under sections 403(a)(1) and (2) of SMCRA; and (b) Priority 3 coal reclamation that is part of Priority 1 and 2 coal reclamation under sections 403(a)(1) and (2) of SMCRA and § 874.13 of this chapter. You may not use minimum program make up funds for AMD set-asides because section 402(g)(6)(A) of SMCRA allows only State share, Tribal share, or historic coal funds to be used for this purpose. Similarly, you may not use minimum program make up funds for water supply restoration under section 403(b) or noncoal reclamation under section 409(b) because those sections also allow only State share, Tribal share or historic coal funds to be used. You may not use minimum program make up funds for stand alone Priority 3 problems or other work because section 402(g)(8) of SMCRA allows us to distribute minimum program make up funds only so long as they are necessary to achieve the priorities in section 403(a)(1) and (a)(2).

Responses to Comments

IMCC/NAAMLP and one State commented on this section. As proposed, § 872.28 would have allowed States and Indian tribes to use minimum program make up funding only for Priority 1 and 2 coal reclamation. Both comments suggested we change this section to allow States to use minimum program make up funds to reclaim certain Priority 3 coal problems as part of addressing Priority 1 or 2 hazards. The State clarified that it was not proposing to do ''stand alone'' Priority 3 coal reclamation with minimum program make up funds. Both, however, asserted that reclaiming Priority 3 problems such as spoil ridges as part of abating Priority 1 or 2 hazards such as highwalls allows them to leverage their limited funding to get the best reclamation at the lowest cost. They observed that we historically allowed this practice, under which States and Indian tribes save considerable amounts of money while providing valuable reclamation.

We agree with the comments. Section 402(g)(8)(A) of SMCRA provides that we will ensure grant awards total not less than $3,000,000 ''so long as an allocation of funds to the State or tribe is necessary to achieve the priorities stated in paragraphs (1) and (2) of section 403(a)''. 30 U.S.C. 1232(g)(8)(A). This section does not limit expenditures of minimum program funds to Priority 1 and 2 coal problems. However, we believe that there must be a strong connection between expenditures of these funds and the Priority 1 and 2 coal problems which made them necessary. We recognize that States have an interest in getting the most reclamation for their limited funds, and we share that interest. Also, we recognize that it can be economically and logistically advantageous to address lower priority problems, such as spoil ridges or waste piles, as part of abating higher priority problems such as highwalls, portals, and vertical openings. This approach reclaims more AML problems overall, in

some cases can more effectively abate and reclaim hazards and can reduce the cost of reclaiming the higher and lower priority problems. In that context, paragraph § 872.28(b) is added to allow you, the eligible States and Indian tribes, to use minimum program make up funds for Priority 3 coal reclamation that is part of Priority 1 and 2 coal reclamation under sections 403(a)(1) and (2) of SMCRA and § 874.13 of this chapter.

What are prior balance replacement funds? (§ 872.29)

Section 872.29 is one of three new sections we are adding regarding section 411(h)(1) of SMCRA and what we have termed ''prior balance replacement funds.'' This section describes these funds 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 SMCRA, 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 continue through FY 2014. Other than comments related to new § 872.35 and discussed in the preamble to that section, we did not receive any comments on this section and adopt it as proposed.

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

We are adding § 872.30 to describe how we distribute and award prior balance replacement funds. Under paragraph (a)(1), we 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 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, paragraph (a)(3) requires us to distribute these funds to you in seven equal annual installments, beginning in FY 2008.

Under § 872.30(b), we are awarding 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).

Section 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 is the same amount that we pay you as prior balance replacement funds under this section and 411(h)(1) of SMCRA. Section 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.

Responses to Comments

We received comments on this section from IMCC/NAAMLP and two States. Two commenters advocated that we amend our proposed rule text to allow States and Indian tribes the option of receiving prior balance replacement funds under this section and certified in lieu funds under § 872.32 either in grants or by direct payments. The third commenter simply asserted that ''OSM's interpretation that the payments to certified States must be accomplished by the grant process is in error and the funds should be distributed by a direct payment.''

More specifically, IMCC/NAAMLP and one State contend that SMCRA does not directly address the issue of the system that should be used to disburse Treasury funds to States and Indian tribes and acknowledge that the ''Secretary has the discretion to design a payment mechanism that meets the needs of the States and tribes.'' At the same time, these two commenters advocate that we choose a system that allows the States and Indian tribes to have the flexibility to choose between grants, which would give States and Indian tribes the '' 'protection' and guidance that such a process affords,'' and some type of direct payment mechanism, which would ''provide more unrestricted and immediate access to these moneys for States and Tribes who desire maximum discretion with regard to the use of these moneys * * *.'' These commenters never identified a specific mechanism that we could use to provide the direct payment but urged us to create a system similar to that used to pay mineral royalties to States under the Mineral Leasing Act. They also stated that 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.

We disagree with the commenters' assertions either that we should distribute Treasury funds to you as direct payments or allow you to choose between receiving the funds in grants or some type of direct payment. We agree with the Solicitor's M-Opinion that we are required to use grant agreements to make the Treasury payments under section 411(h) of SMCRA, and we incorporate its reasoning by reference. Furthermore, even if we did have some discretion, we would still choose to distribute these funds as grants. As explained further in the preamble to the proposed rule, we identified at least four reasons why it is advantageous to use grants to distribute funds under section 411(h). These reasons include allowing us to continue the established and effective process we have been using for almost 30 years to disburse moneys from the Fund to States and Indian tribes, helping us to address our programmatic responsibilities concerning certified and uncertified States and Indian tribes under sections 201(c)(1) and (4) of SMCRA, maintaining financial accountability for the distributed moneys, and maintaining consistency with Treasury regulations associated with grants (31 CFR Part 205).

In a separate but related comment, IMCC/NAAMLP requested that we change this section to allow distributions of prior balance replacement funds to occur on October 1 of each fiscal year. This would be in contrast to our proposal, which would have us distribute funds in the mandatory distribution after we account for all reclamation fees collected for the previous year.

We agree that we have the authority and the ability to distribute the prior balance replacement funds earlier in the fiscal year than the other funds in the annual mandatory distribution. Prior balance replacement funds are the only funds we are required to distribute that will usually not change in amount based on annual collections. For two reasons, however, we do not believe it advisable to provide for earlier distribution of the prior balance replacement funds. First, in order to distribute these funds earlier than other funds, we would have to

conduct a separate distribution and grants process. This, we believe, would be a waste of our administrative resources. Second, distributing these funds in advance of others could create a significant problem in years where proposed distributions of Treasury funds exceed the $490 million cap provided in section 402(i)(3)(A) of SMCRA. 30 U.S.C. 1232(i)(3)(A). In such years, we would have to reduce the amount of prior balance replacement funds that we distribute. We could not determine that amount of reduction, however, until we calculate the total amount of fee collections for the FY in question. Distributing prior balance replacement funds before we have made that calculation would create a significant administrative burden. Consequently, we did not change the regulatory text to specifically provide for earlier distributions. However, because we are not including any regulations mandating that distributions be made on a specific date, we reserve the right to use our discretion at some point in the future to reconsider the circumstances and allow for an earlier distribution of prior balance replacement funds.

In sum, we are adopting § 872.30 generally as proposed, but, for the reasons explained in the preamble to new § 872.35 we are adding a reference to make clear that prior balance replacement funds will be reduced if the $490 million cap set forth in section 402(i)(3) is exceeded.

Are there any restrictions on how you may use prior balance replacement funds? (§ 872.31)

Consistent with section 411(h)(1)(D)(i) of SMCRA, § 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). 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 our 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 requiring an Authorization to Proceed (ATP) from OSM with an accompanying NEPA review.

Sections 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 § 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.

Responses to Comments

We received numerous comments on this section. We will begin by discussing the comments we received on § 872.31(a) from IMCC/NAAMLP, one Indian tribe, and two States regarding compliance with the National Environmental Policy Act (NEPA). IMCC/NAAMLP and State commenters generally preferred not to have us do the NEPA review or an ATP for prior balance replacement funds expended by certified States and Indian tribes, but these commenters asked that we clarify why we will not require NEPA review. In contrast, IMCC/NAAMLP added that if ''a Tribe is still required to perform a NEPA review due to other federal requirements (i.e. federal fiduciary responsibilities), the Tribes would prefer to work with OSM to accomplish this.'' Likewise, an Indian tribe commented that it was required to have NEPA documentation, and that we should conduct the NEPA reviews and issue ATPs for projects funded with prior balance replacement funds under section 411(h)(1) upon receipt of a certified State's or Indian tribe's written request because we have ''provided well-timed review and approval of [their] SMCRA projects resulting in the timely completion of these projects.''

After reviewing these comments, we have decided not to change § 872.31(a) to specifically incorporate NEPA. As IMCC/NAAMLP suggested, we do not believe that a Federal nexus exists on individual projects undertaken by certified States and Indian tribes using prior balance replacement funds for the purposes set forth by their State legislatures or Tribal councils. We do not need to address this point in these regulations because other statutes, regulations, and case law support that principle. For example, the Department's NEPA regulations state: ''If Federal funding is provided with no Federal agency control as to the expenditure of such funds by the recipient, NEPA compliance is not necessary.'' 43 CFR 46.100(a); *see also* 40 CFR 1508.18 (''‘Major Federal Action' includes actions with effects that may be major and which are potentially subject to Federal control and responsibility.''). Because SMCRA clearly requires us to make the prior balance replacement fund payments to certified States and Indian tribes and gives the State legislatures and Tribal councils sole discretion as to how the funds are spent, we do not need to document NEPA compliance or issue ATPs. The exception to this lack of Federal nexus exists when certified States and Indian tribes use prior balance replacement funds, as directed by their State legislature or Tribal council, to maintain certification status under section 411 of SMCRA by reclaiming any remaining or newly discovered coal problems following the requirements of sections 403 and 404 of SMCRA and Parts 874 and 875 of this chapter.

We also would like to stress that it is possible certified States or Indian tribes will undertake projects with prior balance replacement funds that involve Federal decisions by some other Federal entity, and, as such, NEPA compliance may be required. Moreover, it is possible that some certified States and Indian tribes will have their own requirements to comply with NEPA or its State or Tribal counterparts. It is the responsibility of each certified State and Indian tribe to determine what requirements, if any, apply to individual projects (other than any coal reclamation they do under Part 874) that they fund with moneys they receive under § 872.31(a) and section 411(h)(1) of SMCRA. Thus, it is the responsibility of all States and Indian tribes to ensure that they meet all the applicable requirements they identify including NEPA requirements, and a specific regulation relating to NEPA requirements is not needed.

In much the same way, while we are appreciative that at least one Indian tribe would like for us to remain involved in their NEPA compliance process, given the limitation on our discretion on the use and control of the funds under section 411(h)(1), we do not believe it is appropriate to provide

a formal option for us to do NEPA reviews and issue ATPs for Indian tribes (other than for coal projects under Part 874). However, we will fulfill the Secretary's trust responsibilities for Indian tribes and continue to work cooperatively with them while respecting the roles and jurisdictions of other Federal entities.

With regard to § 872.31(a), we received two additional comments from States in response to our request for comments on the wording of the regulation to describe the purposes for which certified States and Indian tribes may use prior balance replacement fund moneys distributed to them under section 411(h)(1). In the proposed rule, we explained that § 872.31(a) may significantly affect certified States' and Indian tribes' reclamation programs and invited comments on it. The commenters specified that no additional explanation is needed; therefore, we are adopting § 872.31(a) as proposed, with a minor change for clarity to conform to the new title for the section.

Most of the comments submitted on § 872.31 related to paragraph (b). These comments came from IMCC/NAAMLP, one Indian tribe, five uncertified States, one certified State, and three environmental groups. In particular, they were concerned with two purposes for which, under proposed § 872.31(b), uncertified States and Indian tribes cannot use prior balance replacement funds—namely for placement in the 30 percent AMD set-aside accounts and for noncoal reclamation under section 409(c). Most of the comments received were similar because they generally urged us to allow uncertified States and Indian tribes to use prior balance replacement funds for these two additional purposes. But there were subtle differences between them. For instance, IMCC/NAAMLP and most State commenters asserted that we should change this section to give uncertified States and Indian tribes the ability to use prior balance replacement funds for the 30% AMD set-aside and for noncoal reclamation under section 409(c). IMCC/NAAMLP and two States proposed specific language consistent with their interpretation. One State went further and commented that we do not have the authority under SMCRA to limit the use of prior balance replacement funds for noncoal reclamation, and, if we did so, it would be at least considered arbitrary and capricious, violate NEPA, and be tantamount to a taking of their property under the Fifth Amendment. However, we did receive one comment in support of our interpretation because that State perceived that our interpretation gives it greater flexibility on how certified States and Indian tribes can spend their prior balance replacement funds.

To begin, IMCC/NAAMLP and most States maintained that prior balance replacement funds are ''colored'' as State and Tribal share moneys because they are being provided by Congress to compensate them for the State and Tribal share balances that had been allocated, but never appropriated to them, based on past reclamation fees collected from coal producers in those States and from Indian lands. Because uncertified States and Indian tribes had historically been able to use the State and Tribal share moneys that they did receive for noncoal reclamation and the AMD set-aside, these commenters advance the argument that they should be allowed, if they so choose, to use prior balance replacement funds for these purposes as well.

These commenters take issue with the discussion in the preamble to the proposed rule that asserts a fundamental distinction exists between the Treasury funds we distribute under section 411(h)(1) and Fund moneys allocated under section 402(g)(1) for State and Tribal share funds. They refer to section 411(h)(1)(A)(i) of SMCRA, which says ''the amount due for the aggregate unappropriated amount allocated to the State or Indian tribe under subparagraph (A) or (B) of section 402(g)(1)'' and in 411(h)(1)(B) to ''the unappropriated amount allocated to a State or Indian tribe before October 1, 2007, under subparagraph (A) or (B) of section 402(g)(1).'' According to these commenters, these statutory provisions recognize that prior balance replacement funds are considered and always have been considered State and Tribal share funds allocated under section 402(g)(1) of SMCRA regardless of the funding source used to provide the moneys to the States and Indian tribes. In that context, they urge that we base the use of prior balance replacement funds on the original uses for State and Tribal share funds, which would include noncoal reclamation and the AMD set-aside. In contrast, one State supported our statement that there is a fundamental distinction between prior balance replacement funds and section 402(g) moneys distributed from the Fund because this State perceives that such a distinction allows it greater flexibility on how certified States can use prior balance replacement funds.

What is more, one State advocated that a better reading of this provision relies on the references to the ''amount due'' in sections 411(h)(1)(A)(i) and 411(h)(1)(B). Because section 411(h)(1)(B) refers to the past allocation, this State advances that ''funds may be allocated, on the one hand, but unappropriated, on the other. * * * The fact that funds have not been appropriated or are appropriated from one source as opposed to another, does not change the fact that they have been allocated under [section 402(g)(1)].'' Using this approach, the State concludes that because section 409 allows State and Tribal share funds and historic coal funds to be used for noncoal reclamation, and the prior balance replacement funds are simply Treasury fund appropriations used to satisfy the State and Tribal share allocations under section 402(g)(1), then prior balance replacement funds must be allowed to be used for noncoal reclamation, just as the State and Tribal share allocations may be used.

The same State questioned our use of section 411(h)(1)(D)(ii) to prevent uncertified States from using prior balance replacement funds on noncoal reclamation projects. It and other States pointed out that, under section 411(h)(1)(D)(ii), uncertified States are required to use prior balance replacement funds ''for purposes described in section 403.'' 30 U.S.C. 1240a(h)(1)(D)(ii). Section 403 lists three priorities, all of which are coal based. This State correctly noted that section 403 applies to ''all expenditures from the Fund, including [section 402(g)] allocations'' and that section 402(g)(2) provides that ''the Secretary shall ensure strict compliance by the States and Indian tribes with the priorities described in section 403(a)'' in making grants under sections 402(g)(1) and 402(g)(5).

That State continued by pointing out that section 409(c)(1) provides: ''The Secretary may make expenditures and carry out the purposes of this section * * * for those reclamation projects which meet the purposes of this section, the reference to coal in section 403(a)(1) of this title shall not apply.'' 30 U.S.C. 1239(c)(1). The State contends that this provision ''specifically broadens the scope'' of section 403 and that OSM has no basis for interpreting the reference to section 403(a)(1) differently in section 402(g)(2).

Some commenters also maintained that prior balance replacement funds are not fundamentally distinct from State and Tribal share funds when SMCRA is read as a whole. IMCC/NAAMLP and other commenters emphasized that we must read the entire statute in context when interpreting the meaning of section 411. The comments maintained: ''Section 403 * * * is modified by Section 409, which provides for the expenditure of AML funds at any

Priority 1 or 2 site, regardless of the commodity mined.'' Because the wording of section 409(b) indicates that State or Tribal share funds (from 402(g)(1)or (g)(2)) and historic coal funds (402(g)(5)) may be used for noncoal reclamation, these commenters contend that Congress easily could have changed section 411(h)(1), section 409, or both to limit the use of the unappropriated State and Tribal share balances that are being distributed under section 411(h)(1) if it wanted to, but did not. Thus, the commenters assert that because Congress left section 409 unchanged, uncertified States and Indian tribes should be allowed to use all funds distributed under SMCRA to reclaim extremely dangerous noncoal mine problems that threaten public health, safety, and property. *See* 30 U.S.C. 1233(a)(1)(A) and 1239(c).

One comment made by IMCC/NAAMLP provided that section 402(g)(2) does not apply to the use of historic coal funds or prior balance replacement funds. As support, the commenters explained that section 411(h)(1) allows these funds to be ''expended pursuant to the 'priorities' of section 403'', and expenditures made pursuant to section 409(b), which refers to those priorities, are indeed part of the section 403 priorities. As additional support, they point out that section 401 of SMCRA, which ''speaks to the 'purposes' of the Fund,'' specifically includes coal reclamation under section 403 and noncoal reclamation under section 409.

Moreover, IMCC/NAAMLP and two States commented that they believe our position on the use of prior balance replacement funds would force them to spend years working on high-cost, low-priority coal projects that present little threat to public health and safety at the expense of leaving tens of thousands of hazardous abandoned noncoal mines unattended. They stated that all fatalities in recent decades in two western States were related to abandoned noncoal mines. Additionally, they observed that the danger to public health and safety from abandoned noncoal mines throughout the country is increasing due to increased urban sprawl into undeveloped areas and outdoor recreation. One Indian tribe stated that allowing uncertified States to use as much funding as possible would allow timely completion of AML problems that would benefit both Tribal and State stakeholders. One State maintained that we could be held liable if people are hurt or injured in abandoned noncoal mines that we refuse to fund.

