

**FEDERAL REGISTER: 45 FR 47162 (July 14, 1980)**

DEPARTMENT OF THE INTERIOR

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

30 CFR Part 732

Proposed Amendment to Procedures for Review of State Program Amendments

ACTION: Proposed rulemaking.

**SUMMARY:** The Office of Surface Mining Reclamation and Enforcement has granted a petition to initiate rulemaking to amend the procedures of Section 732.17 for review and approval of State program amendments. Amended regulations are proposed and OSM seeks public comment on the proposed amendment.

**DATES:** A public hearing on the proposed amendments will be held on August 14, 1980, at 9:00 a.m. Comments must be received by August 15, 1980 not later than 5:00 p.m.

**ADDRESSES:** The public hearing will be held in the Department of the Interior Auditorium, 18th and C Streets N.W., Washington, D.C. 20240.

Written comments may be mailed to: Office of Surface Mining, U.S. Department of the Interior, P.O. Box 7267, Benjamin Franklin Station, Washington, D.C. 20004, or be hand delivered to: Office of Surface Mining, Room 153, U.S. Department of the Interior, South Building, 1951 Constitution Avenue, N.W., Washington, D.C. 20240.

**FOR FURTHER INFORMATION CONTACT:**

Carl C. Close, Assistant Director for State and Federal Programs, Office of Surface Mining, U.S. Department of the Interior, Washington, D.C. 20240, (202) 343-4225.

**SUPPLEMENTARY INFORMATION:**

**I. BACKGROUND**

On March 13, 1979, the Secretary of the Interior promulgated the final rules for the permanent regulatory program under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.* (SMCRA). The rules include the requirements of Section 503(a) of the Act that for a State to assume primary jurisdiction under the Act for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders it must submit its proposed permanent program to OSM for approval.

Sections 732.12, 732.13 and 732.15 of the permanent program regulations prescribe the procedures, time schedules and criteria for approval and disapproval of a proposed State program. Section 732.17 requires that amendments to the approved State program follow the same procedures as those required by Sections 732.12, 732.13 and 732.15.

On September 24, 1979, Ed Herschler personally and as Governor on behalf of the State of Wyoming petitioned OSM to modify Section 732.17 to streamline the process for amendment of approved State programs following changes in Federal requirements based on court decisions or amendments of the Act. The petition proposed that (1) the Regional Director be authorized to approve any proposed State program amendment containing analogous changes and the decision by the Regional Director be the final decision by the Department of the Interior; (2) the decision be made after notice of the proposed amendment is published in the Federal Register and the public has an opportunity to comment; and (3) the Regional Director publish his decision within 60 days from the day the proposed amendment is received and the amendment to the State program be effective the day it is approved.

On December 20, 1979, the Director, OSM granted the petition submitted by Governor Herschler. In granting the petition, the Director agreed in principle with the need to clarify 30 CFR 732.17, but indicated that he had not made a determination on how this objective could best be accomplished or what time limits should be set on actions to amend State programs.

**II. PUBLIC COMMENTS ON THE PETITION**

Governor Herschler's petition was published in the Federal Register on October 18, 1979. Eight written comments were received during the comment period which closed on November 19, 1979. Seven statements supported the petition and recommended that it be granted by OSM. One statement supported denial of the petition.

Those commenters suggesting that OSM grant the petition provided the following arguments:

*The procedural requirements set forth in Section 732.17 impose upon the States a rigid formula which must be followed regardless of the content or effect of any particular alteration or amendment to the State program.* The commenters would not require the application of Section 732.17 procedures where the State merely seeks to change its program to comply with new changes in the Federal law. Commenters believe that any changes in the Federal Act or regulations which make requirements less stringent should be available to the various parties without delay. In many areas of the Federal regulations there is need for more in-depth analysis of the requirements and the long term effects of those requirements. State programs are based on, and in some cases mirror, the Federal requirements. Therefore, the commenters argue that there must be an equitable and expedient method of changing State programs when Federal requirements are altered.

Commenters believe that the petition to amend 30 CFR 732.17 would result in a more efficient and effective administrative procedure for dealing with the dynamics of a federally-approved State program and promote a more reasonable approach to regulating surface coal mining operations.

