

**FEDERAL REGISTER: 43 FR 11869 (March 22, 1978)**

DEPARTMENT OF THE INTERIOR

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

Petitions to Initiate Rulemaking; Consolidation Coal Co., et al.

ACTION: Notice seeking comments on petitions.

**SUMMARY:** In accordance with the rules and regulations of the Office of Surface Mining Reclamation and Enforcement, 30 CFR Section 700.12(c), notice is hereby given that this Office is now seeking comments from the public concerning petitions submitted by Consolidation Coal Co., Ohio Mining & Reclamation Association, the Mining & Reclamation Council of America, Peabody Coal Co., Illinois Coal Association, and Mid-West Coal Producers Institute, Inc., and Amherst Coal Co., et al.

Consolidation Coal Co., Ohio Mining & Reclamation Association, the Mining & Reclamation Council of America, and Illinois Coal Association, and Mid-West Coal Producers Institute, Inc., request amendment of 30 CFR Section 710.11(d)(2) to extend the dates for the submission of reconstruction plans and the completion of reconstruction for preexisting, nonconforming structures.

Peabody Coal Co. and Amherst Coal Co., et al., suggest that many of the regulatory provisions are arbitrary capricious, or otherwise illegal and request certain changes in accordance with their general allegations.

The Mining & Reclamation Council of America also seeks an extension of the deadline for submitting applications for exemptions as small operations under 30 CFR Section 710.12(d).

DATES: Comments must be received by April 21, 1978. [Page 11870]

ADDRESS: Interested persons should address their comments to the Director, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 18th and C Streets NW., Washington, D.C. 20240, 202-343-4237. The petitions and all comments in response to this notice will be available for public inspection during normal business hours at the foregoing address.

FOR FURTHER INFORMATION CONTACT: John Beattie, 202-343-5207.

**SUPPLEMENTARY INFORMATION:**

Consolidation Coal Co., Ohio Mining & Reclamation Association, the Mining & Reclamation Council of America, and Illinois Coal Association, and Mid-West Coal Producers Institute, Inc., have petitioned the Director, Office of Surface Mining Reclamation and Enforcement, to amend 30 CFR Section 710.11(d)(2) (ii) and (iv) which, as originally promulgated, established February 3, 1978, as the deadline for submitting plans for the reconstruction of preexisting, nonconforming structures, and November 4, 1978, as the deadline for completing reconstruction begun on or before May 4, 1978.

Consolidated Coal Co., Illinois Coal Association, and Mid-West Coal Producers Institute, Inc., propose that the deadline for submitting plans be extended to November 1, 1978; that the deadline for the completion of reconstruction be extended until November 1, 1979; and that Section 710.11(d)(2) be further amended to allow for extensions of either or both of their proposed deadlines upon a determination by the regulatory authority that additional time is required for the completion of sound and economical design, engineering, procurement, and construction work.

Ohio Mining & Reclamation Association proposes to change the date for submitting reconstruction plans to July 1, 1978, and the date for completion of reconstruction to July 1, 1979, provided that reconstruction should be started and completed as soon as individual circumstances warrant. The Association proposes that Section 710.11(d)(2)(iv) should also provide that the regulatory authority may, for good cause shown, extend either or both of the proposed dates.

The Mining & Reclamation Council of America proposes the repeal of the February 3, 1978, deadline contained in both Section 710.11(d)(2)(ii) and Section 710.12(d) in favor of a 6-month delay. The Council therefore proposes that the deadlines for submitting reconstruction plans and applying for an exemption as a small operator be extended to July 3, 1978.

It should be noted that effective February 27, 1978, the Director, Office of Surface Mining Reclamation and Enforcement, promulgated interim final rules revising the dates for submitting plans and beginning reconstruction on

sedimentation ponds or related preexisting, nonconforming structures or facilities which are used in connection with or to facilitate mining (43 FR 8091). New Section 710.11(d)(3) requires that all sedimentation ponds and related preexisting, nonconforming structures or facilities shall comply with the performance standards and the provisions of Section 710.11(d)(2) unless the permittee submits a written statement to the regulatory authority and to the Director by May 3, 1978, demonstrating that it is physically impossible to bring the structure or facility into compliance by May 3, 1978, and setting forth proposed steps to be taken in reconstructing the structure and a proposed reconstruction schedule. If the regulatory authority makes a written finding that it would be impossible to bring the structure or facility into compliance by May 3, 1978, and the permittee will perform the work in accordance with a plan designed by a professional engineer, the date for beginning reconstruction will be extended to June 3, 1978. However, the date for completing reconstruction has not been changed and remains November 4, 1978.

Effective February 7, 1978, the Director, Office of Surface Mining Reclamation and Enforcement, promulgated a new rule which extended the filing date for submitting applications for small operator exemptions to March 1, 1978 (43 FR 5000).