Furthermore, comments from IMCC/NAAMLP and some States described events that occurred after the enactment of the 2006 amendments that they maintain demonstrates Congressional intent to allow uncertified States and Indian tribes to use prior balance replacement funds for noncoal reclamation. They point to a June 6, 2007, letter in which six Senators of three western States expressed their view that a fair reading of the amended Act allows using historic coal funds and prior unappropriated balance allocations for high priority noncoal sites because section 409 did not change in the amendments, allowing it to operate as it did in the past. The comments also described legislation introduced into the 2008 Congressional session and testimony given in support of that legislation to clarify Congress's intent that prior balance replacement funds be used for noncoal reclamation.

After a thorough analysis of the comments, we determined that our interpretation of the 2006 amendments as presented in the proposed rule is consistent with the plain meaning of SMCRA and the Solicitor's M-Opinion, which also analyzes section 409(b). For those reasons, and as explained in the preambles to our proposed rule and this final rule, we are adopting § 872.31(b) as proposed, with a minor change for clarity to conform to the new title for the section.

A proper analysis of this issue must begin with section 409(b) of SMCRA because it specifically provides that ''[f]unds available for use in carrying out the purpose of this section 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). Thus, the plain meaning of this subsection is that moneys uncertified States and Indian tribes can use for noncoal reclamation are restricted to those moneys we must allocate to their State or Tribal share and historic coal funds. While it is true that section 411(h)(1)(B) also discusses the ''unappropriated amount allocated to a State or Indian tribe before October 1, 2007'' for State or Tribal share funds, we believe the statute makes a clear distinction between those Treasury funds (i.e., prior balance replacement funds) based on unappropriated, but previously allocated, State and Tribal share payments, and those that continue to be allocated from current revenue collections. Section 409(b) is written in the present tense—''limited to those funds which *must* be allocated'' as State share funds (emphasis added). 30 U.S.C. 1239(b). The only funds that must be allocated are those from current reclamation fee collections, and not the funds that already have been allocated prior to the beginning of fiscal year 2008, which are the ones that the prior balance replacement funds seek to replace.

In any event, the prior balance replacement funds are not ''allocations'' under section 402(g)(1); they are distributions under section 411(h). Prior balance replacement funds provide a payment equal to the amount of what had been allocated, but had never been appropriated. It is Congress's prerogative to allocate moneys to entities, but not appropriate the full amount. It happens frequently. *See, e.g.*, the discussion in § 872.27 of Congress authorizing $2 million as the minimum program funding level but only appropriating $1.5 million. Just because SMCRA now appropriates the amount of money as prior balance replacement funds that the States and Indian tribes would have received as State and Tribal share funds had it fully appropriated the allocated amount in the first place, it does not follow that the conditions that apply to allocated State and Tribal share funds also attach to the prior balance replacement funds. The prior balance replacement funds are a separate appropriation whose calculation just happens to depend on the difference between the amounts of a prior allocation and a prior appropriation.

We also do not perceive any conflict between the different uses of the moneys distributed under sections 402(g)(2) and 411(h)(1)(D)(ii) even though they both refer to section 403(a)(1). We do not view section 409(c)(1) as a general broadening of the scope of section 403(a)(1) to allow noncoal reclamation; instead, section 409(c)(1) is restrictive and only allows for noncoal reclamation to occur on lands otherwise meeting the criteria of section 403(a)(1) when funds specifically mentioned by section 409(b) are used—the State or Tribal share and historic coal funds. As such, we are acting within the authority that SMCRA grants under section 201(c)(2) ''to publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this Act.''

Likewise, although we recognize how important noncoal reclamation is to several States, the primary purpose of the enactment of SMCRA relates to coal. *See* 30 U.S.C. §§ 1201, 1202. Allowing uncertified States to continue to use the same type of funds that they have used in the past to fund noncoal reclamation (i.e., State or Tribal share and historic coal funds), while providing that some

funds must be used toward coal reclamation (i.e., prior balance replacement funds), is consistent with the purposes of SMCRA.

We recognize the extreme hazards posed by unreclaimed noncoal mine lands. Uncertified States and Indian tribes may continue to use their State or Tribal share and historic coal funds to abate Priority 1 noncoal problems under section 403(a)(1) as provided in section 409(b) and (c) of SMCRA. Nothing in this rulemaking prevents that. In fact, most uncertified States and Indian tribes will have roughly the same amount of those funds available for noncoal reclamation that they have had in the past, even considering the phase-ins. We note that some uncertified western States commonly partner with Federal land management agencies to abate high priority noncoal problems on public lands. Those States receive additional funding from those agencies and in their legislative appropriations that enable them to address a wider range of noncoal AML problems. One Indian tribe commented that uncertified States should be allowed to use prior balance replacement funds for noncoal reclamation to enable an adjacent uncertified State to continue partnering with that Tribe on noncoal projects that impact members of that tribe in areas outside Indian lands. Our interpretation of section 411(h)(1) should not adversely affect such ongoing partnerships or prevent uncertified States and Indian tribes from addressing Priority 1 noncoal problems.

It is possible some uncertified States may find they have more funds for noncoal reclamation than they expected. By using prior balance replacement funds exclusively for coal purposes under section 403, uncertified States no longer would have to split their State share and historic coal funds between coal and noncoal reclamation to the extent they did in the past and could use more State share and historic coal funds for noncoal if they so choose. Moreover, as the phase-in years are completed and as some States certify coal completion, more State share and historic coal funds will become available to uncertified programs for coal and noncoal reclamation. Uncertified States therefore should be able to address Priority 1 noncoal problems to no less an extent than they did before Congress enacted the 2006 amendments. Once States complete reclamation of all known coal problems and certify, their legislatures have the authority to use all the funding States will receive under sections 411(h)(1) and (2) for noncoal reclamation.

IMCC/NAAMLP, five States, and three environmental groups also commented that we should change § 872.31 to allow uncertified States and Indian tribes to use prior balance replacement funds for the 30% AMD set-aside. IMCC/NAAMLP commented that much of its reasoning for using prior balance replacement funds for noncoal reclamation also applies to allowing States and Indian tribes to use those funds for the 30% AMD set-aside, so we do not repeat all of it here. IMCC/NAAMLP and States asserted that AMD treatment projects typically are Priority 3 projects. They maintained that to allow them to use prior balance replacement funds for AMD projects under § 874.13, but not for the AMD set-aside, is inconsistent because both treat the same type and priority of coal-related problems under section 403 of SMCRA. As one State noted, in its opinion, ''OSM is essentially authorizing the use of prior balance replacement funds for current AMD work on one hand, while denying the use of these funds for further AMD work on the other.'' Further, it noted such work clearly is one of the purposes of section 403 of SMCRA, so any restriction on the use of these funds for AMD remediation is inappropriate. It also maintained that section 402(g)(6)(B)(ii)(I) of SMCRA, which states that a qualified hydrologic unit destined for AML abatement must have land and water that ''include[s] any of the priorities described in section 403,'' establishes and defines the use of AMD set-aside funds. It asserted that this passage, along with the statement at section 411(h)(1)(D)(ii), provided a clear nexus to section 403 of SMCRA, and thus prior balance replacement funds can be used for AMD set-aside because it is effectively a priority of section 403. It cited the fact that the references in sections 402 and 411 to section 403 are identical and concluded that ''Treasury funds should not be artificially excluded for use in set-aside for AMD.''

One State commented that Congress created the AMD fund language in SMCRA to allow States and Indian tribes to address this ''eligible priority problem type'' well into the future beyond the expiration of the fee collections and the end of grants to States under SMCRA. That State's comment described its chronic and acute acid mine drainage problem. The comment added that funding the AMD set-aside at the highest level of deposits available is of great importance to the citizens of that State. IMCC/NAAMLP added that Congress has included language in the recent appropriation bills that affirms its support of Title IV funds being set aside for the purpose of environmental restoration related to treatment or abatement of acid mine drainage without restriction.

We agree with the comments that acid mine drainage is a widespread and serious problem and recognize how important it is to the States to address it. Nothing in this rulemaking reduces a State's authority to address acid mine drainage in projects it funds under § 874.13 with State share and historic coal funds. In addition, because prior balance replacement funds must be expended for the reclamation of coal problems, which as many commenters pointed out often includes Priority 3 problems related to AMD, uncertified States can use these funds for those purposes. In sum, as the regulation reflects, funding Priority 1, 2, or 3 acid mine drainage projects with prior balance replacement funds distributed under section 411(h)(1) of SMCRA is consistent with all subsections of section 403 of SMCRA, including section 403(a)(3).

For the reasons in the preamble to the proposed rule, the Solicitor's M-Opinion, and those we provided in this preamble in our responses to comments on uncertified States and Indian tribes using these funds for noncoal reclamation, we do not believe that prior balance replacement funds can be used for the same purposes as State or Tribal share funds simply because an equal amount was allocated but not appropriated as State or Tribal share. The actual appropriation of these funds occurred in the 2006 amendments, and section 411(h)(1)(d)(2) of SMCRA now clearly authorizes prior balance replacement funds to be used only for the ''purposes described in section 403.''

Section 403 of SMCRA does include Priority 1, 2, and 3 coal problems, the restoration of water supplies, and the maintenance of the AML inventory. Priority 1, 2, or 3 coal problems include AMD projects. As § 872.31(b) provides, uncertified States and Indian tribes can use prior balance replacement funds for any of these purposes.

Section 403 does not include the AMD set-aside. So, § 872.31 does not allow uncertified States to place prior balance replacement funds into the AMD set-aside accounts established under State law under section 402(g)(6) of SMCRA. That section explicitly authorizes uncertified States and Indian tribes to set-aside up to 30 percent of ''the total of the grants made annually to the State under paragraphs (1) and (5)'' to address AMD. The requirement in section 402(g)(6)(B) that funds

deposited in the set-aside be used to address AMD in a qualified hydrologic unit that contains land and water that are eligible pursuant to section 404 and include any of the ''priorities described in section 403(a)'' provides the flexibility and assurance that those funds will be used to address AMD ''in a comprehensive manner'' and that their use will not be limited to addressing only part of a problem.

Though Priority 3 AMD projects and funds in the AMD set-aside will address similar problems, section 403 does not refer to the AMD set-aside in its description of the priorities for which funds can be expended under that section. Congress could have said you may use section 411(h)(1) funds for the AMD set-aside under section 402(g)(6), but it did not do so in sections 402(g)(6) or 411(h)(1). It also could have referred to the AMD set-aside in section 403, but did not do that either. Instead, it explicitly worded section 402(g)(6) to say you may use funds you receive under sections 402(g)(1) (State or Tribal share funds) and (g)(5) (historic coal funds) for the AMD set-aside and referred to the ''purposes described in section 403'' for prescribing the use of funds available under section 411(h)(1).

We realize our interpretation means you can use prior balance replacement funds for current AMD projects but not for deposit into the AMD set-aside. We acknowledge that moneys set-aside in such State accounts should be used at some future date to address AMD abatement and treatment problems, but we think there is a distinction between expending funds directly for reclamation costs and depositing funds in a trust account to earn interest. We believe our interpretation of section 411(h)(1)(D)(ii) and of section 403 is consistent with the amended wording of SMCRA.

What are certified in lieu funds? (§ 872.32)

We are adding 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 rule. As the first of these three sections—§ 872.32—describes, certified in lieu funds are moneys that we 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 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 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 are distributing certified in lieu funds for the first time in FY 2009. Other than comments related to new § 872.35 and discussed in the preamble to that section, we did not receive any comments on this section and adopt it as proposed.

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

Section 872.33 describes how we 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 follow the steps described in paragraph (b) to distribute these moneys to you. Under paragraph (b)(1), we 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. Paragraph (b)(2) states that the funds we annually distribute to you are 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 is not the source of these moneys that we distribute to you, you receive moneys each year as though you were still receiving them from your State or Tribal share of the Fund.

Section 872.33(b)(3) explains, using a table, how we are phasing 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 is 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.

Section 872.33(c) states that we 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.

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 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 are doing so at the same time we distribute all other moneys under Title IV. Finally, § 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). Section 872.33(e) incorporates that provision into the regulations.

Responses to Comments

As part of a broader comment, IMCC/NAAMLP commented that we should give States and Indian tribes the option of receiving their certified in lieu funds in grants or by direct payments. In addition, one State stated that SMCRA required certified in lieu funds to be distributed by direct payments.

As we explained in response to similar comments we received on § 872.30, we conclude that we are required to distribute all funds to States and Indian tribes in grants, including certified in lieu funds we distribute under this section. Our detailed explanation of our decision to use grants appears in the discussion of our responses to comments we received on that section, and we do not repeat it

here. Therefore, we are adopting the § 872.33 as proposed with one minor addition to (b) for clarity.

Are there any restrictions on how you may use certified in lieu funds? (§ 872.34)

As proposed, § 872.34 stated that you may use certified in lieu funds for any purpose. After considering the comments described below, we have interpreted SMCRA to place no restrictions on the use of certified in lieu funds. This is because Congress did not place any limits on the use of these funds in the 2006 Amendments. Thus, we have revised the title and language for clarity. 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.

As a certified State or Indian tribe, you must address coal problems that arise after certification under existing § 875.14(b), and we are not changing this requirement. In addition, when each State and Indian tribe became certified under the existing regulations at § 875.13(a)(3), it 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.

Responses to Comments

In the proposed rule, we requested comments on an alternative interpretation of section 411(h)(2). At that time, we explained that section 411(h)(2) of SMCRA, as revised by the 2006 amendments, is silent on how certified in lieu funds may be used, and that an argument could be made that this section's silence on the use of these funds does not mean certified States and Indian tribes may 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. We asked for comments because we recognized this interpretation would make a major difference in not only how these funds may be used but in our role in overseeing that use.

IMCC/NAAMLP, one State, and three environmental groups representing a coalition of conservation districts and watershed groups responded to our request for comments. The IMCC/NAAMLP and State commenters agreed with our interpretation that the use of the funds we distribute under section 411(h)(2) is not restricted by SMCRA. Moreover, they pointed out that provisions in section 411(b) through (g) would be difficult to apply to certified States and Indian tribes. Both the IMCC/NAAMLP and the State commenter maintained that the provisions of sections 411(b) and (c) could possibly apply to newly discovered coal problems because we could require newly discovered coal problems to meet the eligibility criteria of paragraph (b) and the priorities described in paragraph (c). Those commenters added that paragraph (d) would not apply because it refers to expenditures from the Fund and certified States and Indian tribes no longer receive moneys from the Fund. Further, they maintained that paragraphs (e) and (f) would not apply because they restrict the use of funds certified States and Indian tribes receive.

In contrast, the three environmental groups agreed with the alternative approach mentioned in the preamble. Specifically, they contended that sections 411(b) through (g) provide context and guidance for and set the rules on how all funds for the AML program must be used, regardless of their origin. These commenters stated that ''[t]he absence of explicit provision[s] in SMCRA addressing how certified in lieu funds may be used does not authorize organizations that receive such funds to use them for any purpose * * *. [A]n explicit provision in the statute would be required in order to use certified in lieu funds for any purpose'' (emphasis omitted).

After careful consideration of the comments that both agree and disagree with our proposed rule, we agree with the rationale presented in the preamble to the proposed rule and generally espoused by the IMCC/NAAMLP and State commenters. Thus, in the final rule we have clarified that our interpretation of SMCRA is that there are no restrictions on the use of certified in lieu funds. Because we believe there are no restrictions on certified in lieu funds, we disagree with the portion of the IMCC/NAAMLP comment that said the language of the 2006 amendments specifically allows these funds to be used for any purpose. We find SMCRA contains no specific instruction on the use of these funds, but at the same time, it places no restrictions upon them. We also believe that section 411(b) and (c) of SMCRA only apply to certified States and Indian tribes that conduct noncoal reclamation programs with State or Tribal share funds distributed prior to October 1, 2007. As further explained in the preamble to § 875.13, our intention is to work cooperatively with certified States or Indian tribes to ensure coal problems that exist after certification are appropriately addressed.

When will OSM reduce the amount of prior balance replacement funds or certified in lieu funds distributed to you? (§ 872.35)

In the proposed rule, we specifically invited comments on whether we should add a provision to the regulations that describes how we would reduce our distribution of prior balance replacement funds and certified in lieu funds, as well as transfers made to the UMWA health care plans under section 402(i) of SMCRA, if we exceed the annual funding cap of $490 million for disbursement of Treasury funds.

Two States and IMCC/NAAMLP responded to this invitation. IMCC/NAAMLP asserted that such a provision was not necessary, but that we should adopt the language in section 402(i)(3)(B) of SMCRA verbatim if we chose to add one. The State commenters did not take a position on whether or not we should add such a provision, but they also suggested we use the exact wording of section 402(i)(3)(B) if we did.

Although our current funding projections do not indicate that we will ever need to invoke this section, we have decided to add this section so that we can more completely address future funding scenarios. We tried to incorporate the language of section 402(i)(3)(B), while still placing it in plain English. Thus, § 872.35(a) provides that for any FY when moneys distributed from Treasury under section 402(i), including prior balance replacement funds, certified in lieu funds, and transfers to the UWMA health care plans, total more than $490 million, we will adjust all of the disbursed amounts by the same percentage to reduce total payments to the level of the cap. For that FY, we would reduce distributions of prior balance replacement funds by that same percentage from the amount otherwise required under § 872.30. Similarly, we would reduce distributions of certified in lieu funds by that same percentage from the amount otherwise required under § 872.33. Section 872.35(b) incorporates the language of section 402(i)(3)(B)(ii), which states we will not include funds under section 402(h)(5)(A) as part of this calculation.

IMCC/NAAMLP also suggested that if we add a section about the $490 million cap it should say: ''This adjustment does not apply to the minimum program make up funds.'' Although we are not adding this language, we agree with this statement to an extent. The cap applies only to Treasury funds, but minimum

program make up funds come from the Fund not Treasury. So minimum program funds distributed under § 872.27 will not be reduced under this section.

However, we must disagree with a similar comment made by one State that if we add this provision, we need to provide that every State and Indian tribe is guaranteed $3 million because that is the level of funding that States, OSM, Congress, and others recognized as being the minimum funding level to support a viable AML program. We appreciate this comment, but after review, we believe the regulations as written already provide that minimum program States will receive the full $3 million, subject to applicable phase-ins, even if the $490 million cap is reached. The only type of Treasury funds provided to minimum program States is prior balance replacement funds during FY 2008 through 2014. If the cap were reached during that time, their prior balance replacement funding would be reduced by the same percentage as every other recipient of Treasury funds under section 402(i). However, under § 872.27 we calculate minimum program make up funding by adding up the distributions of all other types of funds for that FY, including prior balance replacement funds, then adding the amount of minimum program make up funding needed to increase the total distribution to $3,000,000, subject to phase-ins. Thus, if the $490 million cap is exceeded and prior balance replacement funding is reduced, the Fund will effectively supplement any reduction of the prior balance replacement funds with increased minimum program make up funds, and the total funding for minimum program States will be unchanged.

Part 873—Future Reclamation Set-Aside Program

We proposed to make changes to §§ 873.11 and 873.12 primarily to reflect the elimination of the authority for States and Indian tribes to set aside funds for future reclamation that was once contained in section 402(g)(6). The 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 received no comments on our proposed changes to this part, and are adopting them as proposed.

