

FEDERAL REGISTER: 45 FR 42333 (June 24, 1980)

DEPARTMENT OF THE INTERIOR

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

30 CFR Parts 700, 701

Definition of Surface Coal Mining Operations; Proposed Rulemaking

ACTION: Proposed rulemaking.

SUMMARY: The purpose of this rulemaking proceeding is to resolve any lingering ambiguity as to the meaning of "surface coal mining operations," as the term is used in both the interim and permanent programs under the Act. This is accomplished by redefining that term to reflect more clearly the meaning that OSM believes Congress intended.

DATES: Written comments must be received at the address below on or before July 24, 1980, by no later than 5 p.m. A public hearing will be held beginning at 9:30 a.m. on July 16, 1980.

ADDRESSES: Written comments should be addressed to: Office of Surface Mining, U.S. Department of the Interior, P.O. Box 7267, Benjamin Franklin Station, Washington D.C. 20044, or may be hand-delivered to: Office of Surface Mining, Room 153, U.S. Department of the Interior, South Building, 1951 Constitution Avenue, NW., Washington, D.C. 20240, where all comments will be available for inspection. The public hearing will be held in Room 8070, Department of the Interior, 18th and C Streets, NW., Washington, D.C. 20240.

FOR FURTHER INFORMATION CONTACT: Richard Robinson, Office of Surface Mining, U.S. Department of the Interior, Washington, D.C. 20240, (202) 343-8061, or Mark Squillace, Office of the Solicitor, U.S. Department of the Interior, Washington, D.C. 20240, (202) 343-4671.

SUPPLEMENTARY INFORMATION:

Public Hearing : Individual testimony at the hearing will be limited to 15 minutes. The hearing will be transcribed. Filing of a written statement at the time of testimony will be helpful in facilitating the transcription of the testimony. Advance submission of a written statement would also be helpful in providing OSM officials who attend the hearing with an opportunity to consider appropriate questions in areas where clarification or elaboration is needed.

The public hearing will continue on the day identified above until all persons scheduled to speak have been heard. Persons in the audience who have not been scheduled to speak and who wish to do so will be heard at the end of scheduled speakers. The hearing will end after all people scheduled to testify and persons present in the audience who wish to speak have been heard. Persons not scheduled to testify, but wishing to do so, assume the risk of having the public hearing adjourned unless they are present in the audience at the time all scheduled speakers have been heard.

BACKGROUND

Section 701(28) of the Act defines "surface coal mining operations" as --

(A) *Activities* conducted on the surface of lands in connection with a surface coal mine or subject to the requirements of section 516 surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting leaching or other chemical or physical processing, *and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the mine site: Provided, however* , that such activities do not include the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16 2/3 per centum of the tonnage of minerals removed for purposes of commercial use or sale or coal exploration subject to section 512 of this Act; and

(B) The *areas upon which such activities occur* or where such activities disturb the natural land surface. Such areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities except for haulage, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities of other property or materials on the surface, resulting from or incident to such activities. (Emphasis added.) [Page 42334]

The definition thus encompasses two categories; activities conducted on the surface of land in connection with a surface coal mine or an underground mine with surface effects, and those areas upon which such activities or the effects of such activities occur.

Through the use of examples, the statutory definition offers some guidance as to the scope of activities that are connected with a mine operation. It is unclear from the syntax alone, however, whether the phrase "at or near the mine site" at the end of the examples in paragraph (A), modifies only the phrase immediately preceding it, i.e. "loading of coal for interstate commerce," or whether it also modifies "the cleaning, concentrating or other processing or preparation." In the interim program regulations, the statutory definition of "surface coal mining operations" was adopted verbatim. With the promulgation of the permanent regulations on March 13, 1977, 30 CFR Part 700, the definition of "surface coal mining operations," was amended, *see* 44 FR 15312 (1977), with minor changes not relevant to the problem addressed here. In the preamble to these regulations, however, OSM stated its intent that "at or near the minesite" modify only the phrase "loading of coal for interstate commerce." *See* 44 FR 15095, 15293. OSM's interpretation of the Act in the preamble to the permanent program failed, however, to persuade the Interior Board of Surface Mining and Reclamation Appeals that the definition in the interim rules was not ambiguous.

Western Engineering, 1 IBSMA 202, 211 n. 9 (1979). In that case, Western Engineering, which operated a coal preparation and loading facility along a river, was cited by OSM for failure to comply with certain performance standards under the interim program. While acknowledging that the statutory definition of "surface coal mining operations" could be read as OSM contended, the Board held that, as a legal matter, the ambiguity should be resolved in favor of Western.

The Board has yet to consider OSM's authority to regulate coal processing facilities after the new rules were promulgated although OSM believes that the preamble to these rules plainly disposes of this question in favor of federal regulation. Moreover, in *In re Permanent Surface Mining Regulation Litigation*, Civ. No. 79-1144 (D.D.C., May 16, 1980) Judge Flannery recently held that the Secretary had correctly construed the definition of "surface coal mining operations" so as to encompass coal processing facilities whether or not they are located "at or near the mine site." In reaching this conclusion, the court did not even deem it necessary to resort to the preamble explanation of the definition notes above. (Slip opinion at 52).