Amherst Coal Company, et al., request the repeal or amendment of certain provisions of the rules on grounds that they violate the fifth and tenth amendments to the Constitution, are arbitrary and capricious, or are contrary to the purpose and intent of the Surface Mining Control and Reclamation Act of 1977. Specifically, they allege the definitions of "imminent danger to the health and safety of the public," "significant, imminent environmental harm to land, air or water resources," "aquifer," "groundwater," "roads," "toxic-forming materials," and "toxic-mine drainage" contained in Section 700.5 and Section 710.5 are contrary to the purpose and intent of the Act or subject to arbitrary and capricious application of the rules.

Section 710.11(a) is asserted to be vague and ambiguous which will result in an arbitrary and capricious application of the rules. Section 710.11(d) is opposed on the grounds that: (1) It is contrary to the provisions of Section 502(c) of the Act in that reconstruction of preexisting, nonconforming structures would result in more environmental harm than if they were permitted to continue in their present state, and (2) its application will constitute a taking of private property without just compensation in violation of the fifth and tenth amendments.

Section 715.13(b) is claimed to arbitrarily place the burden on operators to determine and remedy existing, nonconforming conditions and require restoration of the land to a higher use, contrary to Section 515(b)(2) of the Act and in violation of the fifth and tenth amendments. The criteria contained in Section 715.13(d) are challenged as being broader than those contained in Section 515(c) of the Act and, therefore, are arbitrary and capricious. Similarly, the standards in Section 715.14(a), (b), and (c) are alleged to be contrary to the intent of the Act because these standards prevent compliance with Sections 515(b)(3) and 515(d)(2) of the Act. Section 715.15(a)(9) is opposed on the grounds that it is expressly contrary to Section 515(b)(22)(H) of the Act. Amherst asserts that Section 715.15(b) is arbitrary and capricious because it imposes inappropriate limitations on surface mining which are without technical justification. It is alleged that Section 715.16(a)(1) is outside the scope of the Act as indicated by Section 515(b)(5) of the Act and not subject to inclusion in the initial regulatory program. Section 715.16(a)(2) is alleged to be contrary to the intent of the Act because it should only apply to prime farmlands. Sections 715.17, 715.17(a), 715.17(b), 715.17(c), and 715.17(e) are alleged to be contrary to Section 515(b)(10) of the Act as exceeding the scope of that section of the Act. Likewise, Sections 715.17(d)(3), 715.17(e)(8), 715.17(f), 715.17(i), and 715.17(n) are asserted to be contrary to express provisions of the Act. Sections 715.17(1) and 715.19 are alleged to be incompatible and contrary to the provisions of Section 515(b)(17) and (18) and Section 515(b)(15) of the Act, respectively. [Page 11871]

It is suggested that Section 716.7 is outside the scope of the Act's authority to impose a prime Farmland standard during the initial regulatory period.

Section 717.11 et seq. is alleged to be void because it was promulgated without notice and an opportunity to comment as required by Section 501 of the Act.

Sections 721.12, 721.13, and 721.14 are said to violate the fourth and fifth amendments to the Constitution.

Sections 722.11 (c) and (d) and 722.13 are opposed on the grounds that they are in direct conflict with Section 521(a)(2) of the Act. Similarly, Sections 722.12(d) and 722.15(a) are alleged to be in direct conflict with Sections 521(a)(3) and 521(a)(5) of the Act, respectively. Sections 722.14, 722.16(d)(2), and 722.17 are alleged to be in violation of the fifth amendment.

It is contended that Section 723.1 et seq. violates the fifth amendment and the penalty provisions of Section 518 of the Act.

Amherst generally alleges that the rules are void because: (1) they violate the tenth amendment and Congress finding that the primary governmental responsibility for surface mining rules should rest with the States; (2) they were promulgated pursuant to an invalid delegation of the legislative function; and (3) they were promulgated without preparation of an economic impact statement, to the extent the rules set forth a regulatory procedure other than an interim regulatory program.

Peabody Coal Co. suggests changes in areas relating to land reclamation, use of explosives, and hydrologic functions.

In the land reclamation area, Peabody identifies five problems: Lands disturbed prior to the effective date of the regulations, post-mining productivity of reclaimed lands, mulch, revegetation to prevent erosion, and prime farmland grandfather rights.