Part 874—General Reclamation Requirements

Definitions (§ 874.5)

We proposed to add this section to Part 874 to include the definition of the term ''Reclamation plan or State reclamation plan'' as it is defined in § 872.5. We received no comments on this section and adopt it as proposed.

Information Collection (§ 874.10)

In this section, we discuss the Paperwork Reduction Act requirements and the information collection aspects of Part 874. We are updating this section and rewording it using plain English. We did not receive any comments on this section and are adopting the section as proposed.

Applicability (§ 874.11)

As explained in the preamble to the proposed rule, we proposed to revise 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. We received no comments on this section, but for reasons explained in connection to comments received on Part 875, we have made some changes to this section for consistency. Other than minor editorial changes, the significant revision to the final rule merges proposed paragraphs (c) and (d) into a new paragraph (c) that requires certified States and Indian tribes to comply with Parts 874 and 875 to maintain their certification status under section 411(a) of SMCRA, regardless of the funding they use to accomplish the reclamation.

Eligible Coal Lands and Water (§ 874.12)

As explained in the preamble to the proposed rule, we are revising existing paragraphs (c), (e), and (f) of § 874.12 to reflect our changes to the funding applicability in § 874.11, to correct minor errors in the existing regulations, and to reword these paragraphs using plain English. We have not extended the eligibility criterion in paragraph (d) to certified States and Indian tribes because the AML inventory does not show that any sites would be eligible under this section in certified States and Indian tribes and because certified States and Indian tribes would not need any special authority due to their generally unrestricted authority to expend Title IV funds as described in Part 872. We received no comments on this section and adopt it as proposed.

Reclamation Objectives and Priorities (§ 874.13)

We are changing § 874.13 to reflect expenditure priorities outlined in section 403(a) of SMCRA, as revised by the 2006 amendments, and to clarify how reclamation programs should address Priority 3 reclamation objectives. 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 § 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, we are adding the last sentence of § 874.13(a)(3) 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 certain degraded 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 are defining the term ''adjacent'' as Priority 3 eligible lands and waters that are ''geographically contiguous.'' 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.

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 are applying 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 replacing 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 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 § 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 provision to be slightly more restrictive than the existing regulations because it prohibits 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 § 874.13(b)(2).

Section 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, § 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 adding 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 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) 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 § 874.13(b)(2)(ii).

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, particularly section 402(g)(7). To ensure that high priority site reclamation is promoted while we observe our long-term commitment to eliminate all coal problems, we are providing 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 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 diminishes. As part of our oversight and AML 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 are 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 § 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% 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 remining incentives contained in the 2006 amendments would be Priority 3 sites. These remining incentives are specifically authorized by section 415 of SMCRA, as amended. In conclusion, while our requirements at § 874.13(b)(2) will prevent the reclamation of some stand-alone Priority 3 sites previously undertaken as part of the traditional reclamation program, the programs discussed above still offer many Priority 3 land and water reclamation opportunities.

Responses to Comments

We received a range of comments disagreeing and agreeing with various portions of our proposed revisions to § 874.13. Some comments regarding this section were very general, while some suggested specific revisions. We begin with a discussion of the general comments. Some commenters did not agree that the new statutory provisions restricted Priority 3 land and water reclamation. These commenters viewed the proposed revisions to § 874.13 as unwarranted and unnecessary restrictions on the discretion of the State to decide how Priority 3 lands should be addressed prior to the completion of all health and safety problems within their borders. In contrast, two State commenters recognized that the new statutory provisions emphasized the reclamation Priority 1 and Priority 2 AML coal problems first and foremost, but they urged us to be very cautious in defining terms in the new regulations. They supported restraint on both the types and extent of land and water reclamation problems that might qualify for reclamation as a Priority 1 or 2 expenditure so as to not reclaim an inappropriate amount of Priority 3 AML problems.

IMCC/NAAMLP stated that they disagreed with our description in the preamble to the proposed rule that the 2006 amendments substantially elevated and redirected resources towards the reclamation of hazardous coal sites. They assert that Congress did not intend to upset the existing programmatic design; a design they characterize as allowing discretion and flexibility for the States and Indian tribes to undertake stand-alone Priority 3 projects along with other Priority 1 and/or 2 projects. As support, the commenters reviewed the AML inventory and determined that Priority 3 projects are only 15 percent of total projects being reclaimed by the States and Indian tribes; thus, their reclamation work already reflects the priorities in section 403(a).

Moreover, IMCC/NAAMLP contended that the proposed rule would place an unreasonable burden on the States and Indian tribes and would further indicate that we are unwilling to work with the States and Indian tribes to accomplish as much Priority 3 work as is appropriate and feasible under SMCRA. They questioned this perceived approach because ''lower priority, environmental restoration work has paid some of the largest dividends

under the AML program and received some of the greatest accolades from our citizens.'' These commenters pointed to the proposed language of § 874.13 as another example of OSM taking a heavy-handed approach that further erodes the heretofore cooperative relationship between OSM and the States and Indian tribes in reclaiming AML problems. Although IMCC/NAAMLP recognizes that ''OSM has attempted to pave the way for a variety of priority 3 projects to continue, the restrictions and limitations that are contained in [this regulation] will only serve to stifle the flexibility that has been the hallmark of this program since 1982.''

Four State commenters repeated the sentiments expressed by IMCC/NAAMLP. For instance, one State summarized its position that ''it should be the State/Tribe that determines if they have met the requirements and if the Priority 3 features meet eligibility requirements.'' All State commenters and three environmental groups specifically advocated flexibility in State decisions.

After carefully considering the comments by IMCC/NAAMLP, States, and environmental groups regarding these provisions, we have concluded that the 2006 amendments did change the programmatic focus of the AML program by changing how Priority 3 lands and waters can be addressed prior to a State's completion of all Priority 1 or 2 health and safety problems within its borders. In the proposed rule, we observed that the 2006 amendments substantially elevated and redirected resources towards the uncertified State and Tribal reclamation programs with the most hazardous—Priority 1 and 2—coal sites. We base this conclusion on the mandatory distributions of funds, the reallocation of the section 402(g)(1) funding away from certified programs, and raising the minimum program make up funding level, which are all contained in the 2006 amendments. 30 U.S.C. 1231(f)(3)(B), 1232(g)(1)(A), 1232(g)(1)(B), 1232(g)(5), 1232(g)(7), 1232(g)(8)(A), and 1240a(h)(4).

In addition, although we recognize that some commenters disagree, the 2006 amendments clearly imposed additional oversight responsibilities on us by obliging us to ensure that uncertified States and Indian tribes strictly comply with the priorities in section 403 of SMCRA, 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 directing the use of prior balance replacement funds to reclaiming coal problems under section 403. 30 U.S.C. 1232(g)(2), 1233(c), 1240a(a)(A), and 1240a(h)(1)(D)(ii). Although we do not intend for this rule to weaken our cooperation with our State co-regulators, it is clear that the 2006 amendments intentionally altered the design of the program to accelerate the reclamation of Priority 1 and 2 problems and to restrict the amount of Priority 3 reclamation prior to the completion of projects addressing health and safety problems. Thus, we are required to take a more active role in monitoring progress towards these goals.

Although IMCC/NAAMLP acknowledged that they did not dispute our ability and authority ''to review individual State or Tribal determinations on these matters as part of our oversight and inventory management responsibilities,'' they expressed major concerns that this regulatory section and all of these rules will create an adversarial relationship between us and our co-regulators. After having closely reviewed these concerns and SMCRA, as revised by the 2006 amendments, we do not believe the regulations will have such an effect.

Our commitment to cooperatively work with our State and Indian tribal partners on the reclamation of such problems, including Priority 3 lands and waters to the extent provided for under SMCRA, remains as strong as it has been in the past. We view our working relationship with the individual State and Indian tribal programs as a mutually cooperative partnership. As the commenters point out, for close to 30 years, individual States and Indian tribes have implemented effective AML programs, assisted each other as partners, directly supported our training efforts, and worked with us to implement our oversight role. We anticipate that States and Indian tribes will quickly adjust to the new emphasis placed on completing Priority 1 and 2 problems and will incorporate Priority 3 lands and waters under section 402(g)(7) consistent with SMCRA.

In addition to the general comments, IMCC/NAAMLP and several States disagreed with portions of the proposed revisions to §§ 874.13(a)(1), 874.13(a)(2), and 874.13(a)(3). To begin, many comments expressed concern about our use and definition of the term ''adjacent to'' to mean ''geographically contiguous.'' As mentioned above, in § 874.13(a)(3) we provided that ''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.'' At that time, we requested input from commenters concerning the types and extent of land and water reclamation problems that could be elevated to Priority 1 or Priority 2 expenditures under the ''adjacent to'' provision. For example, we provided a list of questions to help frame comments, including whether we should adjust our definition of ''adjacent to'' to encompass hydrologic connections and/or disturbances by a single mining operation or company, whether large and expensive Priority 3 problems next to small and inexpensive Priority 1 or 2 problems would be appropriate to elevate to Priority 1 or 2 status, and whether water lines or AMD abatement activities specifically provided for under other sections of SMCRA (sections 403(b) and 402(g)(6), respectively) should be excluded from coverage.

We received a range of answers on these questions and this provision as a whole. Generally, IMCC/NAAMLP and several States opposed any restrictions on the type or extent of land and water reclamation problems subject to the ''adjacent to'' provision of section 403(a)(1) and (a)(2). These commenters were against any limitations, monetary or otherwise, relative to adjacent lands and waters, and they oppose restrictions on the types of Priority 3 problems or costs that can qualify, including any restrictions on including AMD problems and water supply problems. These commenters generally promoted a rule that would make no limits on the ''adjacent to'' provision and would defer entirely to the discretion of the individual State or Indian tribe. IMCC/NAAMLP stated that the language of SMCRA did not support any restrictions on the types of land and water resources eligible for consideration under the ''adjacent to'' provision. Another State commented that the definition of ''adjacent to'' would be an undue limitation. Moreover, IMCC/NAAMLP and one State cautioned that we not create a situation where we effectively create ''high'' Priority 3 projects and ''low'' Priority 3 projects.

Specifically, we received many comments that suggested alternative definitions for ''adjacent to.'' IMCC/NAAMLP, two State commenters, and three environmental groups proposed that we allow for the watershed connection, and could do so by adding ''and/or hydrologically connected'' after ''geographically contiguous'' in § 874.13(a)(3). IMCC/NAAMLP and one State also indicated that they would not object to the regulations further defining ''hydrologically connected'' to mean ''all watershed areas bounded by a third order stream.'' They promoted this position as being consistent with the

Total Maximum Daily Load (TMDL) process and representing a ''compromise between no limitations on use and directly connected features.'' In addition, three environmental groups suggested we change § 874.13 to allow both geographically contiguous or hydrologically connected Priority 3 sites to be elevated, and that we should add the following sentence to the end of § 874.13(a)(3): ''Priority 3 water resources will be considered hydrologically connected to the problem if the problem is the source of at least 50% of the acid mine drainage that the Priority 3 water resource discharges or receives.'' They point out that mining does not just affect the surface and often affects hydrology, which does not follow surface borders, but the 50 percent limitation will prevent Priority 3 sites whose connection to a Priority 1 or 2 site is highly attenuated from being elevated in priority. What is more, an environmental group explained that the ''[d]efinition of the term 'adjacent' should include all disturbances by a single mining operation. If there is a hydrologic connectivity with sites that might be distant, those should be included in the definition of 'adjacent.' ''

On the other hand, one State supported our proposed definition limiting ''adjacent to'' to land and water resources that are geographically contiguous with existing or remediated Priority 1 or 2 problems. This State requested that if we expanded the definition, then we should do so carefully ''in order to reduce the 'opportunity' for abuse of reclaiming excessive (acres) amount of Priority 3 AML problems.'' Another State generally agreed with limiting ''adjacent to'' to mean ''geographically contiguous,'' and it further commented that it could see no reason to include water supply replacement problems as eligible under a definition of ''adjacent to'' because they currently are assigned no priority and up to 100% of the grant can be spent on them. Thus, it recommended we delete ''and water'' from the last sentence of the proposed § 874.13(a)(3). This State further expressed concern for any definition of ''adjacent to'' that would allow adjacent Priority 3 problems to be used to elevate other Priority 3 problems adjacent to them; in effect creating a domino effect where ''adjacent to'' determinations would elevate the expenditure priority beyond the initial connection to the original health and safety problem. This State, however, suggested we change ''will'' to ''can'' in the last sentence of § 872.13(a)(3). According to the commenter, this change would give the States flexibility to determine whether or not it wanted to have a Priority 3 project elevated in priority.

We thank all commenters for their suggestions, but we have decided not to make any changes to the definition of the term ''adjacent to'' under § 874.13(a)(3). As explained above, we have incorporated the language from sections 403(a)(1) and (a)(2) of SMCRA into § 874.13(a)(1) and (a)(2). We do not believe further regulatory guidance as to that language is needed at this time. As for § 874.13(a)(3), we believe the plain meaning of ''adjacent to'' clearly limits the types of Priority 3 projects that can be elevated to those that are geographically contiguous or share a border with at least one Priority 1 or 2 site. Even if it were not clear, there are many reasons why we would choose to define ''adjacent to'' to relate only to those land and water resources and the environment that are physically next to the Priority 1 or 2 site. We are not including within the definition of ''adjacent to'' the possibility that a hydrologic connection alone could elevate the expenditure priority of land and water reclamation problems. In addition, we are not including in the definition the possibility that all AML problems within a specific watershed or all problems created by a single mining operation would automatically qualify for elevated expenditure priority. We have concluded that to provide such expansions to the definition of ''adjacent to'' would not be consistent with the intent of the 2006 amendments to substantially elevate and redirect resources towards the uncertified programs with the most hazardous—Priority 1 and 2—coal sites.

We considered the comments received from IMCC/NAAMLP that advocated few restrictions on the ''adjacent to'' definition while also observing that, prior to the 2006 amendments, Priority 3 work only comprised about 15 percent of the completed reclamation. We have concluded that there is no need at this time to incorporate limitations on the types and costs of Priority 3 land and water reclamation that may be elevated to a Priority 1 or Priority 2 expenditure under revised § 874.13(a)(1) and (a)(2). Given the requirement in section 402(g)(2) that the Secretary must ensure strict compliance by the States and Indian tribes with the priorities described in section 403(a) until a certification is made under section 411(a), we will continue to perform our oversight duties and monitor the accomplishments of reclamation programs. If we determine that limitations are appropriate for § 874.13(a)(1) and (a)(2), we will develop proposed changes consistent with SMCRA. In summary, all types of land and water reclamation problems, including water supply projects and AMD projects (sections 403(b) and 402(g)(6), respectively) may be elevated in expenditure priority under § 874.13(a)(1) and (a)(2) as long as they are physically contiguous (meaning spatially connected) to a Priority 1 or 2 health or safety problem.

With regard to how many projects could be elevated under our interpretation of ''adjacent to,'' one State raised the possibility of the domino effect where a Priority 3 problem that is elevated to a Priority 1 or 2 expenditure could be used to elevate other Priority 3 problems that are not ''adjacent to'' a Priority 1 or 2 health and safety problem. After considering the comment, we have concluded that the specific language contained in sections 403(a)(1)(B) and (a)(2)(B) does not allow adjacent Priority 3 problems to be used to elevate the expenditure priority of other adjacent Priority 3 problems that are beyond the physical connection to the original health and safety problem. The plain language of 403(a)(1)(B) and (a)(2)(B) requires that the Priority 3 land and water reclamation problems be adjacent to the Priority 1 or 2 health and safety site.

Although we understand the commenter's concerns, we are also not adopting its suggestion that we change ''will'' to ''can.'' We have concluded that sections 403(a)(1) and (a)(2) of SMCRA unambiguously define the expenditure priorities for lands and waters, and Priority 1 and 2 sites clearly include Priority 3 projects that are adjacent to a current or previously addressed health and safety problem. States and Tribes still have discretion to decide whether or not to address lands and waters that are adjacent to a health and safety problem. However, once they commit to address them, such lands and waters must be identified as Priority 1 or Priority 2 expenditures when reporting on program activities.

Another group of comments on this section focused on § 874.13(b). The introductory text of § 874.13(b) allows uncertified States and Indian tribes to use State or Tribal share funds and historic coal funds to reclaim Priority 3 lands and waters when one of two conditions apply. IMCC/NAAMLP and one State requested that we add references to §§ 872.26 and 872.29 to this paragraph to allow uncertified States and Indian tribes to use minimum program make up funds and prior balance replacement funds under this

paragraph. In a similar manner, IMCC/NAAMLP and one State suggested we add a new paragraph (c) to state that prior balance replacement funds could be used to reclaim Priority 3 sites.

The provision as proposed reflects our interpretation that the ''in conjunction with'' provision of section 402(g)(7) of SMCRA does not apply to prior balance replacement funds received under section 411(h)(1) of SMCRA. As provided by section 411(h)(1), uncertified programs must use prior balance replacement funds for the ''purposes described in section 403.'' Section 403 of SMCRA includes the basic land and water reclamation priorities (section 403(a)), the construction of water supply projects (section 403(b)), and the maintenance of the AML inventory (section 403(c)). Because section 402(g)(7) directs the expenditure of section 402(g)(1) and (g)(5) funds and not section 411(h)(1) funds, and because section 411(h)(1) states that the funds received under that section must be used for the ''purposes described in section 403,'' we have concluded that Priority 3 land and water reclamation may be addressed with section 411(h)(1) funds. Uncertified States and Indian tribes may use prior balance replacement funds to fund Priority 3 projects as long as the total program reflects the achievement of objectives in section 403(a) of SMCRA.

One State also suggested we modify § 874.13(b)(1) to state explicitly that States can only conduct stand-alone Priority 3 reclamation after all Priority 1 and Priority 2 reclamation is complete. We are not making any changes in response to this comment. We have concluded that § 874.13(b)(1) is clear that until you completed all of Priority 1 or 2 reclamation, you may only expend funds for Priority 3 reclamation if it is in conjunction with a Priority 1 or 2 project.

We received numerous comments on suggested changes to § 874.13(b)(2). As proposed this paragraph provides: ''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.''

IMCC/NAAMLP suggested that in the introductory text of § 874.13(b)(2), we substitute the words ''past, current or future'' to define the scope of Priority 3 projects that can be undertaken in conjunction with Priority 1 and 2 projects. We disagree with this comment and have not incorporated this change. The comment suggested that § 874.13(b)(2), as it refers to § 874.13(b)(2)(i) and (b)(2)(ii), concerns entire Priority 3 projects. Section 874.13(b)(2) implements the amendments to section 402(g)(7) of SMCRA, and to the extent that a State has not completed all of the Priority 1 or 2 sites within its jurisdiction, using the term ''Priority 3 projects'' would be incorrect.

One State noted that the first sentence of § 874.13(b)(2) appeared confusing and suggested that it be changed to read: ''The expenditure for Priority 3 reclamation is made in conjunction with the expenditure of funds for Priority 1 or Priority 2 reclamation projects including past, current, and future Priority 1 or Priority 2 reclamation projects.'' We agree with this comment and are making the suggested change.

