

FEDERAL REGISTER: 46 FR 7906 (January 23, 1981)

DEPARTMENT OF THE INTERIOR

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

30 CFR Part 732

State Program Amendment Process

ACTION: Final Rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement is amending the procedures of Section 732.17 concerning amendment of State programs, to shorten and simplify in certain situations the State program amendment process.

DATE: This rule is effective January 23, 1981.

ADDRESSES: Written comments submitted on the proposed rule may be reviewed in Room 153, Office of Surface Mining, U.S. Department of the Interior, South Building, 1951 Constitution Avenue, NW., Washington, D.C. 20240, Monday through Friday, 8:30 a.m. to 5:00 p.m.

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 of 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.

On July 14, 1980, the Secretary published a proposed rule (45 FR 47162-47165) to amend 30 CFR 732.17 to clarify and streamline the amendment process for approved State programs.

The proposed regulation provided 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 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 was 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 found that the proposed rule met the requirements of 43 CFR Part 14 concerning requirements for public participation.

In addition to providing a revised scheduling of the amendment review and approval process, the proposed regulation incorporated 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.

On August 14, 1980, a public hearing was held in Washington, D.C. to consider oral public comments on the proposed rule. The public comment period closed on August 15, 1980.

II. PUBLIC COMMENTS ON THE PROPOSED RULE

Comments on the proposed rule were received from eight individuals and groups during the public comment period and at the public hearing on the proposed rule. Six commenters supported the overall purpose of the proposed rule. One commenter opposed adoption of the proposed rule and one commenter expressed concern about those aspects of the proposed rule that limit public review and comment on state program amendments or revised state program amendments. Specific comments and proposals for modification of the proposed rule presented by the commenters are discussed below:

1. The Appalachian Research and Defense Fund of Kentucky, Inc. (ARDFK) opposed the proposed rule because it believes it represents a process which is contrary to congressional intent that there be a uniform surface mine regulatory program in the United States. ARDFK believes the proposed rules allow a particular state to apply pressure at a local or regional level for approval of regulations or a regulatory scheme which is less stringent or in other ways not uniform with the regulatory schemes being approved or disapproved in other states. It stated that the present method for review of state programs and amendments is essential if there is going to be a uniform and fair permanent program regulatory system.

The Secretary does not agree with the commenter's contentions. The proposed rule does not in any way modify or change the criteria for approval of state regulatory programs. Amendments to state programs processed under the procedures set forth in 30 CFR 732.17 will be evaluated against the criteria established in Section 503 of SMCRA and 30 CFR 732.15 that relate to the amendment proposed by the state. This regulation modification does not provide any changes in the standards against which state programs or amendments to state programs will be evaluated. The revised regulation only provides flexibility in the procedures for review of state program amendments. 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 the Secretary believes that the amendment process must be flexible and provide an amendment review procedure that can be tailored to the specific amendment being considered. {7907}

2. The Environmental Policy Institute (EPI) recommended that proposed language of Section 732.17(h)(2)(ii) concerning notice of the cost of copies be deleted and replaced with language comparable to the last sentence of 30 CFR 732.12(a)(1) which provides that single copies of proposed state program materials be furnished, free of charge, by the Regional Director upon request.

The Secretary agrees with the commenter's suggestion and has modified the language of Section 732.17(h)(2)(ii) to provide copies of proposed state program amendments to requesters where the full text of the amendment is not included in the Federal Register

3. EPI recommended that proposed Section 732.17(h)(4) should be made fully consistent with the final amendments of 30 CFR 732.12 issued on May 20, 1980 (45 FR 33925). This section provides that public hearings shall be held no sooner than five days before the close of the public comment period and that the comment period shall end on a date following any public hearing scheduled to be held.

The Secretary agrees with the commenter's suggestion and has modified 30 CFR 732.17(h)(4) to include the revised provision.

4. EPI suggested that there should be more detailed guidelines under which the Regional Director could waive a public hearing under proposed Section 732.17(h)(4). It noted that this is particularly important when the Regional Director waives a hearing on the basis of the state's hearings or meetings. In this case there is no language compelling the state to furnish the record on such hearings to the Regional Director for consideration in his or her recommendation to the Director.

The Secretary agrees that in those instances where the Regional Director determines that a public hearing will not be held on the ground that public hearings and meetings have already been held by the state, that the state regulatory authority should be obliged to provide the Regional Director a complete record of any hearings or meetings including transcripts, written presentations, exhibits and copies of all comments. 30 CFR 732.17(h)(4) has been modified to incorporate the suggested change.

5. EPI suggested that when a state program amendment is disapproved by the Director and there must be revisions to it prior to resubmittal under proposed Section 732.17(h)(7), and that any revisions should be subject to public comment. Specifically, EPI recommends that there should be a public notice of the receipt of a revised amendment and a minimum public comment period of fifteen days from the date of the public notice. EPI states that the notice and public comment period could all occur within twenty days of the receipt of the submission, leaving OSM a full ten days to evaluate and act on the resubmission.

The Secretary agrees that a public comment period should be provided and has modified the language of Section 732.17(h)(8) to provide it.