*The existing regulation provides a cumbersome and time-consuming procedure for Federal review and approval of State proposed amendments to their permanent programs.* Commenters state the current procedure is cumbersome because it requires that the final decision must be made at the highest level within the OSM, the Director, and it is time-consuming because it can, and due to the heavy OSM workload probably will, take at least ten months for amended State programs to be approved by OSM and to become effective. They note by comparison that under the proposal outlined in the petition, review and approval of amendments to approved State permanent programs would likely take one-half of the time required under the existing 30 CFR Part 732 procedure. The proposal would allow the Regional Director to make the final decision on proposed State amendments where such amendments followed legislative or judicial changes in OSM's regulations. Commenters claim that where changes are so limited, it is logical and efficient to place approval authority in the Regional Director's hands.

*Modification of 30 CFR Part 732 will encourage States to formulate and submit their regulatory programs on a timely basis to OSM for review as long as they have confidence that program amendments necessitated by current litigation or OSM rulemaking can be accomplished without undue delay, expense and administrative burden.* Commenters point out that because of the procedural requirements of Section 732.17; States are uncertain whether they should take a chance and submit their program for approval and hope the Federal law does not change and thus require a new approval procedure under Section 732.17, or to hesitate on filing their program pending final publication of proposed OSM regulations which can then be incorporated into the State program. Commenters claim the recommended change would alleviate this confusion and enhance the approval process in that any subsequent changes in the Act or OSM regulations could also be incorporated into the State program with a minimum of detail and confusion.

*The procedures suggested in the petition will return a small portion of State sovereignty extended in sections 101(f) and 505(a) of the Act, but precluded in the permanent program regulations of OSM.* Commenters maintain that States have been consistently supportive of their having primacy in developing, authorizing, issuing, and enforcing regulations under the Federal Act. They believe that lengthy and involved amendment procedures in cases of changes in the Act or regulations is a denial of State primacy contemplated by the Act. Commenters stated that granting the petition will assist in achieving the goal of State primacy in the implementation of the Act by improving administration of the Surface Mining Act based on reasonable regulations through a cooperative effort between the State and the Federal government. Other commenters requested that the petition be denied. They noted that the current regulations at 30 CFR 732.17 explicitly cover those situations where a State may wish to amend its program, but is not required to do so, such as following a change in the requirements of the Act or regulations resulting in less stringent Federal requirements. The commenters believed that the proposed amendment is generally unsound as well as overbroad for achieving the purposes set forth in the petition itself and offered the following reasons:

*In those instances where a new statutory requirement is imposed or an OSM regulation has been invalidated, OSM must have the opportunity to conduct a rulemaking with regard to the subject-matter involved.* Commenters noted that not only does the Act require an OSM rulemaking by which to judge State submissions, but also that a new statutory provision or invalidation of an OSM regulation presents a national issue and this renders rulemaking necessary. The commenters asserted that an expedited procedure would not allow sufficient time to conduct such a rulemaking, for a decision would be required within 60 days of a State's submission of an amendment, that decision would be final for the Department, and the State amendment would be effective immediately.

*The proposed amendment to Section 732.17 would not permit in most instances adequate opportunity for public comment and adequate consideration whether the State amendments meet the requirements of the Act and Federal regulations.* Commenters stated that any change in a State program provision must be measured by the same standard as the original State program provision. The fact that the change is one which makes the State program provision less stringent makes it very important that the change be subjected to sufficient scrutiny to see that it does not fall below the new Federal standard. They contend that an expedited approval process would be justified only where the State amendment would result in a statutory or regulatory provision essentially identical to the new Federal standard.

*The Regional Director is not the appropriate individual to make a final determination for the Department, as proposed by petitioner.* Commenters state that changes in the Federal statute or regulations present national issues to be decided at a national level. The five OSM Regions should not operate autonomously in setting OSM policy and requirements in the wake of such changes. Commenters believe that Regional Directors often have too close a working relationship with the States to be entrusted with the Secretary's final decisionmaking authority on State program provisions.

It should be noted that while these commenters supported denial of the petition, they provided the following guidance for use in drafting a proposed rule should the petition be granted.

(1) The proposed rule should insure that no State program amendment may be considered in the absence of a Federal rule on the subject.

(2) An expedited review procedure should be available only where the State amendment will result in a statutory or regulatory provision essentially identical to the Federal standard.

(3) The final decision should rest with the Director or the Secretary.

The commenters raised concerns about the amendment process that OSM believes should be addressed through rulemaking. The proposed rule sets forth a procedure for amendment processing that will speed action on amendment requests and at the same time assures public participation in the decision making process. Commenters' concerns about the imposition of a rigid procedure for amendment processing have been cured by providing for a case-by-case determination on review processes and time schedules to be followed for each amendment request. The revised amendment procedures apply to both State and OSM initiated amendment requests. OSM has chosen not to seek a change in the delegation of authority for approval/disapproval actions on amendment requests. OSM does not believe that this issue will materially impact the review process and time schedule set forth in the proposed rule.