IMCC/NAAMLP also suggested that we remove the requirements of § 874.13(b)(2)(i) and (b)(2)(ii) and adopt a provision that would allow Priority 3 in conjunction with higher priority work as long as the ''overall reclamation program generally reflects the priorities in section 403(a) of SMCRA.'' The commenter agreed with the May 18, 1982, memorandum by the Solicitor's Office that we described in the preamble to the proposed rule. 73 FR 35230. Upon review of this comment and the memorandum, we have determined that the 2006 amendments no longer support a strong adherence to that memorandum. The memorandum addressed Priority 3 reclamation conducted with those types of funds prior to the 2006 Amendments. Our deference in this rulemaking to section 402(g)(7) of SMCRA which prohibits certain types of Priority 3 reclamation before the completion of all high priority problems recognizes these limitations and has nothing to do with how States may or may not have exercised discretion prior to the 2006 amendments to SMCRA.

Two States did not express specific concerns about the proposed language but did urge us to keep the final rules general in nature. One State commented that each site may have its own unique situation and the rules should allow the State programs the greatest flexibility in resolving the concerns at each site. We are not making any changes in response to these comments. We have revised existing rules consistent with the 2006 amendments while maintaining flexibility for AML reclamation programs.

IMCC/NAAMLP and two States submitted comments expressing concern that we are significantly limiting the types of Priority 3 projects that may be reclaimed by imposing requirements that Priority 3 projects facilitate higher priority projects or result in reasonable savings at the time of the project towards the objective of reclaiming all Priority 3 land and water problems. One State, however, agreed with our statement in the preamble to the proposed rule and that we reiterate here. We appreciate this State's support and reiterate that we do not believe that our efforts to define ''in conjunction with'' will significantly reduce the types of Priority 3 projects that are reclaimed.

In response to our request for comment, one State noted that Priority 3 work requested by a property owner as a condition of agreeing to provide entry to address health or safety problems should not fall within the scope of § 874.13(b)(2)(i) which allows expenditures that facilitate the reclamation of Priority 1 or 2 problems. We agree with this commenter that the States and Indian tribes have the necessary authority under their reclamation plan and regulations to gain entry to sites with Priority 1 and 2 problems, and so we did not change the regulation.

We received a comment from two States that related to the practice of phasing reclamation activities under the ''in conjunction with'' provision. One State urged flexibility in applying the ''conjunction'' standard, as it relates to phases of a project that may be subject to a three-year or longer grant. Another State commented that OSM should not include language that would specifically preclude allowing Priority 3 work that is adjacent to or within a Priority 1 or 2 site as a separate phase of construction. This State cited that efficiency in reclamation should dictate phasing and not the priority designation.

We find that the language of § 874.13(b)(2) as proposed does not specifically preclude Priority 3 work as a separate phase of construction within a Priority 1 or 2 project. However, we also note that 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 and that these types of factors would be central to an analysis to determine whether there are reasonable savings under

§ 874.13(b)(2)(ii). States and Indian tribes have qualified staff with years of mine land reclamation and contracting experience. As one commenter noted ''States and Indian tribes have been reclaiming lands and water for over 30 years. This experience and efficient management of AML funds give the States and Indian tribes the ability to define 'reasonable' without OSM providing the definition in its proposed rules.'' We agree with this commenter and are confident that each State and Indian tribe is capable of reviewing Priority 3 lands and waters to determine if delaying reclamation to a separate phase will prevent a determination under § 874.13(b)(2) that the reclamation will provide reasonable savings towards the objective of reclaiming all Priority 3 land and water problems within their jurisdiction.

One State suggested that the ''in conjunction with'' provision of § 874.13 (b)(2) should be implemented in a manner that allows Priority 3 problems to be addressed ''as long as the Priority 3 that is being reclaimed is necessary to complete the reclamation of a Priority 1 or Priority 2 project.'' This suggested requirement appears to be a more stringent requirement than we have proposed. Generally, we are endeavoring to give States and Indian tribes as much flexibility and discretion as we can within the bounds of SMCRA. We do not believe that section 402(g)(7) of SMCRA requires such as a restrictive approach, and we think that such an approach would fail to take advantage of the reclamation efficiencies that may be present on a site-by-site basis. Thus, we are not adopting this suggestion.

IMCC/NAAMLP and one State requested that we confirm that projects conducted under the Appalachian Regional Reforestation Initiative (ARRI) and no-cost AML projects are not subject to the ''in conjunction with'' provision at § 874.13(b)(2). ARRI is an OSM initiative that encourages the planting of trees on reclaimed AML sites. Approval by AML program managers to incorporate ARRI tree planting techniques into an AML project design in no way determines the applicability of § 874.13(b)(2). With regard to no-cost AML projects, as we stated in the preamble to the proposed rule, projects conducted under the AML enhancement rule of 1999 are not subject to the ''in conjunction with'' provision at § 874.13(b)(2) because they are provided for under a separate rulemaking by the Secretary. To the extent that a no-cost contract is implemented under that rulemaking, we agree that it too is not subject to § 874.13(b)(2). Thus, no changes are being made in accordance with these comments.

Several comments were submitted that relate to the interplay between the ''adjacent to'' standard in § 874.13(a)(3) and the ''in conjunction'' language of § 874.13(b)(2). One concern raised by numerous commenters, including IMCC/NAAMLP and several States, regards the potential unnecessary administrative burdens that they perceive that the regulations are placing on the States and Indian tribes. Specifically they were concerned that they will need to devote precious time and resources to demonstrate to us that their Priority 3 projects meet the requirements of this section. Moreover, IMCC/NAAMLP asserted that the requirements are too elusive and subjective, are difficult to define, and will result in significant disputes and conflicts between OSM and the States and Indian tribes. The commenters questioned the level of detail, proof, and justification we will require to obtain project approval and whether we would set a specific timeframe for the qualifying Priority 3 work to be completed. But one State commented that it did not want a formal definition of reasonable.

We are not making changes to the rule as a result of the above comments on the level of detail, proof, and justification we will require to obtain project approval and whether there would be a specific timeframe for the qualifying Priority 3 work to be completed within. We originally proposed 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. We continue to believe that these objectives are central to the 2006 amendments. We do not agree that the requirements are too elusive and subjective, are difficult to define, or will result in significant disputes and conflicts, as suggested by IMCC/NAAMLP. Rather, we believe that experienced State and Indian tribal program officials will have little difficulty recognizing when Priority 3 reclamation facilitates higher priority work, and also in understanding the mechanics and costs of site reclamation to be able to conclude when reclamation of Priority 3 lands and waters represents a reasonable savings through program efficiencies. In those cases where State or Indian tribal officials are uncertain, we remain available to assist in making the determination. In terms of the level of detail and justification needed to confirm that the provision is being implemented properly, each site will be different. Some sites will be located in a manner so favorable that assessments of potential savings on the mobilization/demobilization costs, reduced unit prices, or other such efficiencies will be straightforward and obvious. Some sites, however, may require more detailed assessments of potential savings. AML reclamation programs have been operating for close to 30 years. We remain confident that they possess the technical and administrative expertise to perform adequate assessments.

IMCC/NAAMLP and two States commented that States and Tribes should have sole discretion to determine which type of Priority 3 designation is applicable in the event that a Priority 3 problem would qualify for funding as being both ''adjacent to'' and ''in conjunction with'' a high priority problem. IMCC/NAAMLP suggested a revision to the proposed regulations to support the requested discretion. One State went further by commenting that it should be the State or Indian tribe that determines if it has met the requirements of our definitions for the terms ''adjacent to'' and ''in conjunction with'' and that the burden of proof should be on us to prove that a Priority 3 feature does not meet the stated requirements. Another State proposed we add paragraph (b)(3) to specify States and Indian tribes ''will determine the eligible subparagraphs for eligibility and priority determination.''

We agree with the premise of these comments. States and Indian tribes are responsible for determining whether they have met the requirements of our definitions for the terms ''adjacent to'' and ''in conjunction with,'' but we do not believe explicit language needs to be added to the rule. Determinations made under this section are consistent with essentially all of the other programmatic functions, such as the eligibility requirements in section 404 of SMCRA, that our State and Tribal co-regulators make routinely. We intend to provide assistance to the States and Indian tribes through program guidance, if needed, and will conduct oversight as necessary to ensure that the provisions are being implemented properly. To the extent that we become concerned with individual site or program-wide implementation by a State or Indian tribe, we will address the matter consistent with our oversight process. However, given the new funding directives of the 2006 amendments, it is possible that our oversight process will have to be adjusted. As has been our practice in the past, the States and Indian tribes will be invited to participate in the process of refining the oversight process and the guidance that

helps define the State/Federal partnership in the reclamation program.

In response to one statement that alluded to uncertainty as to what we will require to obtain project approval, we remind the commenter that the environmental clearance and the ATP process is governed by our directive GMT–10, FAM chapter 5–11. We do not believe that the reclamation of Priority 3 lands in conjunction with Priority 1 or 2 problems will require more than minimal additional environmental clearance or inventory review time. In accordance with the simplified grants process implemented in the early 1990s, we rely on the oversight process for conducting in-depth reviews of project implementation and inventory management. Under that process, States can participate with us in studies and reviews that will help staff exchange information and ideas on how best to document program decisions related to the requirements of § 874.13(b)(2)(i) and (b)(2)(ii).

One State commented that the terms ''adjacent,'' ''geographically contiguous,'' and ''spatially connected'' appear ambiguous and requested further guidance from OSM in the final rule. The term ''adjacent to'' is defined as being geographically contiguous. We further explained that such sites must be spatially connected. If needed, we will provide additional guidance as situations arise.

One State commented that OSM Directive AML–1 should be used to make keyword-specific determinations of ''in conjunction with''. This comment is beyond the scope of this rulemaking, but we intend to consider it if and when we review the OSM Directive AML–1.

Although beyond the scope of the rule, we intend to address how the AML inventory is to be revised to provide for the proper recording and reporting of lands and waters adjacent to Priority 1 or 2 health and safety problems. At that time we will consider the detailed comments that IMCC/NAAMLP and some States provided on this rule that relate to changes that could be made to the AML inventory.

One State commented that the differences in how the State or Tribal share, historic coal, and prior balance replacement funds can be applied to Priority 3 expenditures raises the issue of how OSM intends to track Priority 3 reclamation relative to the type of fund expended. This commenter stated that tracking Priority 3 expenditures at a project-by-project level would create a substantial administrative burden on OSM and the States and Indian tribes. The commenter suggested that we revise FAM to require Priority 3 expenditures to be tracked on an overall grant basis. We are not making any changes in response to this comment. We agree that administrative effort will be expended to properly track expenditures from the various funding sources. However, State reclamation programs have performed similar tracking and management duties relative to administrative funding, minimum program funding, set-aside funding, water projects, and any special appropriations received in the past. We are confident that reclamation programs have or will have the accounting tools in place to accurately track expenditures and preserve funding flexibility. However, we will consider making this change to FAM in the future if it becomes appropriate.

One commenter strongly encouraged us to allow modification to the reclamation processes and authorize expenses for Priority 1 and 2 sites to include water quality improvements as a main objective. They stated that Priority 1 and 2 reclamation conducted solely for the purpose of removing a safety hazard may be overlooking the potential water quality benefits that could be derived if alkaline addition occurred as part of the reclamation process. This commenter promoted the use of alkaline material at Priority 1 and 2 sites as a way to significantly reduce the amount of acid mine drainage being produced and then discharged at Priority 3 sites. We did not make any changes in response to this comment. First, we believe that the main objective of reclamation at every Priority 1 or 2 site is the elimination of all health and safety hazards. However, State reclamation programs should review all coal related problems at each Priority 1 or 2 site and address those lower priority problems, including water quality problems, which can be integrated into the reclamation plan consistent with § 874.13(b)(2). The use of alkaline material at Priority 1 or 2 sites to reduce mine drainage produced at nearby Priority 3 sites will have to be evaluated on a site-by-site basis to determine if such expenditures provide reasonable savings towards the objective of reclaiming all Priority 3 land and water problems within the jurisdiction of a State or Indian tribe.

Water Supply Restoration (§ 874.14)

As explained in the preamble to the proposed rule, we are changing this section primarily to reflect the 2006 amendments' removal of section 403(a)(4). We received no comments on this section, and adopt it as proposed.

Contractor Eligibility (§ 874.16)

As explained in the preamble to the proposed rule, we are revising § 874.16 to reflect our changes to the funding applicability section in § 874.11. We received no comments on this section, but as explained further in the preamble to Part 875, this section has been changed to apply to both uncertified States and Indian tribes receiving moneys under Title IV as well as certified States or Indian tribes conducting coal AML reclamation as required to maintain certification under this Part.

Part 875—Certification and Noncoal Reclamation

As proposed, we are amending the title of this Part to more accurately describe the subject matter covered by these regulations. Our proposed revisions to this Part contained a new definition section at § 875.5 and changes to existing §§ 875.10 (Information collection), 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).

In 1994, we explained:

> Congress has created a two-tiered process for addressing noncoal problems. Prior to completing all known coal problems, Congress has limited a State's/Indian tribe's ability to do noncoal work. This is shown in [existing] § 875.12. A State/Indian tribe desiring to implement a greatly expanded noncoal reclamation program (see [existing] §§ 875.14–19), or what could be called the second tier, would first have to certify that it had completed all known coal problems and the Director would have to concur in the finding (see [existing] § 875.13).
>
> Section 409 of SMCRA, as enacted in 1977, authorized States and Indian tribes to undertake noncoal reclamation activities if: (a) The Governor of a State or the Chairman of an Indian tribe requested funding and the State had either completed all known coal reclamation objectives or (b) if coal problems remained, the project for which funding was requested was necessary to protect the public health and safety.

59 FR 28160.

As with the proposed rule, the changes we are adopting in the final rule update certification procedures and how certified States and Indian tribes must address remaining or newly discovered coal problems. As indicated in the preamble to the proposed rule, we are also finalizing one major substantive change from the existing regulations, namely that this Part generally does not apply to certified States and Indian tribes that are expending prior balance

replacement funds or certified in lieu funds. 73 FR 35232–35233.

Responses to Comments

In general comments, IMCC/NAAMLP and one State referred to our proposed changes to Part 875 as a major area of concern. First, they questioned whether our proposed revisions could be interpreted to require certified States and Indian tribes to complete all known noncoal reclamation projects using certified in lieu funds, or alternatively, to require a certified State or Indian tribe that decides to do noncoal reclamation to follow the priority list in the regulations. These two commenters disagreed with either potential interpretation. To further expand on these points, the two commenters noted a perceived conflict between §§ 872.31 and 872.34, which generally allows certified States and Indian tribes to use prior balance replacement funds and certified in lieu funds with few, if any, restrictions and our proposed rule in Part 875, which did not propose any changes to § 875.15 (Reclamation priorities for noncoal program). In other words, the commenters expressed concern that any application of § 875.15 to certified States or Indian tribes would place ''unsupported and illegal restraints'' on their use of prior balance replacement funds and certified in lieu funds. The commenters recommended language be included in the regulations that confirmed that certified States and Indian tribes are not required to spend these types of funds according to Part 875, including according to the noncoal reclamation priorities in § 875.15, and to clarify that a certified State can elect to do noncoal reclamation outside the framework of this Part.

After a careful review of SMCRA and consideration of the comments, we determined to retain Part 875, with the revisions discussed below. We believe it is important to retain these regulatory provisions because they implement sections 411(b) through (g) of SMCRA and are still applicable to any State or Tribal share funds distributed to certified and uncertified States and Indian tribes under section 402(g)(1) before October 1, 2007. We agree with commenters, however, that certified States and Indian tribes are not required to use prior balance replacement funds and certified in lieu funds received under sections 411(h)(1) and (h)(2) to conduct reclamation under this Part. As the commenters pointed out, any other interpretation of Part 875 would be inconsistent with §§ 872.31 and 872.34. However, using the interpretation of SMCRA contained in §§ 872.31 and 872.34, we are no longer authorized to support a noncoal reclamation program under SMCRA that uses prior balance replacement funds or certified in lieu funds because sections 411(b) through (g), which authorized noncoal reclamation programs in certified States and Indian tribes, are expressly not applicable to any funds other than State or Tribal share funds. Thus, as discussed below, we are using § 875.11(b) to clarify the applicability of this part as it applies to certified States and Indian tribes. Noncoal reclamation programs conducted by uncertified States and Indian tribes and funded by State or Tribal share and/or historic coal share funds are authorized by section 409 and are still covered by this Part.

Definitions (§ 875.5)

We are adding a new section to Part 875 to include the definition of the term ''Reclamation plan or State reclamation plan.'' We received no comments on this section and are adopting it as proposed.

Information Collection (§ 875.10)

In this section, we discuss the Paperwork Reduction Act requirements and the information collection aspects of Part 875. We are updating this section and rewording it using plain English. We did not receive any comments on this section and are adopting the section as proposed.

Applicability (§ 875.11)

Except in connection with the sources of funding that may be used for reclamation, our revisions to this section make minimal changes for uncertified States and Indian tribes with approved reclamation plans. Generally, our 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 clarifying 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 §§ 872.16, 872.19, or 872.23. This portion of our rule 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 make up 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 §§ 872.28 and 872.31, respectively.

In paragraph (b) of the proposed rule, we had proposed to limit the applicability of this part to certified States and Indian tribes. As proposed, certified States and Indian tribes could, but were not required to, expend prior balance replacement funds and certified in lieu funds to address eligible coal problems to maintain certification as required by §§ 875.13 and 875.14 or to implement any other requirements of this Part as provided by the approved reclamation plan. After consideration of the comments and discussed in more detail below, we have decided to adopt an amended version of this paragraph to dispel commenters' concerns that the proposed language would require certified States and Indian tribes to spend prior balance replacement funds and certified in lieu funds under Part 875. A sentence has been added at the end of this section to make this point clear.

Responses to Comments

As explained in the general comments to Part 875, we received comments from IMCC/NAAMLP and one State concerning a possible inconsistency between §§ 872.31 and 872.34 and the applicability of Part 875 regarding restrictions on the use of prior balance replacement funds and certified in lieu funds by certified States and Indian tribes. In response, we have amended the regulatory language to clearly express in § 875.11(b)(1) that certified States and Indian tribes are only required to comply with all of the provisions in Part 875 when they expend State or Tribal share funds distributed to them before October 1, 2007. In contrast, under revised § 875.11(b)(2), they may choose to expend prior balance replacement funds and certified in lieu funds under this Part to address eligible coal problems to maintain certification as required by §§ 875.13 and 875.14. If they choose to address eligible coal problems, this reclamation would be governed by Part 874.