6. EPI also raised a question as to how OSM can realistically solicit and publicly disclose the views of Federal agencies within the limits of the review schedule outlined in proposed 30 CFR 732.17(h). The Secretary believes that Federal agency comments can be solicited and disclosed within the time frames outlined in 30 CFR 732.17(h). Amendments requests will normally focus on limited changes to an approved state program and therefore will not require that long review periods be available to Federal agencies. When amendment requests are complex the procedures of 30 CFR 732.17(h) provide longer review periods.

7. Three commenters indicated that the authority for approval of amendment requests in 30 CFR 732.17(h)(5) and (6) should be delegated to the Regional Director. Commenters were concerned that review and decision-making at the Director's level could make it impracticable to remain committed to the time schedule detailed in the proposed rule.

As indicated in the discussion of public comments on the petition (45 FR 47163), OSM has chosen not to seek a change in the delegation of authority for approval/disapproval actions on amendment requests. The Secretary does not believe that this issue will materially impact the review process and time schedule set forth in the rule.

8. One commenter suggested that 30 CFR 732.17(h)(3) should reflect that the 15 day public comment period will 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 * * *." The commenter stated that it is unclear what purpose is served by granting discretion to vary from this period once the decision has been made that the change is in fact analogous. The commenter also suggested that a converse change be made to Section 732.17(h)(4) by substituting "may" for "will."

It is the intent of OSM to provide a 15 day public comment period when state program amendments concern changes in State law, regulations or the procedures contained in an approved program that are analogous to changes in SMCRA or implementing regulations. However, general rulemaking procedures set forth by the Department of the Interior in 43 CFR 14 provide for a minimum public comment period 30 days (43 CFR 14.5(b)(3)(iv)). A shorter period may be used only in special cases requiring more timely action. The proposed rule was drafted to make allowance for those cases when providing a 30 day comment could be accommodated without impacting the operation of the surface coal mining regulatory program by the State

regulatory authority. The Secretary has, therefore, made no change in the wording of the final rule. The clarifying wording change to 30 CFR 732.17(h)(4) suggested by the commenter has been adopted by the Secretary.

9. One commenter recommended that in determining if a public hearing should be held, another factor for consideration would be whether the amendment is analogous to changes in SMCRA and/or implementing regulations. The Secretary agrees that this factor would be a consideration in determining whether a public hearing should be held and believes that factors identified in the proposed rule would cover such amendment. The purpose of provisions for discretionary public hearings was to eliminate unnecessary hearings while still preserving any potential need for oral public comment.

10. One commenter indicated that 30 CFR 732.17(h)(9) should be modified to reflect that where the proposed state program amendment is in response to and consistent with court or legislative changes to the Act or regulations, consistency with the changed law is the appropriate criteria for approval or disapproval.

The Secretary believes that the language of the proposed regulation adequately reflects such criteria in that court or legislative changes to SMCRA or implementing regulations would be incorporated in the sections of SMCRA and 30 CFR referenced in 30 CFR 732.15.

11. One commenter recommended that 30 CFR 732.17(h)(11) be modified to state that the decision approving or disapproving program amendments will be published in the Federal Register within 10 days after the Director's decision has been made.

The Secretary has accepted the recommendation of the commenter and has made appropriate modifications to 30 CFR 732.17(h)(11). {7908}

12. Two commenters recommended that more consideration be given to the time frame proposed in Governor Herschler's September 19, 1979, petition and indicated that it should take OSM only 60 days for approving changes made at the state level to reflect Federal changes. One suggested that OSM approvals could be expedited by using the notice required by Section 732.17(h)(1) as a means both to alert the public to the receipt of an amendment and to provide the determination by the Regional Director as to whether the amendment proposes a complex or significant change. The commenter also suggested that when it is determined that the amendment is not a complex or significant change, both the Regional Director and Director should be able to review simultaneously and concurrently approve the proposed amendment.

The regulation would allow amendment processing in 65 days premised on a Federal Register announcement within 10 days, a 15-day public comment period, a 30-day period for discussion by the Regional Director and Director and publication of the decision in the Federal Register within 10 days. A public comment period of 30 days would increase the total time to 80 days. A few days may be cut from either of the cited examples if time is saved during the Regional Director's and Director's review of Federal Register publications occur earlier.

However, because of normal lag time required by the Federal Register and time required for analysis of public comments, it is unlikely that realistic schedules of shorter duration could be developed.

The commenter also suggested that the notice of receipt be used to provide the determination of the Regional Director whether the amendment proposes a complex or significant change. The proposed rule requires that the notice announcing receipt of the state program amendment set forth the schedule for review and action on the amendment request. This action requires that a determination on both the length of comment period and a determination on hearing plans (30 CFR 732.17(h)(3) and (4)). The final point made by the commenter concerned simultaneous review by the Regional Director and Director. The proposed rule does not preclude simultaneous review and to the extent possible such a review will occur. However, until the public comment period has closed and comments have been analyzed by the Regional Director, review by the Director cannot be completed.

The Secretary, while noting the commenters suggestions, has made no change in the review schedule outlined in the proposed rule.