For the disturbed lands problem, Peabody suggests that Section 715.16 be revised by adding a new subsection stating that the requirements of that section shall not apply to land disturbed prior to the effective date of the regulations. For post-mining productivity, Peabody suggests that Section 715.13(b) and 25 CFR 177.104(b) be amended to exclude any reference to improper management as a basis for determining the premining use of land. Peabody argues that the mulching requirement in Section 715.20(d) is overly broad and therefore should be revised to provide that mulch will be used in regraded and topsoiled areas only where it will assist revegetation by controlling erosion, and where used, mulch will be anchored to the soil surface where appropriate to ensure effective protection of the soil and vegetation. Peabody alleges there is no authority in the Act requiring stable soil surfaces to be obtained in reclamation in areas where the soil is not by nature stable nor is there statutory authority for prohibiting mining in those areas, which would be the effect that such a requirement would have. Therefore, Peabody requests that 30 CFR 715.20(a)(2) and 25 CFR 177.100(a)(2) be amended to provide that vegetative cover shall be capable of stabilizing the soil surface with respect to erosion only where practical under natural climate and soil conditions existing in the area to be reclaimed. Peabody claims that Section 716.7(a)(2) of the regulations ignores the statutory grandfather exemption for existing surface mining operations. As a result, it proposes deleting Section 716.7(a)(2) (i) and (ii) and putting in a new subsection which would state that permit renewals or revisions shall only include those areas that are contiguous to and a normal extension of mining operations covered by a permit or mining plan approved prior to August 3, 1977.

For explosives use, Peabody suggests changes in distance and airblast limitations, and blasting personnel requirements. Peabody maintains the distance limitations are contrary to the Act and would propose to revise Section 715.19(e)(1)(vii) to provide distances of 300, 100 and 500 feet in (A), (B), and (C), respectively, and allow for lesser distances as approved by the regulatory authority upon a demonstration of no probable harm to persons or property. Peabody also suggests amending Section 715.19(e)(1)(vi) to allow a 136 decibel linear-peak at any occupied man-made dwelling or structure located within one-half mile of the permit area. Peabody asserts this change is necessary because recent literature on airblast damage only supports a finding that 136 decibels is the lowest level at which the possibility of damage to persons or property exists. Lower levels, it is asserted, only result in subjective complaints of annoyance. Finally, Peabody suggests: (1) that Section 715.19(a)(3)(v) be revised to require blasting personnel to have obtained a certificate of completion of training and qualification where required and made available by State law or the regulatory authority; (2) that Section 715.19(a)(3)(ii) be amended by deleting the "mature judgment" provision; and (3) that Section 715.19(a)(3) be revised to provide a more definite statement to cover only those persons who actually use or handle explosives or detonators and to be consistent with MESA regulations. In this regard, Peabody suggests that Section 715.19(a)(3) be entirely deleted because the section may be construed as contradictory to MESA regulations governing the same area and, in event of an overlap or contradiction, the Act requires that no OSM regulation may supersede, modify or repeal any employee safety regulations adopted by MESA.

For hydrologic functions, Peabody first suggests that the requirement in Section 715.17(a) that effluent limitations must be satisfied until revegetation requirements of Section 715.20 have been met is arbitrary and a sharp departure from EPA water pollution control requirements. As a result, Peabody proposes that OSM work with EPA to establish realistic effluent limits for the revegetation process. Next, Peabody argues that the provisions in Sections 715.17(a) and 717.17(a), and in 25 CFR 177.108(a) requiring treatment of alkaline water for manganese is in contrast to EPA water pollution control rules and available literature. Peabody suggests that OSM should at least eliminate control of manganese in alkaline waters when downstream testing shows that the limitation is met before the water is drawn off for residential or commercial use. Peabody also requests that, if existing sedimentation ponds must comply with new design criteria and if the present manganese requirements are retained, OSM establish a date for compliance for the construction of manganese neutralization facilities that realistically comports with the establishment of its final sedimentation pond requirements. Lastly, Peabody seeks to eliminate the prohibition against impounding waste material in dams or having used waste as dam material prior to

the compliance date of May 3, 1978. It is Peabody's position that there is no provision in the Act prohibiting the impoundment of waste by dams and that there is also no statutory authority which would allow OSM to require conformance of existing structures to the general performance standards contained in Section 515 of the Act. Therefore, Peabody would amend Sections 715.18 and 717.18, and 25 CFR 177.109 to provide that no waste material should be used in dams constructed after May 3, 1978, without the approval of the regulatory authority.

In regard to the petitions submitted by Amherst Coal Company, et al., and Peabody Coal Co., interested persons and petitioners should note and consider the amendments to Sections 715.17 (c) and (e), and 717.17 (c) and (e) promulgated February 27, 1978 as interim final rules.(43 FR 8090, 8091-93.) [Page 11872]

These petitions are being considered under the authority of Section 201(g) of the Act and 30 CFR 700.12 of the rules and regulations of the Office of Surface Mining Reclamation and Enforcement.

It should also be understood, however, that the opportunity to submit and comment on petitions does not affect or defer the finality of the rules or their amendments during the petitioning process.

Comments should include relevant data for affected mines and should be addressed to the specific issues raised. At the close of the comment period, a determination will be made regarding the necessity of conducting a further investigation or holding a public hearing. However, it is anticipated that the comments will provide a sufficient basis for a final decision on these petitions, which will be made shortly after the close of the comment period.

Dated: March 20, 1978.

WALTER N. HEINE,  
*Director, Office of Surface Mining Reclamation and Enforcement.*

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