In addition, IMCC/NAAMLP and one State responded to our request for alternative approaches to our proposal that certified States and Indian tribes be required to use prior balance replacement funds or certified in lieu funds to address eligible coal problems to maintain certification. Specifically,

they commented that a certified State or Indian tribe should be able to use either prior balance replacement funds or certified in lieu funds to maintain certification. However, to use prior balance replacement funds, a certified AML program would be required to gain the approval of the State legislature or Tribal governing body to do so. These commenters suggested that our proposed § 875.11(b) should be rewritten to clarify prior balance replacement funds can be used for the purposes stated only if approved by the State legislature or Tribal governing body.

After consideration of this comment, we have decided not to include any language in § 875.11 that specifies that States and Indian tribes would have to gain approval from their State legislature or Tribal council before using prior balance replacement funds to maintain certification status. We believe that any such provision would simply repeat what is already contained in § 872.31(a) of these regulations. In accordance with this comment and as discussed above, we also clarified that § 875.11(b)(2) gives certified States and Indian tribes discretion on whether to spend any prior balance replacement funds and/or certified in lieu funds to maintain certification status as required by §§ 875.13(a)(3) and 875.14(b).

IMCC/NAAMLP and one State also responded to our request for comments on a possible alternative approach under which our regulations would require certified States and Indian tribes to continue to conduct noncoal reclamation under this Part and to use certified in lieu funds only for reclamation of lands or water affected by the mining of minerals and materials other than coal. These commenters asserted that such an approach would be contrary to SMCRA because SMCRA ''mandates the use of the funds received by a certified State or Tribe.'' They followed that ''the decision to do noncoal reclamation should be up to the individual States and Tribes, as noncoal reclamation is an option in SMCRA and not a requirement.''

These comments relate to our discussion of the comments received under § 872.34 regarding the alternative approach that would require certified in lieu funds to be expended under this Part. As discussed in more detail in the preamble to that section, § 872.34 makes clear that we have decided not to place any restrictions on the use of certified in lieu funds. We do not believe that we need to repeat a similar provision here.

Importantly, however, as a consequence of this decision, we must remove proposed § 875.11(b)(2) from the rule altogether. This provision had been proposed to allow certified States and Indian tribes the choice to expend prior balance replacement funds or certified in lieu moneys to fund a noncoal reclamation program under SMCRA. *See, e.g.*, 73 FR 35236. Under the existing rules, after a State or Indian tribe certified, the State or Indian tribe could ''implement a noncoal reclamation program pursuant to the provisions in Section 411 of SMCRA.'' 30 CFR 875.13(c) (2005). Sections 411(b) through 411(g) of SMCRA, which provide the authority for certified States' and Indian tribes' noncoal reclamation programs, by their own terms apply only to grants of State or Tribal share funds. *See, e.g.*, 30 U.S.C. 1240a(b) (''If the Secretary has concurred in a State or tribal certification under subsection (a), for purposes of determining the eligibility of lands and waters for annual grants under section 402(g)(1) * * *.''). After October 1, 2007, certified States and Indian tribes no longer receive grants under section 402(g)(1). *See* 30 U.S.C. 1231(3)(B) (''Beginning on October 1, 2007, certified States shall be ineligible to receive amounts under section 402(g)(1).''). Because sections 411(b) through (g) allow only State or Tribal share funds to be expended for a noncoal reclamation program under SMCRA and because these funds are no longer distributed to certified States and Indian tribes, SMCRA no longer authorizes a noncoal reclamation program for certified States and Indian tribes. Thus, we cannot allow certified States and Indian tribes a choice to expend the funds they do get, namely prior balance replacement funds and certified in lieu funds, for a SMCRA sponsored noncoal reclamation program.

This approach is consistent with our 1994 statement that ''[t]he Secretary has no independent authority to undertake noncoal reclamation activities, and only the States and Indian tribes, utilizing AML funds allocated pursuant to Section 402(g)(2) (as amended in 1990, this section is now Section 402(g)(1)), could carry out such tasks.'' 59 FR 28160. The only difference is that now certified States and Indian tribes are prohibited from receiving moneys under section 402(g)(1) of SMCRA. We do recognize that certified States and Indian tribes may choose to use prior balance replacement funds, certified in lieu funds, or other funds to conduct their own program to reclaim noncoal hazards. Such a program, however, would not be conducted under SMCRA, and Part 875 would not be applicable.

Finally, one State commenter suggested a revision to § 875.11(a) to enable uncertified States and Indian tribes to use prior balance replacement funds under § 872.31 to conduct reclamation projects on land or water affected by mining of minerals and materials other than coal. As described in our discussion of comments received in the preamble to § 872.31, we have decided not to make the proposed revisions.

Eligible Lands and Water Prior to Certification (§ 875.12)

We proposed to make minor revisions to § 875.12. We received no comments on this section, and we adopt it as proposed.

Certification of Completion of Coal Sites (§ 875.13)

We proposed to make some changes to paragraphs (a) and (a)(1) of this section and add a new paragraph (d). We did not receive any comments on these proposed changes and are adopting them as proposed. However, we also invited comments as to whether we should add language to the rule detailing how we would 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.

Responses to Comments

In their comments, IMCC/NAAMLP recognized our authority to suspend or remove certification from a State or Indian tribe under SMCRA as revised by the 2006 amendments, but they believe OSM should never use this authority. They suggest that the addition of such a provision would only continue to highlight what they perceive as a undeserved heavy handed approach that we are taking against our State and Tribal co-regulators in this rule.

After consideration of this comment, we have decided not to add any additional provisions regarding a certification suspension or removal process. We view our authority to suspend or remove certification of a State or Indian tribe as an action of last resort, if necessary. We intend to focus our efforts to work cooperatively with certified States or Indian tribes to ensure coal problems that exist after certification are appropriately addressed.

We have also decided to retain § 875.13(c). As discussed in the responses to comments under § 875.11, existing § 875.13(c) allows certified States and Indian tribes to conduct reclamation programs under section 411 of SMCRA. Because certified States and

Indian tribes still have active grants that use State and Tribal share funds distributed before October 1, 2007, we believe it is important to recognize that those funds may be used for SMCRA's noncoal reclamation program authorized by sections 411(b) through (g). However, our decision to retain § 875.13(c) does not authorize certified States and Indian tribes to expend prior balance replacement funds and certified in lieu funds under their SMCRA noncoal reclamation program. Thus, as explained below, any reclamation of noncoal hazards that uses prior balance replacement funds and certified in lieu funds will not benefit from the provisions in Part 875, including limited liability.

Eligible Lands and Water Subsequent to Certification (§ 875.14)

We proposed revisions to § 875.14(a) to clarify eligibility dates and reword it using plain English. We did not receive any comments on this section and adopt it as proposed. We note, however, that because this paragraph is related to a SMCRA noncoal reclamation program, certified States and Indian tribes cannot use it to expend prior balance replacement and certified in lieu funds. We only retained it because of the remaining active grants that certified States and Indian tribes have that contain State share or Tribal share funds distributed under section 402(g)(1) and that can be used for a noncoal reclamation program under sections 411(b) through (g) of SMCRA.

We also proposed revisions to § 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, were required to address coal problems no later than the next grant cycle, subject to the availability of funds distributed. Under our proposed rules we would require you to 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. Our proposed rules acknowledged that certified in lieu or prior balance replacement funds would, most likely, be identified as a funding source in any plans submitted to us. In our proposed rule, we stated that we would review plans submitted to us to ensure they represent a timely approach to reclamation of existing coal problems. We also confirmed that we will monitor progress towards completion of any plans submitted. Finally, we proposed retaining the requirement that any coal reclamation projects, regardless of funding source, must conform to sections 401 through 410 of SMCRA and Part 874 of this chapter. 30 U.S.C. 1231–1240.

Responses to Comments

IMCC/NAAMLP and one State responded to our request for comments on how we might review plans submitted under § 875.14(b) by certified States and Indian tribes to address newly discovered coal sites. The commenters said that it is appropriate that a certified State or Indian tribe submit to OSM a notice that an eligible coal problem has been discovered and that the notice should contain an estimated timeframe for addressing the problem and the source of funding. They also commented that our review should be limited to the reasonableness of the State's or Indian tribe's approach to address the problem. IMCC/NAAMLP said that to conduct an investigation of the coal lands, obtain clearances, and to physically mitigate the problem may take several years. Both commenters stated that the notice should not be required to be submitted as a formal reclamation plan amendment. They observed that the reclamation plan should already contain a commitment to address any newly discovered eligible coal problem as part of the certification process and, therefore, a revision to the reclamation plan is not required.

We agree with the commenters that the discovery of a new coal problem should not require an amendment to the reclamation plan as long as the State or Indian tribe maintains certification. We also agree that each coal problem will present its own unique set of circumstances when developing and reviewing any plans. Because we received no adverse comments, we are adopting § 875.14(b) generally as proposed. However, we are removing the ''at the direction of the State legislature or Tribal council'' because this language is redundant with the regulations contained in § 872.31. Under this provision then, certified States and Indian tribes must comply with all of the applicable coal provisions contained in sections 401 through 410 of SMCRA and Part 874 of this chapter, the applicable regulations that address existing or newly discovered coal problems.

Reclamation Priorities for Noncoal Program (§ 875.15)

In our proposed rule, we did not include any revisions to the language in § 875.15 (Reclamation priorities for noncoal program) stating that we believed 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 Part 875.

Responses to Comments

IMCC/NAAMLP and one State commented on our original proposal that § 875.15 would remain unchanged; thus requiring a certified State or Indian tribe to get a determination from the Governor or Tribal Chairman in order to do public facilities projects under Part 875. The commenters objected that our proposed § 875.15 went on to list priorities that a certified State or Tribe must meet to gain approval from us. IMCC/NAAMLP and the State said that the clear wording in SMCRA contains no restrictions on certified States or Indian tribes other than responding to newly discovered coal sites and expending prior balance replacement funds as directed by the State or Tribal legislative body. The commenters concluded that requiring a certified State or Indian tribe to comply with all provisions of this section is contrary to SMCRA.

We respect this comment but have decided not to make changes to § 875.15. We believe it is necessary to retain this section because it is still applicable to State or Tribal share funds distributed before October 1, 2007, that certified States and Indian tribes are using to fund SMCRA noncoal reclamation programs. However, as previously discussed, § 875.15 would not apply to any project, either related to noncoal reclamation or otherwise, that uses prior balance replacement funds or certified in lieu funds. Section 875.15 is authorized by sections 411(b) through (g), which does not apply to prior balance replacement funds or certified in lieu funds.

Exclusion of Certain Noncoal Reclamation Sites (§ 875.16)

We proposed 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 (UMTRCA), 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 (CERCLA), 42 U.S.C. 9601 *et seq.* We proposed this revision 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. In our proposed rule we also clarified that 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. Finally, we invited you to comment on whether this paragraph is still needed.

Responses to Comments

IMCC/NAAMLP and one State supported our proposal, which allows certified States and Indian tribes to use prior balance replacement funds or certified in lieu funds for reclamation projects identified under UMTRCA or the CERCLA provided they comply with the general statutory language and restrictions of those funds. IMCC/NAAMLP also noted that the Tribes handle these sites by working with the U.S. Department of Energy and the U.S. Environmental Protection Agency. IMCC/NAAMLP and one State commented that the proposed rules currently dictate that uncertified States may not use money from the Fund or from the prior balance replacement fund for those purposes and requested that the proposed rule be revised to expressly allow certified States and Indian tribes to use those funds for these purposes should they choose to do so.

However, one Indian tribe commented that they did not support our proposal to allow the certified States and Indian tribes to use their prior balance replacement funds or certified in lieu funds for UMTRCA or CERCLA remedial action projects. The Tribe commented that these projects are very expensive environmental activities and that current legislation exists that clearly defines the regulatory authority for these two programs, which would be in direct conflict with SMCRA authority. Finally, the Tribe noted that Congress continues to fund the U.S. Department of Energy to carry out remedial action of the UMTRA sites and that the U.S. Environmental Protection Agency (EPA) takes the lead on CERCLA sites. They commented that the EPA should be responsible for all costs associated with CERCLA sites.

We appreciate the comments from the IMCC/NAAMLP and one State supporting our proposal allowing certified States and Indian tribes to use prior balance replacement funds or certified in lieu funds for reclamation projects identified under the UMTRCA or CERCLA. Consistent with our discussions above, we have included paragraph (b) to state that certified States and Indian tribes are only restricted in using moneys from the Fund distributed under section 402(g)(1) for UMTRCA and CERCLA projects. This provision was necessary because certified States and Indian tribes may still have State or Tribal share moneys distributed before October 1, 2007. Because prior balance replacement funds and certified in lieu funds are not ''moneys distributed from the Fund,'' these moneys do not contain the same restriction. Moreover, we do not believe it is necessary to expressly state that certified States and Indian tribes may use their prior balance replacement funds or certified in lieu funds for UMTRCA or CERCLA remedial action projects because we believe that the authority for such expenditures is clear under Part 872. We also cannot accommodate the comment made by the Indian tribe because of the generally unrestrictive nature of our interpretation of the use of prior balance replacement funds or certified in lieu funds contained in §§ 872.31 and 872.34. We do note, however, that a certified State or Indian tribe is not required to use these moneys for UMTRCA or CERCLA remedial action projects, and our regulations simply give certified States and Indian tribes discretion on the use of these funds.

IMCC/NAAMLP and one State commented that in our proposed rule this subsection used the phrase ''of this chapter'' twice. One should be deleted. We agree with the comment and have revised the final language of § 875.16.

Limited Liability (§ 875.19)

In our proposed rule, we did not include any revisions to the language in § 875.19 (Limited liability), but we did note that under the proposed rule, the only scenario in which a certified State or Indian tribe could avail itself of the limited liability provision of § 875.19 would be if it decided to maintain a noncoal reclamation program under section 411 of SMCRA. 73 FR 35236.

Responses to Comments

IMCC/NAAMLP and one State commented that ''certified AML programs should not be required to follow all of Part 875 to enjoy the protection of the limited liability provisions of § 875.19 * * *.'' The commenters supported this position by noting that ''the limited liability provisions are tied to a State or Tribe following approval of the reclamation plan not, to the other provisions of Section 875.''

We disagree with the implication of this comment and have not made any changes to this section. As explained elsewhere in this Part, a certified State or Indian tribe must comply with all provisions of Part 875 in order to expend all State and Tribal share funds distributed to certified States and Indian tribes before October 1, 2007. Thus, they would receive the benefit of § 875.19 in these circumstances. However, prior balance replacement funds and certified in lieu funds cannot be used to fund a noncoal reclamation program under SMCRA; therefore, the only provisions in Part 875 applicable to those funds relate to existing or newly discovered coal problems in certified States and Indian tribes. If a certified State or Indian tribe decides to use prior balance replacement funds and/or certified in lieu funds to reclaim existing or newly discovered coal problems, they must do so under sections 401 through 410 of SMCRA and Part 874 of this chapter. In that case, the limited liability provision of § 874.15 would apply. As we interpret SMCRA in this regulation, the limited liability provision contained in § 875.19 will not apply to the reclamation of noncoal hazards by certified States and Indian tribes regardless of whether they use prior balance replacement funds and/or certified in lieu funds as a funding source since such expenditures are not subject to this Part.

We are not persuaded by the commenters' statement that the limited liability provisions of our regulations are tied to the approval of the reclamation plan and not Part 875. Section 405(l) provides:

> No State shall be liable under any provision of Federal law for any costs or damages as a result of action taken or omitted in the course of carrying out a State abandoned mine reclamation plan approved under this section. This subsection shall not preclude liability for cost or damages as a result of gross negligence or intentional misconduct by the State. For purposes of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.

As the commenters mention, it is this statutory subsection that provides the basis for §§ 874.15 and 875.19. However, the reclamation plans under section 405 only contain information regarding Title IV of SMCRA. Because prior balance replacement funds and certified in lieu funds cannot be used to fund a noncoal reclamation program under SMCRA, section 405(l) does not support an interpretation that limited liability protection is extended to noncoal reclamation programs that are not conducted under Title IV. Under the general framework of § 875.11, however, this provision still provides limited liability protection to noncoal

reclamation performed by uncertified States or Indian tribes using State or Tribal share funds and/or historic coal funds, as well as certified States and Indian tribes that expend State or Tribal share moneys distributed before October 1, 2007.

Contractor Eligibility (§ 875.20)

We proposed revisions to § 875.20 to remove the phrase ''[t]o 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. We also proposed that this section applies to contracts by certified States and Indian tribes only when used to address coal problems as necessary to maintain certification and that 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.

We did not receive any comments on this proposed section. However, we made some changes to the proposed language consistent with the other changes to this Part. This section now clearly applies to uncertified State or Indian tribes conducting noncoal reclamation under this Part and certified States or Indian tribes undertaking noncoal reclamation using moneys distributed from the Fund under section 402(g)(1) of SMCRA. Section 874.16 will now apply to certified States and Indian tribes that elect to use prior balance replacement funds and certified in lieu funds to address existing or newly discovered coal problems.

Part 876—Acid Mine Drainage Treatment and Abatement Program

Along with some minor changes, we proposed to make three major changes to this Part consistent with the 2006 amendments. First, to comply with amended section 402(g)(6)(A), we are raising 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 are specifying the requirements for an uncertified State or Indian tribe to establish an AMD abatement and treatment fund. Third, we are eliminating 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 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).

Information Collection (§ 876.10)

In this section, we discuss the Paperwork Reduction Act requirements and the information collection aspects of Part 876. We are updating this section and rewording it using plain English. We did not receive any comments on this section and are adopting the section as proposed.

Eligibility (§ 876.12)

As explained in the preamble to the proposed rule, we are revising the first sentence of paragraph (a) to delete the specific information on the time period during which States and Indian tribes may expend funds under the 2006 amendments. This section does not need to explain these time limits in detail because this section makes these limits not applicable to the AMD set-aside program. We also are raising the existing 10% cap on deposits to AMD abatement and treatment funds to 30%, as required by the 2006 amendments. Four environmental groups commented in support of the increase in the funding limit for AMD set-asides from 10% to 30% because of the huge task of cleaning up acid mine drainage from abandoned coal mines.

Existing paragraph (a)(1) is deleted because it referred to the future reclamation set-aside fund, which is addressed in Part 873. Existing § 876.12(a)(2), which requires that States and Indian tribes create the AMD funds under their State or Tribal law, is now located in the last sentence of § 876.13(a).

In addition, we are revising 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 or 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. This subsection also provides that generally up to 10% of the funds we distributed to you before December 20, 2006, may be deposited into an AMD abatement and treatment fund.

We are eliminating existing 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 existing paragraph (b) is no longer needed.

With minor modifications suggested by commenters, we are 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. 30 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 are using the modifier ''comprehensive'' in the regulatory text of paragraph (b)(2) because we are deleting existing § 876.13 where ''comprehensive abatement of the causes and treatment of the effects of acid mine drainage'' was previously contained. We received one comment in support of this deletion.

Also, paragraph (b)(2) requires AMD abatement and treatment projects to occur within ''qualified hydrologic units.'' We are defining ''qualified hydrologic unit'' in paragraph (c). We are removing this definition from existing § 870.5 of this chapter and adding it to this section for clarity and ease of use because the phrase is used only in this section. In addition, we are rewording the definition slightly in an attempt to make it easier to understand.