All amendment requests would be considered using the proposed procedures. The establishment of different review procedures for certain types of amendments would needlessly complicate the amendment review process. The flexibility found in the proposed review process will allow consideration of all amendments. Adjustments in the review process and timing can be made on a case-by-case basis giving consideration to both scope and complexity of the proposed modifications to approved State programs.

### **III. PROPOSED CHANGES**

The rule being proposed today clarifies and streamlines the amendment process for approved State programs. While the existing regulations in 30 CFR 732.17 provide opportunity for State initiated changes, the procedures make no allowance for the scope of complexity of amendment requests. All amendment requests are treated in the same manner. The references to procedures, time, schedules and criterion for approval or disapproval set forth in Sections 732.12, 732.13, and 732.15 are confusing because application to the amendment process requires selecting only those aspects of the cited regulations applicable to the amendment being considered.

In drafting the proposed regulation change OSM has attempted to balance the need for prompt action on State program amendments with the need for and desirability of public involvement in the review process. The minimum 30 day public comment period set forth in 43 CFR Part 14 has been incorporated in the proposed rule. A shorter period may be used only in certain specified situations when the additional requirements of 43 CFR Part 14 are met. Amendment requests will vary in both scope and complexity and may range from minor wording changes in State regulations to complete revisions of all or parts of complete systems that form an approved State program. For this reason OSM believes that the amendment process must be flexible and provide an amendment review procedure that can be tailored to the specific amendment being considered.

The proposed regulation provides for:

- (1) Publication of notice of receipt of an amendment by OSM within ten days;
- (2) Public comment period of 30 days for the majority of all amendment requests and a minimum 15 day public comment period under certain specified conditions as required by 43 CFR Part 14;
- (3) Holding public hearings on proposed amendments as necessary;
- (4) Decision on amendment requests within 30 days after the close of the public comment period;
- (5) A resubmission period of 30 days following the disapproval of an amendment request; and
- (6) Final decision on resubmitted amendment requests within 30 days.

Under this process amendments that contain changes analogous to the Federal Act and/or regulations could be processed in two months or less. For complex amendments where public hearings are determined to be desirable the process could be expanded to the full six month maximum time. Six months has been established as the maximum period for action on State program amendments to conform with Section 503(b) of SMCRA which provides that the Secretary approve or disapprove a State program within six calendar months after submission. OSM believes that the proposed rule meets the requirements of 43 CFR Part 14.

In addition to providing a revised scheduling of the amendment review and approval process, the proposed regulation incorporates either in whole or by reference requirements of 30 CFR 732.12, 732.13 and 732.15 that are directly applicable to the amendment review process. Included in this category are provisions concerning hearing format and procedures, review by the Regional Director, review and concurrence by appropriate Federal agencies, effective dates of amendments, and criteria for amendment approval.

#### **IV. ADDITIONAL INFORMATION REQUESTED**

OSM seeks public comment on the proposed rule.

Interested persons may submit written comments on the proposed rulemaking on or before August 15, 1980 at the address listed under "Addresses" not later than 5:00 p.m. A public hearing will be held on August 14, 1980 in the Department of the Interior Auditorium, 18th and C Streets, N.W., Washington, D.C. The hearing will begin at 9:00 a.m. 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 giving oral testimony would be helpful and would assist the court reporter.

Persons in the audience who have not been scheduled to speak and wish to do so will be heard after the scheduled speakers. Persons not scheduled to testify, but wishing to do so, assume the risk of having the public hearing adjourned if they are not present when all scheduled speakers conclude. The administrative record will remain open for receipt of additional written comments until August 15, 1980 at 5:00 p.m.

#### **V. DETERMINATION OF SIGNIFICANCE**

The proposed rule does not fall within any of the categories listed in 43 CFR 14.3(c). Consequently, the Department of the Interior has determined that this document is not a significant rule and does not require a regulatory analysis under Executive Order 12044 and 43 CFR Part 14.

Furthermore, the Department has determined that a notice of intent to propose rules will not be beneficial to the drafting process. OSM received sufficient information during the public comment period, which was initiated when the petition was published in the Federal Register, to prepare a draft rule and proceed directly to proposed rulemaking. A notice of intent to propose rules would only duplicate OSM's efforts in the first public comment period.