To avoid further confusion on this issue, however, and to more fully advise the public of OSM's interpretation of the Act OSM proposes to redefine "surface coal mining operations" so as to specifically include coal preparation and processing facilities within the jurisdiction of the Act, whether or not they are at or near the mine site, so long as such activities are connected with a mine operation subject to the Act. This is accomplished simply by incorporating the phrase "loading of coal for interstate commerce at or near the mine site" into a separate sentence. For purposes of this definition, the loading of coal does not include such activities as the crushing or sizing of coal. These activities are considered part of coal processing and preparation.

In addition to the above change, the definition of "coal processing plant" at 30 CFR 701.5 is revised to clarify that the chemical or physical processing of coal is included within its scope regardless of whether that processing is accompanied by the separation of coal from its impurities. This change is intended to make the rules more fully consistent with the language of the Act defining "surface coal mining operations," 30. U.S.C. 1291(28), and to reflect more clearly OSM's original intent.

OSM believes that these proposed rules reflect Congress' intent. Congress was aware of the serious environmental and safety problems that can accompany the processing and preparation of coal, and intended that such problems should be controlled. The House Report on the Act states that it would "implement a national system of coal mining regulation by -- (1) covering all coal surface mining * * * and the surface impacts of underground mines and *coal processing*; * * *" H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 57 (1977). (Emphasis added.) Moreover, many times throughout the legislative history, Congress cited the Buffalo Creek disaster as the kind of tragedy it expected the Act to prevent. *See e.g.*, H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 85 (1977); H.R. Rep. No. 94-1445, 94th Cong., 2d sess. 19 (1976). The disaster at Buffalo Creek resulted from the collapse of a refuse dam at a coal preparation facility in West Virginia. This facility processed coal from five underground mines, two auger mines and one surface mine. Given Congress' intent to prevent future disasters of the kind that occurred at Buffalo Creek, OSM does not believe that the authority to regulate coal processing or preparation facilities was intended to depend on the fortuitous circumstance of one or more of the mines serviced being sufficiently near the facility to be deemed at or near the mine site. Indeed, such a construction would encourage circumvention of the Act by allowing operators to avoid regulation by locating their processing facilities away from the mine sites.

In preparing the permanent regulatory program OSM assumed that the interpretation set forth in this rule, as it is proposed to be amended, was the interpretation that would be given to the rule as adopted. *See e.g.*, 44 FR 15095, 15293 (1979). Accordingly, the Director, OSM has determined that this rulemaking is within the scope of the regulatory analysis and environmental impact statement that were prepared for the permanent regulatory program under the Act. Permanent Regulatory Program of the Surface Mining Control and Reclamation Act of 1977; Final Regulatory Analysis, OSM-RA-1 (1979); Permanent Regulatory Program implementing Section 501(b) of the Surface Mining Control and Reclamation Act of 1977: Final Environmental Impact Statement, OSM-EIS-1 (1979). [Page 42335]

DRAFTING INFORMATION

The primary author of this proposed rulemaking is Mark Squillace, Office of the Solicitor.

Joan M. Davenport,
Assistant Secretary, Energy and Minerals .

June 13, 1980

PART 700 -- GENERAL

Section 700.5 is proposed to be amended as follows:

SECTION 700.5 [AMENDED]

Surface coal mining operations means --

(a) Activities conducted on the surface of lands in connection with a surface coal mine or subject to the requirements of Section 516 surface operations and surface impacts incident to an underground coal mine, the products of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating or other processing or preparation of coal. Such activities also include the loading of coal for interstate commerce at or near the mine site. *Provided* , these activities do not include the extraction of coal incidental to the extraction of other minerals, where coal does not exceed 16 2/3 per centum of the tonnage of minerals removed for purposes of commercial use or sale, or coal exploration subject to Section 512 of the Act; and *provided further* , that excavation for the purpose of obtaining coal includes extraction of coal from coal refuse piles; and

(b) Areas upon which the activities described in paragraph (a) above occur or where those activities disturb the natural land surface. These areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of those activities and for haulage and excavation, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas, and other areas upon which are sited structures, facilities, or other property or material on the surface, resulting from or incident to those activities; and

PART 701 -- PERMANENT REGULATORY PROGRAM

Section 701.5 is proposed to be amended as follows:

SECTION 701.5 [AMENDED]

Coal processing plant means a collection of facilities where run-of-the-mine coal is subjected to chemical or physical processing or separated from its impurities. The processing plant may consist of, but need not be limited to, the following facilities: loading facilities; storage and stockpile facilities; sheds, shops and other buildings; water treatment and water storage facilities; settling basins and impoundments; coal processing and other waste disposal areas; roads, railroads and other transport facilities.

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