We are also adding paragraph (d) providing that deposits into the State or Tribal AMD accounts are considered State or Indian tribal moneys. We receive two comments in support of this addition.

Responses to Comments

IMCC/NAAMLP and one State commented that paragraph (b)(2) as proposed would require that moneys may only be used for the comprehensive abatement of the causes and treatment of the effects of AMD and that such a result is different from section 402(g)(6)(A) of SMCRA which requires amounts from the AMD accounts to be

''expended by the State for the abatement of the causes and the treatment of the effects of acid mine drainage in a comprehensive manner * * *.'' The comment suggests that we revise the regulation language to better match the statutory language. We agree with this comment and are changing the regulation accordingly.

Three environmental groups also noted that OSM did not propose to define the terms ''hydrologic unit'' and ''comprehensive manner'' in section 402(g)(6) of SMCRA. They noted that by not proposing uniform national definitions, we have effectively left the interpretation of these terms to the discretion of each State or Indian tribe. The commenters believed this deference is appropriate but urged us to eliminate any doubt on the subject by stating explicitly that our regulations leave the definition of ''hydrologic unit'' and ''comprehensive manner'' to the discretion of each State or Indian tribe authorized to administer an approved AML program. We agree that States and Indian tribes are in the best position to designate qualified hydrologic units within their borders. While § 876.12(c) provides the overall basic structure for a hydrologic unit, States and Indian tribes have considerable flexibility in determining the location, shape, size, and components of such units. With regard to providing a definition of ''comprehensive manner'' we believe that it is best left to reclamation program officials to establish appropriate restoration goals and treatment thresholds for each hydrologic unit to ensure that funds are expended by the State for the abatement of the causes and the treatment of the effects of acid mine drainage in a comprehensive manner. Past guidance from us to State and Tribe reclamation programs emphasized that expenditures must address the eligible sites in a hydrologic unit as a whole rather than site-by-site. We have concluded that, at this time, we do not need to revise the regulations to incorporate a definition of ''comprehensive manner.''

IMCC/NAAMLP commented that the word separating the two conditions for defining a hydrologic unit in paragraphs (c)(1) and (c)(2) should be ''or'' instead of ''and''. They realized that our definition is consistent with the statutory language, but they note that actual practice over the past 25 years has been that hydrologic units must meet one or the other of these criteria, but not both. They commented that if the term is defined as we proposed, the scope of this important provision will be severely limited in a way that would render the purposes and intent of the program ineffective despite the increase in the funding limit to 30%.

We agree with this commenter and others who have identified acid mine drainage as a major problem associated with many AML sites, and that there is a significant need to treat and abate it. However, the statutory requirement is clear. Section 402(g)(6)(B)(ii) says a qualified hydrologic unit must contain ''land and water that are (I) eligible pursuant to section 404 and include any of the priorities described in section 403(a); and (II) the subject of the expenditures by the State from the forfeiture of bonds required under section 509 or from other States sources to abate and treat acid mine drainage.'' Our proposed regulation incorporates this language and we are adopting it as proposed.

IMCC/NAAMLP and one State responded under this section to our request for comments on 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 of § 874.13.

IMCC/NAAMLP asserted that all AMD abatement and treatment projects are considered at a minimum to be Priority 3 projects. As a result, the ''adjacent to'' and ''in conjunction with'' provisions of § 874.13 are applicable. The State commenter urged that maximum flexibility be given to the States in determining whether AMD abatement and treatment can be accomplished under the adjacent to or in conjunction with provisions. We agree and are not making any revisions here that would restrict AMD as a problem type that can be accomplished under the ''adjacent to'' or ''in conjunction with'' provisions.

Plan Content (§ 876.13)

We are removing this section because the 2006 amendments eliminated the previous requirement for States and Indian tribes to prepare AMD abatement and treatment plans. We did not receive any comments on the proposed deletion of this section and are adopting it as proposed.

Plan Approval (§ 876.14)

We are also removing 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. We did not receive any comments on the proposed deletion of this section and are adopting it as proposed.

Part 879—Acquisition, Management, and Disposition of Lands and Water

Scope (§ 879.1)

Our proposed rule did not include any changes to this section, but we received comments from IMCC/NAAMLP and one State that this Part should not apply to certified States and Indian tribes for anything other than land acquisition for coal reclamation work to maintain certification. We agree with the commenters, and we are now revising § 879.1 to clarify the scope of this Part. However, after reviewing the comments, we have decided that this Part should not apply to certified States and Indian tribes because certified States and Indian tribes have such wide discretion over the projects and activities they choose to complete with the funds they receive under Title IV. In addition, we are also deleting the phrase ''and establishes requirements for the redeposit of proceeds from the use or sale of land.'' to reflect our revisions to § 879.15, and we are rewording this section in plain English.

Definitions (§ 879.5)

We are adding a new section to Part 879 to include the definition of the term ''Reclamation plan or State reclamation plan.'' We did not receive any comments on this section and are adopting it as proposed.

Information Collection (§ 879.10)

We are removing § 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. We did not receive any comments on this section and are adopting it as proposed.

Land Eligible for Acquisition (§ 879.11)

In addition to minor plain English revisions, we proposed to modify this section to incorporate the appropriate references to prior balance replacement funds received by uncertified programs under section 411(h)(1) of SMCRA and § 872.29 and remove references that restrict land acquisition to moneys that States and Indian tribes receive from the Fund because the prior balance replacement funds for uncertified States are derived from the Treasury. We are adopting these changes as proposed because 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 also proposed to move the definition of ''permanent facility'' from § 870.5 to § 879.11(a)(2) and modify it. For the reasons stated in the preamble to the proposed rule, we are adopting this regulation as proposed.

Responses to Comments

We received comments from IMCC/NAAMLP and one State that this section should not apply to certified States and Indian tribes acquiring lands that are not necessary for coal reclamation work. We agree with these comments, and, as explained in the preamble to § 879.1, we made changes to that section to make this Part not applicable to certified States and Indian tribes.

Disposition of Reclaimed Land (§ 879.15)

For the reasons stated in the preamble to the proposed rule, we proposed to revise the language in existing § 879.15 to remove the provision (h) and replace it with language that would implement the requirements of §§ 885.19 and 886.20, which relate to the disposition of unused funds, particularly those that have been deobligated. After review of the comments received on this section, we are adopting it with the modifications described below.

Responses to Comments

We received comments from IMCC/NAAMLP and one State that moneys gained from the sale of property acquired for any reason should be placed in the State's or Indian tribe's own reclamation fund account rather than returned to the Federal government because paying the funds to the Federal government then awarding them back to the State is unnecessary bureaucratic paper shuffling. We consider funds received from disposal of acquired land to be one of many possible sources of unused funds in grants, so we are adopting the proposed revisions that require any proceeds received by uncertified States and Indian tribes under this section to be treated as unused funds under § 886.20. However, we deleted the sentence in the proposed rule text that required all moneys received from disposal of acquired land to be returned to us because appropriate handling of unused grant funds may vary depending on the particular circumstances. We address the general question of whether States and Indian tribes must return unexpended grant funds in our discussion of comments to § 886.20. We also deleted the reference in the proposed rule to § 885.19, about unused funds in grants to certified States and Indian tribes, because this Part no longer applies to certified States and Indian tribes.

Part 880—Mine Fire Control

Definitions (§ 880.5)

We are adding a new section to Part 880 to include the definition of the term ''Reclamation plan or State reclamation plan.'' We did not receive any comments on this section and are adopting it as proposed.

Part 882—Reclamation on Private Land

Information Collection (§ 882.10)

In this section, we discuss the Paperwork Reduction Act requirements and the information collection aspects of Part 882. We are updating this section and rewording it using plain English. We did not receive any comments on this section and are adopting the section as proposed.

Liens (§ 882.13)

Consistent with the 2006 amendments' revision of section 408(a) of SMCRA, in paragraph (a)(1) we are removing 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. We received one comment from an environmental group in support of our changes and are adopting the section as proposed.

Part 884—State Reclamation Plans

As further explained in the preamble to the proposed rule, the only proposed changes to this Part were the addition of a definitions section and revisions to §§ 884.11 and 884.17. Consistent with section 405(h) of SMCRA, our proposed revisions to this Part 884 clarified 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. However, we specifically requested comments on how we should implement these provisions as they relate to prior balance replacement funds and certified in lieu funds. After review of the comments, we have not made any further changes to this Part. Instead, we have modified the first sentence of the definition of eligible lands and water in § 700.5 to make it clear that certification qualifies a State or Indian tribe for a State or Tribal reclamation plan. That change, along with the proposed changes that we are adopting here, will clarify how this Part relates to certified State and Indian tribal reclamation programs.

Responses to Comments

IMCC/NAAMLP and one State commented that we should require certified States or Indian tribes to have an approved reclamation plan including a commitment to address newly discovered coal issues beginning with the next grant period. They explained that the next grant request should include the information concerning the newly discovered coal issue and the approximate time to obtain clearances, design and actual mitigation of the coal issue and if available a cost estimate. These commenters also maintained that all other projects directed by the legislature of a certified State or the governing body of a certified Indian tribe, including noncoal projects, would be part of the simplified grant process and do not need to be part of the reclamation plan, which should simply state that the State or Indian tribe will undertake projects as directed by the State or Tribal legislative body. Finally, the commenters proposed that very little information should be required to be in the reclamation plans for certified States and Indian tribes on noncoal reclamation projects other than that projects will be undertaken as selected and that the specific projects would be included as part of the simplified grant process.

As we discussed in our responses to comments under Part 875, we are modifying our approach to reclamation plan requirements for certified programs. We initially proposed that in addition to the necessary commitments to address existing and newly discovered coal problems, States and Indian tribes planning to conduct noncoal reclamation programs under the umbrella of Part 875 would need to maintain, and revise as necessary, their reclamation plan. We now conclude that while certified programs still need to maintain a reclamation plan that contains the appropriate assurances for addressing coal problems in order to receive Title IV moneys, they cannot operate a noncoal reclamation program under Part 875 unless they are expending State or Tribal share funds received before October 1, 2007. However, as discussed in the preamble to Part 874, we are requiring that States and Indian tribes that expend moneys, regardless of the source, to maintain certification under section 411(a) of SMCRA do so as required by the applicable provisions of sections 401 to 410 of SMCRA and Parts 874 and 875 of this chapter. As a consequence of our revised position on the applicability of Part 875, we are not requiring any information for the reclamation plan on

activities other than maintenance of certification and a statement that the program will undertake projects in accordance with the State or Tribal legislative body.

One State commenter suggested that the reclamation plans of minimum program States should primarily reflect funding sources and what may or may not be reclaimed with these funding sources. After consideration of this comment, we have decided not to make any changes to this Part to implement this suggestion. Upon completion of rulemaking, we intend to develop notifications to be sent to the States and Indian tribes concerning reclamation plan modification, and we expect that each State and Indian tribe will review their existing reclamation plan and propose modifications. To the extent that a State or Indian tribe wishes to inform the public about the allowable uses of specific funding sources, they may incorporate the information into their modified reclamation plan.

Definitions (§ 884.5)

We are adding a new section to Part 884 to include the definition of the term ''Reclamation plan or State reclamation plan.'' We did not receive any comments on this section and are adopting it as proposed.

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. As proposed, we are finalizing several revisions to this section. First, we proposed to update the citation to the definition of ''eligible lands and water'' because we are moving that definition from § 870.5 to § 700.5. In addition, we proposed to add 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, for the reasons set forth in the preamble to the proposed rule, we proposed to use this section to clarify how Tennessee and Missouri are affected by the requirement to have and maintain a reclamation plan in light of the statutory direction under section 402(g)(8) of SMCRA.

Responses to Comments

We received three comments from environmental groups regarding this section. One commenter supported the statutory mandate that Tennessee and Missouri receive minimum program make up funding under section 402(g)(8)(A) in spite of the section 405(c) requirement to have an approved State regulatory program under section 503 of SMCRA. Another commenter supported the requirement that an approved reclamation plan continues to apply to all States and Indian tribes, regardless of certification status under section 411(a) of SMCRA.

We received no adverse comments on this section and adopt it as proposed. But we would like to clarify that Tennessee and Missouri are not exempt from the certification process. As with any State, they may not certify until they have completed all known coal problems, but once they have done so, we expect them to proceed with certification in accordance with § 875.13.

Content of Proposed State Reclamation Plan (§ 884.13)

We did not propose any changes to this section in our proposed rule. However, we received two comments on this section. First, IMCC/NAAMLP and one State commented that section 403 of SMCRA, with the exception of paragraph (c), does not apply to certified States and Tribes. Thus, they contend that this section should be revised to clarify that certified States and Indian tribes are subject to different policies and procedures with regard to their State reclamation plans. We agree with the commenter and are revising the final rule to reflect that States and Indian tribes are eligible to submit a reclamation plan if they have been certified under section 411(a) of SMCRA and Part 875 of this chapter. Second, we received a comment from one State that State plans should be updated to reflect any additional requirements that the State may have to meet under the final approved rules. We agree with the comment but believe the requirement is sufficiently imposed under the existing rules.

State Reclamation Plan Amendments (§ 884.15)

We did not propose any changes to this section in our proposed rule. However, we received a comment on this section. This State commenter suggested that we include the specific changes that States and Indian tribes are required to make to their reclamation plans when we notify them under § 884.15(b). The State or Indian tribe would then make those specific changes with any other changes that it believes are necessary. We agree with the comment to the extent that we are required by § 884.15 to notify each State and Indian tribe of any changes to SMCRA and AML regulations. But because each reclamation plan is tailored to specific program and regional conditions, we believe rather than for us to dictate amendments to the reclamation plans, it will be more constructive for us to work cooperatively with each State or Indian tribe to identify and revise plan amendments as necessary to comply with SMCRA and these regulations.

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

For the reasons explained in the preamble to the proposed rule, we only proposed to update the grant application reference from § 886.15 to § 885.13 and to change the heading and wording of this section to reflect the greater discretion that certified States and Indian tribes now have to use Title IV moneys.

Responses to Comments

IMCC/NAAMLP and one State opposed our proposed retention of § 884.17(a), with provisions for a reclamation plan which includes construction of public facilities as a result of coal development. The commenters stated that imposing such requirements are in direct conflict with SMCRA which allows prior balance replacement funds to be used at the discretion of the State legislature or Tribal governing body and certified in lieu funds to be used for any purpose. They suggest that existing subparagraphs (a) and (b) should be deleted and replaced by the language proposed for the new subparagraph (b).

We agree that § 884.17(a) no longer applies to certified States and Indian tribes using prior balance replacement funds or certified in lieu funds. However, we are retaining paragraph (a) to accommodate the unexpended 402(g)(1) funds still being managed by certified States and Indian tribes. We are also retaining our proposed paragraph (b) that ''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.''

Part 885—Grants to Certified States and Indian Tribes

As explained further in the preamble to the proposed rule, we are adding this new Part to provide different rules for

Title IV grants to certified States and Indian tribes.

What does this Part do? (§ 885.1)

This section specifies that this Part provides procedures for grants to certified States and Indian tribes only. We did not receive any comments on this section and are adopting it as proposed.

Definitions (§ 885.5)

We are adding this section to include definitions of the terms ''award,'' ''distribute,'' and ''reclamation plan or State reclamation plan.'' We did not receive any comments on this section. For the reasons explained in the preamble to the proposed rule, we are adopting it as proposed.

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 are changing Part 886 by limiting it to grants to uncertified States and Indian tribes and adding 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. We received no comments on this section and are adopting it as proposed.

Who is eligible for a grant? (§ 885.11)

In this section, we are stipulating that only certified States or Indian tribes with an approved reclamation plan are eligible for grants under this Part. We did not receive any comments on this section. For the reasons explained in the preamble to the proposed rule, we are adopting it as proposed.

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

In this section, we are describing how you, a certified State or Indian tribe, may use funds awarded in Title IV grants. We did not receive any comments on this section. For the reasons explained in the preamble to the proposed rule, we are adopting it as proposed.

What are the maximum grant amounts? (§ 885.13)

Paragraph (a) allows you to apply for a grant of any or all available funds at any time. Paragraph (b) provides how we determine the amount of Title IV funds available to the certified State or Indian tribe. Paragraph (c) provides that current FY funds are not available for award until after we complete the annual distribution. Paragraph (d) requires us to give you current information on the amounts and types of funds that are available for award. We did not receive any comments on this section. For the reasons explained in the preamble to the proposed rule, we are adopting it as proposed.

How long is my grant? (§ 885.14)

In this section, we proposed that the performance period of a certified State's or Indian tribe's grant will be the period of time you request in your grant application. This proposed section did not establish any requirements for how long a grant should be or how many grants may be open at any time.

Responses to Comments

We received comments from IMCC/NAAMLP and one State agreeing that the performance period of the grant should be at the discretion of the individual States and Indian tribes. The commenters stated that we should not be concerned about the administrative burdens of managing grants which are open for very long periods, and that the length of the grants should be left to the discretion of the States and Indian tribes. IMCC/NAAMLP noted that we should be more concerned about the administrative burden of the myriad confusing codes used in the process of managing our grants. Because we received no adverse comments, we are adopting this section as proposed. Although it is beyond the scope of this rulemaking, we intend to do what we can to simplify our accounting system's codes if an opportunity arises.

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

In this section, we proposed to provide application procedures for certified States and Indian tribes to receive Title IV grant awards. Paragraph (a) mandates that you must use the application forms and procedures that we specify. As explained in the preamble to the proposed rule, we are not specifying 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. Proposed 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. Paragraph (c) requires that if your application is not complete, we must notify you as soon as practicable of the additional information we need to process the award. Paragraph (d) requires you to 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.

Responses to Comments

We received a comment from IMCC/NAAMLP and one State in response to our request for suggestions on further streamlining grant procedures. The commenters stated that the process is streamlined but noted that if we want to really streamline the process, we should change it from a grant to a direct payment. This suggestion is addressed in our discussion of comments on § 872.30. After consideration of this comment and for the same reasons stated in § 872.30, we are adopting this section as proposed.

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

In this section, we proposed to describe the formal grant agreement and your operations under it. Proposed paragraph (a) required us to send you a written grant agreement when we award you a grant. Proposed paragraph (b) provided that you could subgrant functions and funds to other organizations, but that you will still be responsible for administration of the grant, including funds and reporting. Proposed paragraph (c) provided that funds become obligated when we approve the grant agreement and that you accept the grant by starting work or drawing down funds under it. In paragraph (d), we proposed to make you responsible for ensuring that all applicable laws, clearances, permits, or requirements are met before you expend funds. Proposed paragraph (e) provided 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. Proposed paragraph (f) required that public facilities constructed with grant funds should use fuel other than petroleum or natural gas to the extent technologically and economically feasible. Finally, proposed paragraph (g) required that you not commit or spend more funds than we have awarded and provided 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 provision does not affect our annual mandatory distributions to you under section 411(h) of SMCRA.