13. Two commenters expressed concerns about the provision in proposed 30 CFR 723.17(h)(3) which allows a shorter public comment period for changes in state law, regulations or procedures contained in the approved program that are analogous to changes in SMCRA or implementing regulations. One concern related to the belief that "analogous" would be interpreted to mean "identical to" by OSM. The Secretary does not believe that state proposals must be identical to Federal provisions to receive the benefit of the shortened review time provided in 30 CFR 732.17(h)(3). Analogous means only that provisions must be comparable or similar.

This commenter also questioned whether changes in guidelines, interpretative rules or provisions for which no Federal regulation existed could receive the benefit of any expedited review. Such changes would be considered in that the proposed rule is applicable to procedures contained in the approved program in addition to changes in state laws and regulations.

A commenter charged that the amendment to 30 CFR 732.17 makes only one small distinction between analogous and other state program amendments and that is to reduce the minimum public comment period to 15 days, rather than 30 days.

The Secretary does not agree with the commenter in that once a proposed state program amendment has been found to be "analogous" in all likelihood a public hearing would not be held and review by the Regional Director and Director could be completed more quickly than would be the case for amendments of greater complexity and scope.

The Secretary has not modified the proposed rule based on the concerns expressed by either of the commenters.

III. ACTION

The rule being adopted today remains largely as proposed. Changes have been made in response to public comments on the proposed rule and include:

1. Section 732.17(h)(2)(ii) has been modified to provide that requesters may upon request receive one free copy of proposed amendments to a state program from the Regional Director when the full text is not included in the Federal Register.
2. Section 732.17(h)(4) has been modified to provide that public hearings shall be held on sooner than five days before the close of the public comment period and provide that the public comment period shall end on a date following any public hearing scheduled to be held. This provision has also been modified to provide that when state regulatory authority public hearings or meetings are accepted in lieu of an OSM hearing, the state regulatory authority shall provide to the Region Director a complete record of any hearings or meetings including transcripts, written presentations, exhibits and copies of all comments.
3. Section 732.17(h)(8) has been modified to provide for a 15 day public comment period on amendments resubmitted for approval after modification by the state regulatory authority pursuant to an initial disapproval by the Director.
4. Section 732.17(h)(11) has been modified to provide that the decision approving or disapproving program amendments will be published in the Federal Register within 10 days after the date of the Director's decision.

In all other substantive respects the final rule mirrors the rule proposed on July 14, 1980.

The rule has been made effective upon publication on the ground that it does not impose obligations upon any individual or State; rather, it clarifies and streamlines the amendment process for approved state programs. The public and states should receive the benefits of this process immediately. A later effective date is not in the public interest.

IV. DETERMINATION OF SIGNIFICANCE

The rule does not fall within any of the categories listed in 43 CFR 14.3(o). 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.

V. 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. {7909}

VI. STATE OF AUTHORSHIP

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

Dated: January 15, 1981.

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

TEXT OF THE AMENDMENT

SECTION 732.17 [AMENDED]

30 CFR 732.17(f)(2) is removed. A new section 30 CFR 732.17(h) is added to read as follows:

(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 (amendments) is being reviewed by the Regional Director and will include the following:

(i) The text or a summary of the (amendments) proposed by the regulatory authority:

(ii) Addresses where copies of the proposed (amendments) may be obtained if the text is not included in the Federal Register notice and that each requestor may receive, free of charge, one single copy of proposed (amendments) from the Regional Director.

(iii) (Dates) of public comment (periods) and addresses where public comments should be directed;

(iv) Dates and locations of public (hearings) and/or (meetings) if public (hearings) and/or (meetings) are to be held; and

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

(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 amendments: And provided, That all applicable provisions of 43 CFR Part 14 are compiled with.

(4) Public hearings may be provided at the discretion of the Regional Director and shall be held no sooner than five days before the close of the public comment period. The comment period shall end on a date following any public hearing scheduled to be held.

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, its complexity and public hearing and meetings conducted by the state regulatory authority prior to submission of the amendment for OSM approval. When state regulatory authority public hearings or meetings are accepted in lieu of an OSM hearing, the state regulatory authority shall provide to the Regional Director a complete record of any hearings or meetings including transcripts, written presentations, exhibits and copies of all comments. 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 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. There shall be a public comment period of not less than 15 days from the date of publication of the notice of receipt of the revised amendment. If the scope of the amendment has been expanded beyond that of the initial amendment request the Director may approve/disapprove portions of the initial 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 (amendments) as proposed; and

(ii) Obtained written concurrence of the Administrator of the Environmental Protection Agency with respect to those aspects of a state program (amendments) which relate to air to water quality standards promulgated under the authority of the 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. The decision approving or disapproving program

amendments will be published in the Federal Register within 10 days after the date of the Director's decision.

(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.

(Authority for establishing procedures and criteria for approval or disapproval of State program submissions is found in Sections 102, 201(c), 501(b), 503, 506-519, 521, and 522, Pub. L. 95-87, 91 Stat. 448, 449(c), 468(b), 470, 473-486, 495, 498, 499, 501, 504, and 507 (30 U.S.C. 1202, 1211(c), 1251(b), 1253, 1256-1269, 1271, and 1272)

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