#### **VI. STATEMENT OF ENVIRONMENTAL IMPACT**

The Department of the Interior has determined that this action will not have a significant effect on the human environment and an environmental impact statement will therefore not be prepared.

#### **VII. Statement of Authorship**

The primary author of this document is Arthur Abbs, State Programs Division, Office of Surface Mining.

Dated: July 3, 1980.

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

#### **Text of the Proposed Amendment**

30 CFR 732.17(f)(2) would be deleted. A new section 30 CFR 732.17(h) would be added to read as follows:

##### **SECTION 732.17 - STATE PROGRAM AMENDMENTS.**

\* \* \* \* \*

(f) \* \* \*

(2) [Deleted]

\* \* \* \* \*

(h) The following procedures, time schedules and criteria for approval and disapproval shall apply to State program amendments.

(1) Within ten days after receipt of a State program amendment from a State regulatory authority, the Regional Director will publish a notice of receipt of the amendment in the Federal Register.

(2) The Federal Register notice announcing the receipt of the amendment will indicate that the amendment(s) is being reviewed by the Regional Director and will include the following:

(i) The text or a summary of the amendment(s) proposed by the regulatory authority;

(ii) Addresses where copies of the proposed amendment(s) may be obtained if the text is not included in the Federal Register notice and the cost for copies of the proposed amendment(s) if applicable.

(iii) Date(s) of public comment period(s) and addresses where public comments should be directed;

(iv) Dates and locations of public hearing(s) and/or meeting(s) if public hearing(s) and/or meeting(s) are to be held; and

(v) A schedule for review and action on the amendment(s).

(3) A minimum public comment period of 30 days will be provided for each proposed State program amendment, except a 15 day public comment period may be provided where an amendment concerns changes in State law, regulations or the procedures contained in the approved program that are analogous to changes in SMCRA and/or implementing regulations, provided that the notice of receipt published in the Federal Register includes the full text of the proposed amendment and provided that all applicable provisions of 43 CFR Part 14 are complied with.

(4) Public hearings will be provided at the discretion of the Regional Director. Public hearing plans will be announced in the notice of receipt of the amendment published in the Federal Register. In determining whether to hold a public hearing, the Regional Director will consider the subject of the amendment, the complexity of the amendment, and public hearing and meetings conducted by the State regulatory authority prior to submission of the amendment for OSM approval.

Hearings shall be informal and follow legislative procedures. The format and the rules of procedure for each hearing shall be determined by the Regional Director and published in the notice required by Section 732.17(h)(1).

(5) Upon the close of the public comment period, the transcript, written presentations, exhibits, and copies of all comments shall be transmitted by the Regional Director to the Director with a recommended decision from the Regional Director.

(6) Upon receipt of the Regional Director's recommendation, the Director shall consider all relevant information, including any information obtained from public hearings and comments, and shall approve or disapprove the amendment request within 30 days after the close of the public comment period established in accordance with Section 732.17(h)(3).

(7) If the Director disapproves the amendment request, the State regulatory authority will have 30 days after publication of the Director's decision to resubmit a revised amendment request for consideration by the Director.

(8) The Director will approve or disapprove amendment resubmissions within 30 days after receipt. No public comment will be sought prior to the Director's final decision unless the scope of the amendment has been expanded beyond that of the initial amendment request. In such cases the Director may approve/disapprove portions of the amendment request and subject the remainder to review and approval procedures outlined in this subsection or treat the entire amendment request as a new request and initiate the review procedures of this section.

(9) The applicable criteria for approval or disapproval of State programs set forth in Section 732.15 shall be utilized by the Director in approving or disapproving State program amendments.

(10) State program amendments shall not be approved until the Director has --

(i) Solicited and publicly disclosed the views of the Administrator of the Environmental Protection Agency, the Secretary of Agriculture, and the heads of other Federal agencies concerned with or having special expertise relevant to the program amendment(s) as proposed; and

(ii) Obtained written concurrence of the Administrator of the Environmental Protection Agency with respect to those aspects of a State program amendment(s) which relate to air or water quality standards promulgated under the authority of the Federal Clean Water Act, as amended (33 U.S.C. section 1251 *et seq.* ), and the Clean Air Act, as amended (42 U.S.C. section 7401 *et seq.* ).

(11) All decisions approving or disapproving program amendments shall be published in the Federal Register and shall be effective upon publication unless the notice specifies a different effective date.

(12) The Director shall complete actions on amendment requests in accordance with the schedule developed under Section 732.17(h)(2)(v); however final action on all amendment requests must be completed within six months after receipt of the proposed amendments from the State.

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