Responses to Comments

We received comments from IMCC/NAAMLP and one State requesting clarification of the requirement in paragraph (d) that certified States or Indian tribes must ensure compliance with any applicable laws, clearances, permits or requirements for projects other than coal reclamation. The commenters state that NEPA must have a Federal nexus, and because we maintain in the preamble that we will make no Federal decision authorizing individual project expenditures, there will be no Federal involvement. They therefore assume that NEPA will not apply to projects certified States and Indian tribes do and suggest that we clarify this in the regulations.

We disagree with the commenters' assumption that NEPA compliance will not be required and we made no changes to the regulation. As we discussed in the responses to comments for § 872.31, we will not make a Federal decision authorizing individual projects other than coal reclamation, but it is possible that you will have to comply with NEPA for other Federal or State or Indian tribal requirements. We believe the regulation language appropriately assigns to the States and Indian tribes the responsibility to determine which requirements apply to individual projects other than coal reclamation they do under Part 874 and to ensure that those requirements are met before they begin projects.

How can my grant be amended? (§ 885.17)

In this section, we describe the procedures to amend an existing grant. We did not receive any comments on this section. For the reasons explained in the preamble to the proposed rule, we are adopting it as proposed.

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

In this section, we explain that you and we must follow standard procedures from OMB for grants management actions. We did not receive any comments on this section. For the reasons explained in the preamble to the proposed rule, we are adopting it as proposed.

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

In this section, we describe how we handle any funds awarded in grants but not expended. We did not receive any comments on this section. For the reasons explained in the preamble to the proposed rule, we are adopting it as proposed.

What must I report? (§ 885.20)

This section describes the information you must report to us about your grant. We did not receive any comments on this section. For the reasons explained in the preamble to the proposed rule, we are adopting it as proposed.

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

In this section, we explain that if you fail to comply with your grant award or a Federal law or regulation, we will take appropriate action. We did not receive any comments on this section. For the reasons explained in the preamble to the proposed rule, we are adopting it as proposed.

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

This section allows either you or us to terminate the grant for convenience if that should become appropriate. We did not receive any comments on this section. For the reasons explained in the preamble to the proposed rule, we are adopting it as proposed.

Part 886—Reclamation Grants to Uncertified States and Indian Tribes

In this Part, we are describing the procedures that you, the uncertified State or Indian tribe, and we, OSM, 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 adding a new Part 885 for grants to certified States and Indian tribes, we are now limiting this Part to grants to uncertified States and Indian tribes only. Throughout this Part, we are also changing 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 are adding ''uncertified'' to limit this Part to grants to uncertified States and Indian tribes and update 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. We did not receive any comments on this section. For the reasons explained in the preamble to the proposed rule, we are adopting it as proposed.

Authority (§ 886.3)

We proposed to delete this section because it is unnecessary and duplicative. We did not receive any comments on this proposed deletion, and, for the reasons explained in the preamble to the proposed rule, we are adopting it as proposed.

Definitions (§ 886.5)

We are adding a new section to Part 886 defining the terms ''award,'' ''distribute,'' and ''reclamation plan or State reclamation plan.'' We did not receive any comments on this section. For the reasons explained in the preamble to the proposed rule, we are adopting it as proposed.

Information Collection (§ 886.10)

We are revising this paragraph using plain English and using 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. We received no comments on this section and are adopting it as proposed.

Who is eligible for a grant? (§ 886.11)

We are adding language to this paragraph to specify that this Part applies to grants to uncertified States and Indian tribes only. We did not receive any comments on this section. For the reasons explained in the preamble to the proposed rule, we are adopting it as proposed.

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

We proposed to reword paragraph (a) using plain English and move the existing provision about OMB cost principles from this paragraph to paragraph (e). In paragraph (b), we proposed to reword the provision about our reclamation grants and move the existing provision about fuels to be used in public facilities to § 886.16(f). We proposed 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. This proposed paragraph listed each type of funds that may be awarded in an AML grant to an uncertified State or Tribe and referenced the section number which governs its use. We also proposed to move existing paragraph (c) to paragraph (d), reword it using plain English, and correct a spelling error. Finally, we proposed to add paragraph (e) requiring you to use grant funds only for costs that are allowable according to OMB cost principles in Circular A–87. We did not receive any comments on this section. For the reasons explained

in the preamble to the proposed rule, we are adopting it as proposed.

What are the maximum grant amounts? (§ 886.13)

As proposed, this new section established and clarified our current grant procedures. Proposed paragraph (a) allowed you to apply for a grant of any or all funds distributed to you at any time. Proposed paragraph (b) set forth a calculation for determining the amount of funds available to your State or Tribe. Proposed paragraph (c) provided that current FY funds are not available for award until after we complete the annual distribution, which occurs after we receive fee collections for coal produced in the final quarter of the previous fiscal year. Moreover, proposed paragraph (d) required us to give you current information on the amounts and types of funds that are available for award.

Responses to Comments

We received comments from IMCC/NAAMLP and one State suggesting that we change the wording of § 886.13(a) that you may apply at any time for a grant of any or all of the program funds ''that are distributed to you'' to funds ''to which you are entitled'' because this wording is more accurate and reflects a more appropriate perspective. We agree with the commenters that ''distributed'' is not the most accurate word as funds may also become available through deobligation or carry-over. However, we disagree that ''entitled'' is a more appropriate word because the amount we can award in a grant is limited to the funds actually available for obligation. We changed the wording to funds ''which are available to you'' because that is consistent with the parallel language in § 885.13 for grants to certified States and Indian tribes.

IMCC/NAAMLP also commented that the list of all available funds in the preamble for § 886.13(b) should include minimum program make up funds and carryover funds from previous years. The regulatory text as proposed includes these types of funds, so the preamble should have explained the calculation as:

- The current annual AML distribution, including State share, Tribal share, historic coal funds, minimum program make up funds, and prior balance replacement funds;
- Plus any funds distributed in previous years that were not awarded in a grant (''carryover'');
- Plus any funds distributed in previous years that were awarded but were subsequently deobligated from a grant (''recoveries''); but
- Minus any funds already awarded to you this fiscal year.

One state commented that the information we give States and Indian tribes on funds currently available for award should be provided to the States and Indian tribes between October 1 and December 15 of each year, and on an as-needed basis. For the immediate future, we intend to provide an annual report to all States and Indian tribes on current funds available as part of the annual distribution process. Furthermore, we intend to provide additional information to each State and Indian tribe upon request throughout the year. However, we decided not to add this requirement to the regulations because we expect that future system changes will allow us to give you direct access to this information rather than relying on requests and scheduled reports.

How long will my grant be? (§ 886.14)

We proposed deleting existing § 886.14, recodifying existing § 886.13 as § 886.14, and revising it to reflect the simplified grant process that we use for AML grants. Paragraph 886.14(a) is the existing § 886.13(b) which we are rewording using plain English. Paragraph (b) establishes three years as the normal grant period. Paragraph (c) allows us to extend the grant period, typically for a year, if requested. Paragraph (d), which establishes one year as the normal period for administrative accounts, is the existing § 886.13(a) and is reworded using plain English.

We also proposed to add § 886.14(e), which would have allowed us to lengthen the time period for new or amended AML grants that contain State or Tribal share funds distributed during FY 2008, 2009, and 2010 for up to five years at your request. This paragraph incorporated 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 funds. 30 U.S.C. 1232(g)(1)(D). After consideration of the comments received on this section, we are modifying proposed paragraph (e), as described below, but are otherwise adopting this section as proposed.

Responses to Comments

We received comments from one State about the provision in paragraph (c) that we normally limit extensions of the grant performance period to one extension for up to one additional year, which was expanded in the preamble to the proposed rule with the explanation that we may allow more or longer extensions in special or unusual circumstances. The State notes that it currently has at least one construction contract longer than three years and expects to have many contracts lasting five years or longer as program funding increases. The commenter suggests we allow grant extensions on the basis of the needs of the projects so that States and Indian tribes can run their programs efficiently. We agree that we must consider the needs of the projects when we review a grant extension request. However, we also have a responsibility to encourage States and Indian tribes to use program funds efficiently and to minimize unobligated fund balances. We did not change the regulation because we believe the word ''normally'' allows us to consider project needs, as evidenced by the fact that the State currently has a longer project. Thus, we still are able to allow more or longer grant extensions in special circumstances.

We received comments from IMCC/NAAMLP and two States about paragraph (e) of our proposed rule. We proposed that, although grants are normally awarded for three years, we may award or extend grants containing State or Tribal share funds distributed in FY 2008, 2009, or 2010 for up to five years at your request. IMCC/NAAMLP and one State noted that section 402(g)(1)(D) of SMCRA states that States and Indian tribes shall have up to five years to expend State and Tribal share funds awarded in FY 2008 through 2010. These commenters suggested that we award grants with these funds for a five year period, which may be decreased to three years at your request. However, another State commented that they supported the proposed language because in many cases States and Indian tribes will be able to expend the funds within that period and the additional years would add more administrative burden. To reflect that State opinions differ on the most efficient length of these grants, we revised the rule to give individual States the flexibility to choose whether we award these grants for three or five years.

IMCC/NAAMLP also commented that section 411 of SMCRA does not establish any timelines on grant performance periods for uncertified States' or Indian tribes' use of prior balance replacement funds. The commenter concluded that ''an annual distribution payment in the full amount due under section 411 should be available as an option for grants to each State/Tribe, which in turn could be

deposited into a separate State/Tribal account and considered State/Tribal funds and used without restriction for any section 403 priority (including AMD treatment).'' We agree that section 411 does not establish any time limits but disagree with the commenter's conclusion for the reasons explained in the preamble to § 872.30.

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

In paragraph (a), we are removing the existing provision that a preapplication is not required under certain conditions. We do not require a preapplication for AML grants. In paragraph (b), we are removing 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 are rewording this entire section using plain English. We did not receive any comments on this section. For the reasons explained in the preamble to the proposed rule, we are adopting it as proposed.

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

This section reflects the electronic processing of our grant awards and has been reworded in plain English. Paragraph (a) requires us to send you a written grant agreement. Paragraph (b) allows you to subgrant functions and funds, but you retain responsibility for them. Paragraph (c) explains how you accept an award. Paragraph (d) concerns our Authorization to Proceed and NEPA review process. Paragraph (f) relates to fuel used at public facilities, and paragraph (g) states that we are not obligated to provide any more funds to you in new or revised grants. We did not receive any comments on any of these paragraphs. For the reasons explained in the preamble to the proposed rule, we are adopting these provisions as proposed.

We are revising paragraph (e) to conform to section 403(c) of SMCRA, which now requires that OSM, acting for the Secretary, must approve proposed amendments to the AML inventory that are made by States and Indian tribes. 30 U.S.C. 1233(c). In this paragraph, we 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 define the term ''amendment'' to 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 making 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 are normally 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 AML 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 provide that our approval of an emergency project under section 410 of SMCRA, which is our ATP for an emergency project, also constitutes our approval to place the coal problems being addressed by the emergency into the AML inventory. We are establishing this process for emergency projects because our declaration of an emergency 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 are adding an approval requirement consistent with that 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. We do not intend this requirement to limit your ability to use funds to assess a problem and to determine its eligibility and feasibility for reclamation. This paragraph applies only to coal reclamation problems added to the AML inventory after December 20, 2006. We believe this requirement 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 promotes 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 will spread out our review workload and potentially expedite later project ATP reviews because field staff will already be familiar with the proposed project area.

Responses to Comments

We received multiple comments about paragraph (e) and its subparagraphs relating to the AML inventory. IMCC/NAAMLP and one State commented that the term ''coal problem'' in paragraph (e) should be clarified. They asked if this phrase was synonymous with an AML feature or with additional units. They suggested it would be helpful to add to the preamble examples of the types of changes which would and would not constitute amendments and require our approval. We agree with the commenters that it could be helpful to discuss these questions here, but we note that we make decisions on individual problem sites case by case. Generally, we consider a coal problem to be anything on lands eligible under section 404 of SMCRA and that meets the priority requirements of section 403(a), and we consider the addition of another AML feature or units to the AML inventory to be a new coal problem requiring our approval. The examples provided by the commenters of adding a new portal or other problem type in the same location as an existing dangerous highwall, or increasing the length of an existing dangerous highwall to include a previously undocumented segment as a Priority 3 highwall, would likely constitute amendments. However, the commenters' other example of increasing the length of an existing dangerous highwall to include a previously undocumented segment likely would not constitute an amendment.

One State noted that requiring AML inventory entry and approval for new problems would prohibit or slow the reclamation of problems identified during the actual reclamation construction. We do not intend this provision to require that you enter these newly discovered problems into the AML inventory if they are found during reclamation. After reclamation begins, any newly discovered coal problems on the site would not be entered into the AML inventory until after reclamation is

completed when you report the problems which have been reclaimed.

IMCC/NAAMLP and one State commented that this definition of amendment is inconsistent with the definition we provided in Change Notice AML 1–2, which defined ''amendment'' as a new Problem Area, and that this change significantly increases the administrative burden. We agree that the directive, issued shortly after enactment of the 2006 amendments, contained a narrower definition, but we now believe that our definition in this rule is more appropriate because it better enables us to 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.

IMCC/NAAMLP and one State suggested three changes to reduce the number of required inventory approval actions, and the administrative burden that would come with the regulation as proposed:

- Make our new definition effective on the effective date of this rule rather than December 20, 2006, so States don't have to go back and re-process all the inventory changes between these two dates.
- Add a dollar threshold provision, so States don't have to request approval for changes made simply for nominal additional costs.
- Do not consider the addition of Priority 3 problems to be an amendment to the AML inventory.

We appreciate these comments and are sensitive to the additional administrative burdens this statutory requirement may impose on uncertified States and Indian tribes, but we do not agree with the recommendations and have not changed the regulation. Generally, after reviewing our process for our approval, we do not believe this section will be unduly burdensome. Therefore, the measures suggested by the commenters are not necessary. In addition, delaying the effective date is not an option because the 2006 amendments became effective on December 20, 2006, and using this date recognizes that, as required by the law, our regulation must apply to the entire period since enactment of the 2006 amendments. We are not adopting the suggestion for a dollar threshold at this time because we believe that we need more experience with this process to be able to determine if we should accept this proposal. Such a threshold could be the subject of future rulemaking. Finally, we believe that if you plan to expend funds on a problem, even if it is Priority 3, it must be in the AML inventory.

IMCC/NAAMLP and one State commented that AML inventory requirements should not apply to water supply projects under section 403(b) of SMCRA or to Priority 3 problems because section 403(c) of SMCRA only requires the AML inventory to include eligible lands and waters which meet the priorities in 403(a)(1) and (a)(2). We agree that SMCRA limits the AML inventory to Priority 1 and 2 coal problems. However, we have for many years required you to enter all types of projects into the AML inventory, including water supply and priority 3 problems, before you expend AML funds on them. This information needs to be in the AML inventory so that we can track and report on projects funded and completed with AML funds. We therefore disagree with this comment and did not change the regulation.

IMCC/NAAMLP and three States also suggested that we delete the provisions in paragraphs (e) and (e)(2) that require problems to be entered into the AML inventory before you can spend AML funds on project development and design. The commenters asserted that this requirement is overly burdensome and could waste time if a project turns out not to be feasible. One State commented that some project development and design work is necessary to assess a problem and identify its eligibility and feasibility for reclamation. Another State notes that there are many instances when programs can receive substantial savings by doing design work prior to or in conjunction with a problem being entered into the AML inventory. These commenters conclude that our historic requirement that projects be entered into the AML inventory prior to NEPA processing and project construction has proven to be efficient and effective and there is no need to change it.

After consideration of these comments, we have concluded that significant amounts of AML funds should not be spent on a project until we have approved its entry into the AML inventory. Thus, we are adopting the regulation as proposed. However, we recognize that programs must expend funds to assess a coal problem, to determine whether it is eligible and feasible for reclamation, and to collect the information needed to enter the problem into the AML inventory. We do not believe that we need to add specific language to the regulations for you to use AML funds for project assessment.

How can my grant be amended? (§ 886.17)

We are moving the requirement that grant amendment procedures must follow the Grants Common Rule from the last sentence of existing paragraph (a) to paragraph (c). In paragraph (b), we are deleting the second sentence, with specific conditions which require an advance amendment, because we believe it is unnecessary. We are renumbering existing paragraph (c) to (d). We are also rewording this section using plain English. We did not receive any comments on this section. For the reasons explained in the preamble to the proposed rule, we are adopting it as proposed.

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

We are moving and dividing existing § 886.18 into §§ 886.20, 886.23, 886.24, 886.25, and 886.26. New § 886.18 is a combination of two short existing sections, §§ 886.19 and 886.20. Paragraph (a) contains the audit requirement from existing § 886.19, which we are updating by deleting the reference to the General Accounting Office and adding one to OMB Circular A–133. Paragraph (b) comes from the existing § 886.20 on administrative procedures. We are deleting 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. We will address specific requirements and forms in our directives. We are also rewording this section using plain English. We did not receive any comments on this section. For the reasons explained in the preamble to the proposed rule, we are adopting it as proposed.

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

As explained above, we are moving existing § 886.19 to § 886.18(a). We are moving the content of existing § 886.22, ''Financial management,'' to this section and rewording it using plain English. We did not receive any comments on this section. For the reasons explained in the preamble to the proposed rule, we are adopting it as proposed.

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

As proposed, we are moving existing § 886.20 to § 886.18(b) and adding a new section here to clarify how we 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 occurring 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.

In paragraph (a), we explain that we deobligate all unexpended funds from a completed grant agreement in order to close it out and describe how we 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 are modifying 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 paragraph (a)(1) 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 distribute transferred funds to uncertified States and Indian tribes at the next annual distribution using the prescribed historic coal formula described in § 872.22. In paragraph (a)(2), we explain that we hold any unused Federal expense funds, such as State emergency program funds, for distribution to any State or Indian tribe that needs them for the specific activity for which Congress appropriated the funds. Finally, in paragraph (3) we specify that unused funds of all other types are 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 adding 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. After consideration of the comments, we are adopting this section as proposed.

Responses to Comments

IMCC/NAAMLP commented that § 886.20(a) should say we ''may'' deobligate any unexpended funds after your grant is completed, rather than ''will.'' They say that deobligating the funds is a discretionary function rather than a statutory requirement. Moreover, they asserted that Treasury payments should not be subject to deobligation, and we should ensure that funds do not revert to Treasury. They concluded that if we work together with the States and Indian tribes to monitor the situation closely, provide maximum flexibility in designing payment protocols, and allow appropriate grant periods and applicable requirements, there should be no need for payments to revert to Treasury.

We respond that if Treasury funds are deobligated, they will not revert to Treasury because section 402(i)(4) of SMCRA specifies that Treasury funds remain available until expended. Similarly, moneys from the Fund, except for State and Tribal share and Federal expenses as provided in paragraphs (a)(1) and (a)(2), remain available to you. Paragraph (a)(3), as proposed, requires us to reaward any deobligated historic coal, minimum program make up or prior balance replacement funds to the same State or Indian tribe in another grant on request. So you will not lose access to these funds. We enthusiastically endorse the position that we work closely with you to ensure the most efficient use of grant funds and avoid deobligations.

We received a comment from IMCC/NAAMLP and one State on § 879.15 which we discuss here because it relates to this section and to the procedures that we must use for Federal funds. The commenters asserted that paying unused funds back to the Federal government then awarding them back to the State is unnecessary bureaucratic paper shuffling. We recognize that those controls impose additional processing costs. Our financial systems, however, are designed with internal controls to ensure that the systems function properly and to protect Federal funds against waste, fraud and abuse. If your grant's performance period has ended and you have unexpended funds, it is not an allowable cost to obligate more funds under the expired grant. In order for you to use the funds we must reaward them into a grant with a current performance period, and we cannot reaward the funds until we have deobligated them from the expired grant. We will work with you to minimize the needed paperwork and simplify the processing, possibly through offsetting cash drawdown actions.

One State supported our proposal in paragraph (a)(1) to transfer any State share or Tribal share funds which you do not expend within 3 years, or 5 years for FY 2008, 2009, or 2010 funds, to historic coal funds because they need more funding for high priority coal reclamation. The State also supported our proposal in paragraph (a)(2) that we hold and redistribute unused Federal expense funds because almost every year some State needs additional AML emergency funding and redistributing unused funds allows us to meet those needs. We appreciate these comments, and the final regulation includes these provisions as proposed.

What must I report? (§ 886.21)

We are deleting existing § 886.21 because that topic is addressed in § 886.12. We transferred existing § 886.23 in an effort to group related topics in a more logical manner. The existing paragraph (a) in § 886.23 required you to submit to us every year the reporting forms that we specified. We are replacing this paragraph with a requirement that each year you report to us the program performance and financial information that we specify. We are not establishing 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 are clarifying this requirement by separating the AML inventory and grant closeout requirements. Paragraph (b) describes 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. Paragraph (c) requires you to update the AML inventory upon completing each reclamation project. We are removing this item from the grant closeout requirements to emphasize that you must update the AML inventory as you complete each project rather than waiting until the grant is completed. After reviewing the comment, we decided to adopt this provision as proposed.

Responses to Comments

We received a comment from one State which disagrees with our conclusion in the preamble for paragraph (a) of this section that allowing a variety of forms and formats for reporting program and financial information will make it less of a burden for you. They believe there needs to be consistency in reporting because program and financial information sent to OSM from 26 States and Indian tribes using different forms, formats, or methods is not useful. We did not change the language of this section because we believe the requirement to report the ''performance and financial information that we specify,'' would allow us to standardize reporting forms if we were to decide that was appropriate. At this time, we believe our current position, originally based on recommendations from grantee staff, provides usable data which we standardize into our annual oversight reports, but we will continue to seek input from you on the most efficient ways to meet our information needs.

The State also expressed support of our proposal in paragraph (c) that you must update the AML inventory as each project is completed rather than waiting until the grant is completed. We agree with this commenter and did not change this provision in the final regulation.

What records must I maintain? (§ 886.22)

As proposed, this section covers all records related to your grant, including programmatic and accounting information. We did not receive any comments on this section. For the reasons explained in the preamble to the proposed rule, we are adopting it as proposed.

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

As proposed, this section described circumstances when your grant could be subject to remedial actions or termination. We did not receive any comments on this section. For the reasons explained in the preamble to the proposed rule, we are adopting it as proposed.

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

As proposed, this section described the procedures we would use to reduce, suspend, or terminate your grant. We did not receive any comments on this section. For the reasons explained in the preamble to the proposed rule, we are adopting it as proposed.

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

As proposed, this section provided your administrative appeal rights if your grant is reduced, suspended, or terminated. We did not receive any comments on this section. For the reasons explained in the preamble to the proposed rule, we are adopting it as proposed.

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

As proposed, this section describes the much simpler procedures for terminating a grant for convenience. We did not receive any comments on this section. For the reasons explained in the preamble to the proposed rule, we are adopting it as proposed.

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

As proposed this section describes special procedures applying to Indian lands not subject to an approved Tribal reclamation program. We did not receive any comments on this section. For the reasons explained in the preamble to the proposed rule, we are adopting it as proposed.

Part 887—Subsidence Insurance Program Grants

We proposed to make changes to this Part to add references to Indian tribes to clarify that they may choose to establish a subsidence insurance program under the same rules as States. We received no comments on our proposed changes to this part, and are adopting them as proposed.

IV. Procedural Determinations

Executive Order 12866—Regulatory Planning and Review

This 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 determination that:

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

c. The rule will 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 will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities. The rule will 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 quarters beginning October 1, 2007 and ending September 30, 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. 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. Under 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 rule at § 870.13. The fee rates for 2007–2012 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 are made outside of the appropriations process. 30 U.S.C. 1231(d).

2. All States and Indian tribes with approved reclamation programs are 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 are 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 rule, certified States and Indian tribes are allowed to use certified in lieu funds for any purpose they deem appropriate. We assume that States and Indian tribes 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 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 are 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 pay to the UMWA under the 2006 amendments because those payments are not addressed in this rule.

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

Alternatives	A	B	C	D
	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
(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 providing 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 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	A	B	C	D
	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)
(1) No Action or Old Law	$2,110.4	210,379	157,937	(52,442).

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

Alternatives	A	B	C	D
	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)
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.	(Source: collections prior to September 30, 2007 plus interest earned on prior collections).			
(2) 2006 Amendments	$6,027.6	210,379	210,379	210,257
Uncertified States and Indian tribes	$4,045.7 (Source: prior balance replacement funds, 50% State share, 30% historic coal funds and 3% estimated minimum program funds).	208,131	208,131	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. It should be noted that this analysis assumes that all funds are used for high priority coal reclamation.

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 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 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 that 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. Over $200 million has already been collected. The 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 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 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

The rule is considered a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act for the following reasons.

a. As discussed above under the heading *Executive Order 12866—Regulatory Planning and Review*, the provisions of the 2006 amendments have an annual effect on the economy of $100 million or more.

b. The 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 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 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 rule does not have significant takings implications. Contrary to the view of one commenter, nothing contained in this rule is a governmental action capable of interference with constitutionally protected property rights. Thus, 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 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 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 rule does not preempt State law, it does not impose substantial direct compliance costs on State and local governments, and 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 rule. In January, February, and May 2007, we met with representatives of States and Indian tribes with approved reclamation programs at meetings hosted by IMCC and NAAMLP to notify the States and Indian tribes of the 2006 amendments' changes to SMCRA and to seek their input on the amendments. IMCC and NAAMLP subsequently submitted joint written comments on specific provisions of the amendments. We considered these comments 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 M-Opinion, one or more States may object to several provisions in these 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. As discussed above in ''IIIA. General Comments,'' we received comments on the proposed rule from 9 States and 1 Indian tribe as well as joint comments from IMCC/NAAMLP. We have considered all these comments in developing this final rule.

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 or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. 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 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. Indian Tribal representatives are members of NAAMLP and had the opportunity to participate in the IMCC/NAAMLP comments on draft regulations in 2007 and on the proposed rule. One Indian tribe commented on the proposed rule, and we considered their comments in developing this final rule.

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

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

Paperwork Reduction Act

OSM sought comments on the collection of information contained in the AML Program proposed rule for modified Part 785. No comments were received from the public regarding the collection of information. The collection of information contained in this final rule has been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned control number 1029–0040. The expiration date for this collection in 30 CFR Part 785 is November 30, 2011. This collection estimates that the applicant burden is 5.3 hours, and the burden for State regulatory authorities is 3.4 hours per response. These burden estimates include time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. We 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. You should direct comments regarding the burden estimate or any other aspect of this collection to the Information Collection Clearance Officer, OSM,

Room 202 SIB, 1951 Constitution Ave., NW., Washington, DC 20240.

National Environmental Policy Act

OSM has determined that these 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).

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: October 14, 2008.

C. Stephen Allred,

Assistant Secretary, Land and Minerals Management.

■ For the reasons given in the preamble, we are amending 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 lands and water eligible for expenditures under title IV of SMCRA and this chapter. Eligible lands and water for reclamation or drainage abatement expenditures under the Abandoned Mine Land program contained in this chapter 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 remining 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:

(1) 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;

(2) 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

(3) 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.*

■ 8. Revise § 785.10 to read as follows:

§ 785.10 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 785 and assigned it control number 1029–0040. The information is being collected to meet the requirements of sections 507, 508, 510, 515, 701 and 711 of Public Law 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. 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.

§ 785.25 [Amended]

■ 9. In § 785.25, remove paragraph (c).

PART 816—PERMANENT PROGRAM PERFORMANCE STANDARDS—SURFACE MINING ACTIVITIES

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

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

■ 11. 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

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

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

■ 13. 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

■ 14. 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.

■ 15. 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

■ 16. 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.

■ 17. 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

■ 18. 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.

■ 19. 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.

■ 20. 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—

* * * * *

■ 21. 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]

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

■ 23. 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.

■ 24. 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].''

■ 25. 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).

* * * * *

■ 26. 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 a 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.

■ 27. 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?
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872.10 Information collection.
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872.12 Where do moneys distributed from the Fund and other sources go?
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872.24 What are Federal expense funds?
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872.26 What are minimum program make up funds?
872.27 How does OSM distribute and award minimum program make up funds?
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872.29 What are prior balance replacement funds?
872.30 How does OSM distribute and award prior balance replacement funds?
872.31 Are there any restrictions on how you may use prior balance replacement funds?
872.32 What are certified in lieu funds?
872.33 How does OSM distribute and award certified in lieu funds?
872.34 Are there any restrictions on how you may use certified in lieu funds?
872.35 When will OSM reduce the amount of prior balance replacement funds or certified in lieu funds distributed to you?

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 distribute all

Fund moneys and other moneys from the Treasury that have been designated for mandatory distribution. We provide information to you showing how we calculated your distribution. We 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 calculate annual fee collections for coal produced in the previous Federal fiscal year on a net cash basis. This means that we 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 distribute any Congressionally-appropriated funds for grants to you out of the Federal expense 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 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 award these funds to you in grants according to the provisions of Part 886 of this chapter.

§ 872.16 Are there any restrictions on how States may use State share funds?

Yes. 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;

(e) Land acquisition under § 879.11 of this chapter; and

(f) Maintenance of the AML inventory under section 403(c) of SMCRA.

§ 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 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 award these funds to you in grants according to the provisions of Part 886 of this chapter.

§ 872.19 Are there any restrictions on how Indian tribes may use Tribal share funds?

Yes. 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;

(e) Land acquisition under § 879.11 of this chapter; and

(f) Maintenance of the AML inventory under section 403(c) of SMCRA.

§ 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 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 Surface Mining Control and Reclamation Act Amendments of 2006, which were enacted as Division C, Title II, Subtitle A of P.L. 109–432, 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 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 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 years 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 calculate 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 calculate using the formula described in paragraph (b) of this section.
(4) October 1, 2022 (fiscal year 2023), and thereafter	100 percent of the amount we calculate using the formula described in paragraph (b) of this section until funds are no longer available or you have reclaimed 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 award these funds to you in grants according to the provisions of Part 886 of this chapter.

§ 872.23 Are there any restrictions on how you may use historic coal funds?

Yes. 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;

(e) Land acquisition under § 879.11 of this chapter; and

(f) Maintenance of the AML inventory under section 403(c) of SMCRA.

§ 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 Are there any restrictions on how OSM may use Federal expense funds?

(a) We may use Federal expense funds only for the purposes in sections 402(g)(3)(A) through (D) and 402(g)(4) 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)(A) through (D) or (4) of SMCRA for any State or Indian tribe from moneys we annually allocate or distribute to a State or Indian tribe under the authority of sections 402(g)(1) or (5) of SMCRA.

(c) We 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 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 funds is moneys in the Secretary's 20 percent share of the Fund that are authorized for mandatory distribution.

(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 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 years 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 Are there any restrictions on how you may use minimum program make up funds?

Yes. You may only use minimum program make up funds for:

(a) Priority 1 and 2 coal reclamation under sections 403(a)(1) and (2) of SMCRA;

(b) Priority 3 reclamation that is part of Priority 1 or 2 coal reclamation under sections 403(a)(1) or (2) of SMCRA and § 874.13 of this chapter;

§ 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) Subject to § 872.35, 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 Are there any restrictions on how you may use prior balance replacement funds?

(a) Yes. 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) Yes. 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 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 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 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) Subject to § 872.35, 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.
(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 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 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 Are there any restrictions on how you may use certified in lieu funds?

There are no limitations or restrictions on the use of certified in lieu funds in the Surface Mining Control and Reclamation Act Amendments of 2006 which were enacted as Division C, Title II, Subtitle A of P.L. 109–432.

§ 872.35 When will OSM reduce the amount of prior balance replacement funds or certified in lieu funds distributed to you?

(a) In any fiscal year in which the amount of Treasury funds required to be transferred under §§ 872.30 and 872.33 of this chapter and under section 402(i)(1) of SMCRA exceeds the maximum annual limit of $490 million, we will adjust the amount of these payments to reduce them to the level of the cap. Each distribution or transfer for the FY will be reduced by the same percentage.

(b) We will not include amounts under section 402(h)(5)(A) as part of this calculation.

PART 873—FUTURE RECLAMATION SET-ASIDE PROGRAM

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

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

■ 29. 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

■ 30. The authority citation for part 874 continues to read as follows:

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

■ 31. 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.

■ 32. 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 for—

(a) Reclamation projects using moneys from the Fund;

(b) Reclamation projects using prior balance replacement funds provided to uncertified States and Indian tribes under § 872.29 of this chapter; or

(c) Coal reclamation projects by certified States and Indian tribes required to maintain certification under section 411(a) of SMCRA and the agreement required by §§ 875.13(a)(3) and 875.14(b) of this chapter to maintain that certification.

■ 33. 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.

* * * * *

■ 34. Revise § 874.13 to read as follows:

§ 874.13 Reclamation objectives and priorities.

(a) When you conduct reclamation projects under this Part you may 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 past, current, and future Priority 1 or Priority 2 reclamation projects. 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.

■ 35. 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.

* * * * *

■ 36. 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 or to certified States or

Indian tribes for coal AML reclamation as required to maintain certification under section 411(a) of SMCRA, 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

■ 37. The authority citation for part 875 continues to read as follows:

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

■ 38. Revise the heading for Part 875 to read as set forth above:

■ 39. 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.

■ 40. 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 § 872.16, Tribal share funds under § 872.19, or historic coal funds under § 872.23 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:

(1) you must use State or Tribal share funds distributed to you under section 402(g)(1) of SMCRA before October 1, 2007 in accordance with this part; and

(2) you may use prior balance replacement funds distributed to you under section 411(h)(1) of SMCRA, certified in lieu funds distributed to you under section 411(h)(2), or both to maintain certification as required by §§ 875.13 and 875.14. The noncoal reclamation requirements of this Part do not apply to the use of prior balance replacement funds or certified in lieu funds.

■ 41. 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;

* * * * *

■ 42. 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**.

■ 43. 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 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 and Part 874 of this chapter.

■ 44. Revise § 875.16 to read as follows:

§ 875.16 Exclusion of certain noncoal reclamation sites.

(a) 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 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.*).

(b) You, the certified State or Indian tribe, may not use moneys distributed from the Fund under section 402(g)(1) of

SMCRA 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.*).

■ 45. 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 noncoal reclamation using moneys distributed from the Fund under section 402(g)(1) of SMCRA, 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

■ 46. The authority citation for part 876 is revised to read as follows:

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

■ 47. 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.

■ 48. 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 abatement of the causes and treatment of the effects of acid mine drainage in a comprehensive manner 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]

■ 49. Remove §§ 876.13 and 876.14.

PART 879—ACQUISITION, MANAGEMENT, AND DISPOSITION OF LANDS AND WATER

■ 50. The authority citation for part 879 is revised to read as follows:

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

■ 51. Revise § 879.1 to read as follows:

§ 879.1 Scope.

This part establishes procedures for acquisition of eligible land and water resources for emergency abatement activities and reclamation purposes by you, a State or Indian tribe with an approved reclamation program which has not certified completion of coal reclamation, or by us. It also provides for the management and disposition of lands acquired by the OSM, State, or Indian tribe.

■ 52. 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]

■ 53. Remove § 879.10.

■ 54. 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.

* * * * *

■ 55. Amend § 879.15 by revising paragraph (h) to read as follows:

§ 879.15 Disposition of reclaimed land.

* * * * *

(h) We will handle all moneys received under this paragraph as unused funds in accordance with § 886.20 of this chapter.

PART 880—MINE FIRE CONTROL

■ 56. The authority citation for part 880 is revised to read as follows:

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

■ 57. 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

■ 58. The authority citation for part 882 is revised to read as follows:

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

■ 59. 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.

■ 60. 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

■ 61. The authority citation for part 884 is revised to read as follows:

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

■ 62. 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.

■ 63. 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.

■ 64. In § 884.13, revise the introductory text and paragraph (a) to read as follows:

§ 884.13 Content of proposed State reclamation plan.

You must submit each proposed State reclamation plan to the Director in writing. A proposed plan for a certified State or Indian tribe must include the designation described in paragraph (a) below and a commitment to address eligible coal problems found or occurring after certification as required in §§ 875.13(a)(3) and 875.14(b) of this chapter. A proposed plan for an uncertified State or Indian tribe must include the following information.

(a) A designation by the Governor of the State or the governing authority of the Indian tribe of the agency authorized to administer the State or Tribal reclamation program and to receive and administer grants under Part 885 or Part 886 of this chapter.

* * * * *

■ 65. 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.

■ 66. 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 are 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 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 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 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 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 deobligate the funds when we close your grant. We 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.

■ 67. 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) may 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 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 § 886.20 of this chapter.

(c) Funds for the current fiscal year are 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 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 is normally for 3 years.

(c) We may extend the grant period at your request. We normally approve one extension for up to one additional year.

(d) The grant period for funding your administrative costs does not normally exceed the first year of the grant.

(e) We award grants containing State or Tribal share funds distributed to you in Fiscal Years 2008, 2009, or 2010 for a budget period of five or three years at your request.

§ 886.15 How do I apply for a grant?

(a) You must use application forms and procedures specified by OSM.

(b) We approve or disapprove your grant application within 60 days of receipt.

(c) If we do not approve your application, we 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 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 do 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 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 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 deobligate the funds when we close your grant. We treat unused funds as follows:

(1) We 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 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 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 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 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 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, Public Law 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, Public Law 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

■ 68. The authority citation for part 887 continues to read as follows:

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

■ 69. 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]

■ 70. Remove § 887.3.

■ 71. 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.

■ 72. 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.

■ 73. 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.

[FR Doc. E8–26458 Filed 11–13–08; 8:45 am]

BILLING CODE 4310–05–P